

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska )  
corporation, )

Plaintiff, )

vs. )

716 WEST FOURTH AVENUE LLC and )  
LEGISLATIVE AFFAIRS AGENCY, )  
Defendants. )

Case No.: 3AN-15-05969 CI

**716'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL RESPONSES  
TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION TO 716 WEST  
FOURTH AVENUE, LLC**

Plaintiff the Alaska Building, Inc. ("ABI") has moved to compel responses to Plaintiff's First Request for Production to 716 West Fourth Avenue, LLC ("716"). 716 opposes ABI's motion to compel. For the reasons contained herein, this court should deny ABI's motion to compel.

**I. Background**

On August 25, 2015, ABI filed its Second Amended Complaint in this matter, focusing solely on the purported illegality of the Legislative Information Office ("LIO") lease extension.<sup>1</sup> Plaintiff issued requests for production on August 3, 2015. On September 3, 2015, 716 produced a significant amount of material in response to Plaintiff's requests. The material is specifically described in 716's response, attached as

<sup>1</sup> ABI has filed a separate action relating to alleged construction damages. 3AN-15-9785CI.

Exhibit A. As promised in the initial production, 716 supplemented its discovery production on October 14, 2015. Specifically, 716 produced thousands of pages of emails regarding the LIO Project. 716 has communicated to ABI that it is still working to produce material to ABI germane to the claims at issue in this case and in fact, an additional round of supplemental discovery is being produced to ABI today.

As discussed below, the majority of the discovery requests 716 objects to producing relate to 716's internal financial operations. ABI filed a motion for preliminary injunction in connection with its attempt to obtain this same material. 716's opposition to that injunction is being filed with the court today as well.

**I. The financial information sought by Plaintiff is not relevant to any legitimate issue in this case**

Under Alaska Civil Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (emphasis added). The information ABI seeks is not reasonably calculated to lead to the discovery of admissible evidence, therefore ABI's Motion to Compel should be denied.

Plaintiff has asserted that the documents pertaining to the "financial condition of [the] LLC" are relevant to "716's ability to pay back money it receives under the LIO Lease in excess of what is allowed under AS 36.30.083(a)." <sup>2</sup> Plaintiff cites *Lockwood v.*

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<sup>2</sup> See Memorandum in Support of Plaintiff's Motion to Compel at 2-3.

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*Geico*<sup>3</sup> for the proposition that the relevancy standard should be so broadly construed at the discovery stage to include the financial information it seeks in its motion to compel.<sup>4</sup> First, the disputed discovery material in *Lockwood* was subject to *in camera* review, both at the trial and appellate levels.<sup>5</sup> (716's request for the court to review privileged material is addressed *infra*.) Second, the material sought by Lockwood was actually relevant to the bad-faith cause of action. Plaintiff cannot meet this same relevancy threshold.

In *Lockwood*, the plaintiff was injured in an automobile collision and brought a bad-faith tort claim against her insurer, Geico, when Geico refused to make additional medical payments outside of a total settlement of Lockwood's claim.<sup>6</sup> The superior court denied Lockwood's request to review Geico's training and claims-handling manuals.<sup>7</sup> The Alaska Supreme Court reversed after conducting an *in camera* inspection of the manuals and determining that portions of the manual were relevant to Lockwood's bad-faith claim because they shed light on Geico's standard practices and could lead to admissible evidence as to what a typical investigation entails and whether standard procedures were followed in Lockwood's case.<sup>8</sup>

Here, ABI's request to access proprietary confidential financial information about 716 and its members is in no way relevant to the two remaining issues in this

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<sup>3</sup> *Lockwood v. Geico*, 323 P.3d 691 (Alaska 2014).

<sup>4</sup> See Plaintiff's Memorandum in Support of Motion to Compel at 2.

<sup>5</sup> *Lockwood v. Geico*, 323 P.3d at 699.

<sup>6</sup> *Id.* at 692.

<sup>7</sup> *Id.*

<sup>8</sup> *Lockwood v. Geico*, 323 P.3d at 699-700.

litigation—whether the lease is an extension and rental rate—nor is it likely to lead to admissible evidence.<sup>9</sup>

As to the first claim, Plaintiff has already asserted that whether the LIO Lease “extends a real property lease... is strictly question of law” which needs to be decided before the court can focus on “the appropriate remedy.”<sup>10</sup> ABI’s request for proprietary confidential financial information about 716 and its members is in no way relevant to this claim, nor is it likely to lead to the discovery of admissible evidence regarding whether the lease at issue is an “extension” under AS 36.30.083(a). At this stage, when there is no indication that ABI will prevail on its claims, it would be putting the cart before the horse to permit ABI to invade the finances of 716 prior to awarding a decision on the merits. ABI has specifically chosen **not to file** a veil piercing claim.<sup>11</sup> If it had, ABI might be better able to make a straight faced argument that the requested material could lead to admissible evidence as to whether 716 was solvent or could pay back any purportedly illegally paid rent in the event ABI prevailed. However, as pled, ABI has yet to assert any facts supporting its contention that 716’s finances are relevant to its first claim or that 716 would or could not satisfy any prospective judgment levied against it.

As to the second claim before the court, Plaintiff has claimed that whether the rent being paid to 716 under the lease at issue is at least 10 percent below the market

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<sup>9</sup> See Amended Complaint, filed by Plaintiff on September 25, 2015.

<sup>10</sup> Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment (Not Extension) at 1-2.

<sup>11</sup> See Memorandum in Support of Plaintiff’s Motion for Preliminary Injunction at 5, FN 3.

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rental value is “a factual issue.”<sup>12</sup> Plaintiff has submitted an affidavit from Larry Norene, a retired appraiser who was not involved in the actual appraisal of market rent value at the time the lease was executed, to suggest that the lease does not comply with AS 36.30.080(a).<sup>13</sup> Norene disputes the validity of the appraisal relied upon by the Agency. 716’s private financial information is wholly irrelevant to Norene’s analysis or any other of Plaintiff’s theories on the rental rate. Likewise, ABI has not articulated how 716’s private finances would be relevant to the claim in general. Therefore, the requested material is not only proprietary and privileged, but simply not relevant to the causes of action before the Court. Accordingly, the court should deny ABI’s motion to compel.

**II. 716 has conducted discovery in an above-board manner in compliance with the discovery rules.**

Plaintiff has egregiously misrepresented 716’s willingness to meaningfully sift through potentially discoverable material by asserting that 716 “did not take [ABI] up on [its] offer” to negotiate a protective order.<sup>14</sup> ABI attached to its motion to compel the email chain between the parties after counsel for ABI and counsel for 716 met to confer on September 30, 2015.<sup>15</sup> Upon review of the emails, it is undisputed that 716 did in fact offer to provide 716’s Operating Agreement to the court for *in camera*

<sup>12</sup> Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment (Not Extension) at 2, FN 1.

<sup>13</sup> Norene Affidavit, dated 10/2/15, submitted as an attachment to Plaintiff’s Motion for Preliminary Injunction.

<sup>14</sup> *See Id.*

<sup>15</sup> *See Exhibit 2 Attached to Plaintiff’s Motion to Compel.*

review.<sup>16</sup> 716 stated that if Judge McKay “found this document relevant and distributed it to [ABI], [then ABI] could assess its relevance, and then determine if [ABI] wanted to pursue 716’s financial records.”<sup>17</sup> Instead of agreeing to this reasonable request, given that 716 wholeheartedly disputes that 716’s operative finances or structure are discoverable, ABI then decided to unilaterally file this motion to compel. ABI, not 716, has acted uncooperatively in crafting reasonable safety mechanisms for discovery review.

The trial court has broad discretion in determining the extent of discovery and crafting the scope of protective orders.<sup>18</sup> ABI was offered the opportunity to stipulate to the court’s *in camera* review of 716’s Operating Agreement.<sup>19</sup> 716’s position, nevertheless, remains that if the court finds the Operating Agreement to be discoverable to ABI, it must then release the materials to ABI under an appropriately crafted protective order designed to protect the confidential and privileged information contained within the document. For example, ABI should be prohibited from releasing the document to any third party, and ABI should not be permitted to publish the material

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<sup>16</sup> *See Id.*

<sup>17</sup> *Id.* at 1 of 4. Plaintiff’s RFP No. 5 also seeks “all amendments and any other agreements pertaining to the operation and/or management of 716 LLC.” 716 objects to the production of any material other than the current operating agreement as described in this opposition.

<sup>18</sup> *Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990).

<sup>19</sup> 716 reincorporates its objection to the release of any material to the Plaintiff involving accounting/bookkeeping records (RFP No., 2); documents pertaining to disbursements of payments made to 716 members (RFP No.3); documents of 716’s personal financial statements (RDP No. 1). As thoroughly detailed in 716’s opposition to ABI’s motion for preliminary injunction, these documents have no relevance to the instant action.

on its website or distribute the material to media outlets, like it has done in this case or as Mr. Gottstein did in the Zyprexa case described herein.

716's substantial concerns regarding ABI's willingness to abide by any protective order or confidentiality agreement imposed by the court are warranted. First, ABI has published every document, including all discovery,<sup>20</sup> documents referencing private affairs of the parties, and settlement negotiations on its website.<sup>21</sup> ABI has admitted in depositions that it maintains an e-mail "list" of journalists it contacts about case developments.<sup>22</sup> ABI regularly speaks telephonically with reporters about case developments.<sup>23</sup> ABI has actively, and at times inappropriately, chosen to litigate this case in a public forum.

716's concerns are not based on Mr. Gottstein's conduct in this case alone. Mr. Gottstein's history of unlawful dissemination of confidential material is troubling. In *Eli Lilly & Co. v. Gottstein*, the Court of Appeals for the Second Circuit upheld the federal district court's issuance of a permanent injunction that prohibited Mr. Gottstein from further disseminating confidential documents that had been unlawfully disclosed by Mr. Gottstein under a protective order during pretrial discovery in a liability suit in

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<sup>20</sup> See 10-16-15 Gottstein Depo Transcript at 49-50, attached as Exhibit D.

<sup>21</sup> Emails produced on Plaintiff's website reference, *inter alia*, counsel's paternity leave schedule, and the parties attempt to negotiate a resolution. This information should not be publically available.

<sup>22</sup> See Ex. D at 48-49.

<sup>23</sup> See Ex. D at 48-49.

which Eli Lilly Co. had been sued regarding the use of Zypexa, a prescription drug used to treat schizophrenia.<sup>24</sup>

The Second Circuit held that Mr. Gottstein had conspired with plaintiff's expert to obtain confidential documents through use of sham subpoenas and then unlawfully disseminated the drug manufacturer's confidential material to various entities, including contacts at the New York Times.<sup>25</sup> The Court concluded:

As he issued the subpoenas, burned DVD copies, forwarded emails and sent packages containing the data to associates, Gottstein actively took part in and furthered that shared goal [to violate the protective order and to disseminate Eli Lilly's confidential information]. Therefore, Gottstein aided and abetted [the expert's] violation of the protective order<sup>26</sup>

Given Mr. Gottstein's behavior thus far in the litigation, on a matter he views as being one of public importance, 716's concerns regarding the dissemination of confidential proprietary information is more than warranted.

This Opposition has largely focused on ABI's request for financial information from 716 and the Operating Agreement. With respect to the production of documents sought by Plaintiff outside of 716's finances, 716 requests a court hearing for the ABI to be able to meaningfully articulate what precisely it is seeking and whether that material has in fact already been produced in 716's voluminous discovery and supplemental discovery production efforts to date. (For example, 716 has produced hundreds of emails regarding its negotiation of the lease extension at issue in response to RFP No.

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<sup>24</sup> *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2010); opinion attached as Exhibit B. The District Court's order is attached as Exhibit C.

<sup>25</sup> *Id.* at 195.; *See also* 10-16-5 depo of Jim Gottstein at 52-53.

<sup>26</sup> *Eli Lilly & Co. v. Gottstein*, 617 F.3d at 195-196.

4.) Moreover, contrary to assertion, privileged documents were listed in a privilege log provided to Plaintiff by 716. Plaintiff should also have to make a specific application as to why the *additional* documents Plaintiff requests are relevant to the causes of action and/or not validly withheld on privilege/proprietary grounds. For example, 716's production in response to RFP No. 1<sup>27</sup> is responsive to the project's financing. The remaining documents sought by plaintiff as part of this request include loan application(s) and personal financial statements, neither of which appear to be germane to the causes of action at issue.

Because ABI has asserted that it filed its motion to compel *and* motion for preliminary injunction only because 716 failed to provide it with internal financial documents, oral argument addressing these motions should be combined. That joint hearing should be deferred, however, until after the court hears the dispositive arguments on laches based on the summary judgment filed by the Agency and joined by 716. A proposed scheduling order is attached to this motion.

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<sup>27</sup> 716 produced Northrim Bank terms and conditions letter to Mark Pfeffer, dated 9-10-13, Bates-stamped 716-000264 thru 716-000266; 716 – Wells Fargo Commitment Letter, dated 11-29-13, Bates-stamped 716-000267 thru 716-000271; Everbank – Conditional Commitment Letter, dated 11-14-14, Bates-stamped 716-000272 thru 716-000278.; Appraisal of 716 West 4<sup>th</sup> Avenue prepared by Theodore Jensen, MAI of Reliant Appraisal for Kim St. John of EverBank, dated December 12, 2014, Bates-stamped 716-000279 thru 716-000545.; Appraisal of 716 West 4th Avenue prepared by Theodore Jensen, MAI of Reliant Appraisal for Ms. Deatrice Swazer of Northrim Bank dated October 28, 2013, Bates-stamped (note in two parts)-Part One 716-000546 thru 716-000715 and Part Two 716-000716 thru 716-000881.

ASHBURN & MASON, P.C.  
Attorneys for 716 West Fourth Avenue, LLC

DATED: 10-27-15

By: Jeffrey W. Robinson  
Alaska Bar No. 0805038



**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger  
☐ facsimile ☒ U.S. Mail on the 27 day of October 2015, on:

James B. Gottstein  
Law Offices of James B. Gottstein  
406 G Street, Suite 206  
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Kevin Cuddy  
Stoel Rives, LLP  
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Anchorage, Alaska 99501

ASHBURN & MASON

By: Heidi Wyckoff  
Heidi Wyckoff

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska )  
corporation, )

Plaintiffs, )

vs. )

Case No.: 3AN-15-05969 Civil

716 WEST FOURTH AVENUE LLC, )  
KOONCE PFEFFER BETTIS, INC., d/b/a )  
KPB ARCHITECTS, PFEFFER )  
DEVELOPMENT, LLC, LEGISLATIVE )  
AFFAIRS AGENCY, and CRITERION )  
GENERAL, INC., )

Defendants.

**716 WEST FOURTH AVENUE, LLC'S RESPONSES TO ALASKA BUILDING, INC.'S FIRST REQUEST FOR PRODUCTION**

COMES NOW, Defendant, 716 West Fourth Avenue ("716 WEST" or "Defendant"), by and through counsel, Ashburn & Mason, P.C. and responds to Plaintiff's First Request for Production.

**PRELIMINARY STATEMENT**

Discovery in this case is not complete. As discovery proceeds, facts, information, evidence, documents, and things may be discovered which are not set forth in these responses, but which may be responsive to these discovery requests. The following responses are complete based on 716 WEST's current knowledge, information and belief. Furthermore, these responses were prepared based on 716

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WEST's good faith interpretation of the discovery requests and are subject to correction for inadvertent errors or omissions, if any.

716 WEST reserves the right to refer to, conduct discovery with reference to, or offer into evidence at the time of hearing, any and all facts, evidence, documents and things developed during the course of discovery and hearing preparation, notwithstanding references to facts, evidence, documents and things provided herein. These responses are given without prejudice to subsequent revision or supplementation, including objections, based on any information, evidence and documentation which hereinafter may be discovered.

#### **GENERAL OBJECTIONS**

716 WEST expressly incorporates the following general objections as if set forth fully in response to each of the following individual discovery requests addressed in the specific objections section below, and any response below is made subject to and without waiving these objections:

1. 716 WEST objects to the discovery requests to the extent they purport to impose requirements upon 716 WEST beyond those authorized by Alaska Rules of Civil Procedure 26, 33, and 34, and otherwise fail to comport with the Alaska rules.

2. 716 WEST objects to requests for the production of documents, calculations, and analyses that do not exist. Under Alaska Civil Rule 34, parties are required to produce documents within their "possession, custody, or control." A document is not within a party's "possession, custody, or control" if it does not exist.

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3. 716 WEST objects to each and every discovery request insofar as they are vague, ambiguous, overly broad, unduly burdensome, or use terms that are subject to multiple interpretations but are not properly defined or explained for purposes of these discovery requests.

4. 716 WEST objects to each and every discovery request insofar as they are not reasonably calculated to lead to the discovery of admissible evidence and are not relevant to the subject matter of this proceeding.

5. 716 WEST objects to providing information to the extent that it is already a matter of public record, or to the extent it is obtainable from other sources that are more convenient and less burdensome, or are equally available to the Plaintiff. Plaintiff is not entitled to require other parties to gather information that is equally available and accessible to it.

6. 716 WEST objects to each and every discovery request insofar as they seek documents or information protected by the attorney-client privilege or the work product privilege. Nothing contained in these responses is intended as, or shall in any way be deemed, a waiver of any such privilege or protection, or any other applicable privilege or doctrine.

7. 716 WEST objects to the instructions contained in Plaintiff's discovery requests. In responding to the requests, 716 WEST will follow the standard discovery rules and practices for civil litigation in the Alaska courts. 716 WEST will produce

non-privileged documents that are within its own possession, custody or control of its respective officers, employees, representatives and attorneys.

8. 716 WEST objects to production of any confidential documents or other information that could prejudice the business interests of 716 WEST or of any party that may have provided the confidential information to 716 WEST.

9. 716 WEST objects to the discovery requests insofar as certain requests are duplicative of other requests. 716 WEST will not undertake to produce more than one copy of any document that may be responsive to more than one request.

#### **REQUESTS FOR PRODUCTION**

##### **REQUEST FOR PRODUCTION NO. 1:**

Please produce all loan applications and other documents relating to financing the New LIO Building, including without limitation, all projections and *pro formas* and personal financial statements. This includes, without limitation, both interim or construction financing, and permanent financing and loans that were consummated and loans that were not, if any.

**RESPONSE:** 716 objects to this request because it seeks information that is confidential and proprietary and seeks information and documents protected by the attorney client privilege, work product doctrine, or any other applicable privilege. Subject to and without waiver of the foregoing objections, including any and all general objections, 716 hereby produces the following documents in addition to other relevant documents produced in response to another Request:

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- Northrim Bank terms and conditions letter to Mark Pfeffer, dated 9-10-13, Bates-stamped 716-000264 thru 716-000266.
- 716 – Wells Fargo Commitment Letter, dated 11-29-13, Bates-stamped 716-000267 thru 716-000271.
- Everbank – Conditional Commitment Letter, dated 11-14-14, Bates-stamped 716-000272 thru 716-000278.
- Appraisal of 716 West 4<sup>th</sup> Avenue prepared by Theodore Jensen, MAI of Reliant Appraisal for Kim St. John of EverBank, dated December 12, 2014, Bates-stamped 716-000279 thru 716-000545.
- Appraisal of 716 West 4th Avenue prepared by Theodore Jensen, MAI of Reliant Appraisal for Ms. Deatrice Swazer of Northrim Bank dated October 28, 2013, Bates-stamped (note in two parts)-Part One 716-000546 thru 716-000715 and Part Two 716-000716 thru 716-000881.

**REQUEST FOR PRODUCTION NO. 2:**

Please produce the financial records of 716 LLC, from January 1, 2012. If the electronic accounting/bookkeeping records are kept in QuickBooks, please provide the QuickBooks file or a backup of it and any applicable password. If not, it would be preferable for counsel to confer and agree on a reasonably useable form, such as whether exporting to Microsoft Excel or Access is a viable option. Otherwise, they should be produced in word searchable Acrobat (PDF) format and include without limitation (a) all registers (accounts), (b) income statements and balance sheets on an

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annual basis to the end of 2014, and monthly thereafter, (c) check register, (d) general ledger, and (e) listing of all real property assets. Initially your response is to include the time period from January 1, 2012 through July 31, 2015, and should be updated monthly by the 10th of each month for the prior month. This request does not include “backup” documentation, except as specifically requested in the following request.

**RESPONSE:** In addition to the general objections set forth above, 716 objects to this request because it seeks information that is confidential and proprietary. 716 further objects to this request because it calls for the production of documents that are irrelevant to this action and not reasonably calculated to lead to the discovery of admissible evidence in the instant action.

**REQUEST FOR PRODUCTION NO. 3:**

Please produce all documents relating to payments by 716 LLC to Robert Acree; Mount Trident, LLC; Mark Pfeffer; Mark E. Pfeffer Alaska Trust 12/28/07; or Pfeffer Development, LLC; or any combination thereof.

**RESPONSE:** Incorporating all previous objections, 716 objects to this request because it seeks information that is confidential and proprietary. 716 further objects to this request because it calls for the production of documents that are irrelevant to this action and not reasonably calculated to lead to the discovery of admissible evidence.

**REQUEST FOR PRODUCTION NO. 4:**

Please produce all documents, including without limitation, e-mails, relating to 716 LLC leasing or potentially leasing space to the Legislative Affairs Agency for the

Anchorage Legislative Information Office upon the expiration of the lease in effect on January 1, 2010 and thereafter. This includes all documents pertaining to the LIO Lease, including without limitation, negotiation.

**RESPONSE:** 716 objects to this request to the extent that it calls for production of privileged internal documents. Furthermore, the request for “all documents” relating to the expiration of the lease in effect on January 2, 2010 and thereafter is unreasonable, overbroad, and unduly burdensome in light of the work product doctrine, and other privileges, including attorney-client privilege, protecting such internal documents from discovery. The request is also ambiguous as it suggest that the lease entered into occurred upon expiration and 716 objects to any legal characterization of the events and facts leading up to the execution of the Lease in dispute. Searches for internal e-mails not privileged are ongoing and this response will be duly supplemented. Subject to and without waiver of the foregoing objections, including any and all general objections, 716 hereby produces the following documents in addition to other relevant documents produced in response to another Request:

- 2010 Lease Renewal 2, dated 10-11-10, Bates-stamped 716-000882-716-000887.
- 2011 Lease Renewal 3, dated 4-13-11, Bates-stamped 716-000888 thru 716-000893.
- 2012-2013 Lease Renewal 4, dated 7-19-12, Bates-stamped 716-000894 thru 716-000899.

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- Extension of Lease and Lease Amendment No.3, dated 9-19-13, Bates-stamped 716-000900 thru 716-001079.
- Memorandum of Lease – Recorded, dated 10-7-13, Bates-stamped 716-001080 thru 716-001083.
- Memorandum of Understanding between 716, the Legislative Affairs Agency (“LAA”), and Alaska Housing Finance Corporation (“AHFC”) dated 2/18/14, Bates-stamped 716-001084 thru 716-001087.
- LIO Presentation, Bates-stamped 716-001088 thru 716-001103.
- September 18, 2013 email from Mark Pfeffer to Timothy Lowe, Mike Buller and Doc Crouse with Final Budget attached, Bate Stamped 716-001256 thru 716-001258.

**REQUEST FOR PRODUCTION NO. 5:**

Please produce the operating agreement for 716 LLC, including all amendments and any other agreements pertaining to the operation and/or management of 716 LLC.

**RESPONSE:** Incorporating all previous objections, 716 objects to this request because it seeks information that is confidential and proprietary. 716 further objects to this request because it calls for the production of documents that are irrelevant to this action and not reasonably calculated to lead to the discovery of admissible evidence.

**REQUEST FOR PRODUCTION NO. 6:**

Please produce all documents relating to the LIO Lease complying with the requirement in AS 36.30.083(a) that it extend a real property lease.

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**RESPONSE:** 716 objects to this response because it is duplicative, and because any such documents would be in the possession and control of the LAA and not 716 and would thus impose obligations upon 716 greater than those set forth in the Alaska Rules of Civil Procedure. 716 further objects, because under AS 36.30.083, the legislative council, rather than the landlord, has sole authority to extend real property leases. Under AS 36.30.020, the legislative council adopts and publishes procedures to govern procurement. Therefore, 716 objects to any implicit legal characterization of the procurement process used to enter into this lease. Further, this request is also unduly burdensome to the extent it attempts to extend to 716 the scope of internal procurement documents that are exclusively within the possession, custody, or control of the LAA.

**REQUEST FOR PRODUCTION NO. 7:**

Please produce all documents relating to opinions, estimates or determinations of the market rental value and/or value of the New LIO Building and/or leasing or purchasing space for the Anchorage Legislative Information Office from January 1, 2010, except for (a) that certain "Rental Value Appraisal Report Anchorage Legislative Information Office," by Waronzof Associates, submitted October 15, 2013, as of June 1, 2014, a copy of which can be accessed by going to <http://bit.ly/1MCkd93>, and (b) that certain October 10, 2013, Report by the Alaska Housing Finance Corporation on the LIO Building Anchorage, Alaska titled "Evaluation of Cost Estimate for Downtown Development," a copy of which can be accessed by going to <http://bit.ly/1LV9MeW>. This request includes communications with any and all persons regarding the market

rent value of the New LIO Building, including without limitation during the planning phase and whether or not any opinion regarding the market rental value of the New LIO Building was formed or provided. In essence, this request is for all documents relating to the value or market rental value relating to leasing space by the Legislative Affairs Agency for the Anchorage Legislative Information Office after the expiration of the then existing lease.

**RESPONSE:** 716 objects to this request because it seeks information that is confidential and proprietary. Subject to and without waiver of the foregoing objections, including any and all general objections, 716 has already produced, in response to Request for Production No. 1, an appraisal of 716 West 4<sup>th</sup> Avenue prepared by Theodore Jensen, MAI of Reliant Appraisal for Kim St.John of EverBank, dated December 12, 2014, previously attached as Bates-stamped 716-000279 thru 716-0005454.

**REQUEST FOR PRODUCTION NO. 8:**

Please produce all document memorializing payments for costs under the LIO Lease for what is called renovations. In other words, this request is to obtain all cost records for construction of the space under the LIO Lease which the Legislative Affairs Agency occupied in January of 2015. This includes payments for project management to defendant Pfeffer Development, LLC.

**RESPONSE:**

716 objects to this request because it seeks information that is confidential and proprietary and protected by attorney-client privilege, work product doctrine, or any other applicable privilege. 716 further objects because this request is not reasonably calculated to lead to the discovery of admissible evidence and is not relevant to the subject matter of this proceeding. This request is also duplicative of the same request Plaintiff made to Pfeffer Development, LLC., the project manager of the LIO Project. It is also an objectionable request because it seeks the production of documents related to the business activities of third parties not named in Count One.

Subject to and without waiver of the foregoing objections, including any and all general objections, 716 hereby produces the following documents in addition to other relevant documents produced in response to another Request:

- Construction contract between 716 and Criterion General, Inc., including construction cost estimate, dated 11-11-13; Bates-stamped 716-001104 thru 716-001156.
- Criterion General Business License, Bate Stamped 716-001157 thru 716-001159.
- Criterion Payment and Performance Bond, Bate Stamped 716-001160 thru 716-001168.
- Certificate of Liability Insurance, Bate Stamped 716-001169-716-1170;

- Certificate of Liability Insurance (Wells Fargo), Bate Stamped 716-001171.
- Certificate of Liability Insurance, Bate Stamped 716-001172 thru 716-1177.
- Criterion General Builders Risk, Bate Stamped 716-001178 thru 716-001179.
- Contractor Qualification Statement, Bate Stamped 716-001180 thru 716-001186.
- Change Order #1, Bate Stamped 716-001187 thru 716-001189.
- Change Order #2, Bate Stamped 716-001190 thru 716-001192.
- Change Order #3, Bate Stamped 716-001193 thru 716-001195.
- Change Order #4, Bate Stamped 716-001196 thru 716-001207.
- Certificate of Insurance, Bate Stamped 716-001208-716-001209.
- LIO Change Order dated 12/30/14, Bate Stamped 716-001210 thru 716-001221.
- Kpb Subcontract, Bate Stamped 716-001222 thru 716-001255.

ASHBURN & MASON P.C.

LAWYERS

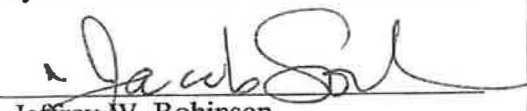
1227 WEST 9TH AVENUE, SUITE 200

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DATED: 9/3/15

ASHBURN & MASON, P.C.  
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By:   
for Jeffrey W. Robinson  
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716 WEST FOURTH AVENUE, LLC'S RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION  
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger  
☐ facsimile ☒ U.S. Mail on the 3 day of September 2015, on:

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716 WEST FOURTH AVENUE, LLC'S RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION  
*Alaska Building, Inc. vs. 716 West Fourth Avenue, LLC*, et. al. 3AN-15-05969 Civil

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 KeyCite Yellow Flag - Negative Treatment  
**Distinguished by** Goodman v. Genworth Financial Wealth  
Management, E.D.N.Y., January 24, 2012  
617 F.3d 186  
United States Court of Appeals,  
Second Circuit.

ELI LILLY & CO., Movant–Appellee,  
v.  
James B. GOTTSTEIN, Respondent–Appellant,  
Vera Sharav, Alliance for Human Research  
Protection, John Doe, David S. Egilman, Laura  
Ziegler, Mindfreedom International, Judi  
Chamberlin, Robert Whitaker, Terri Gottstein,  
Jerry Winchester, Dr. Peter Breggin, Dr. Grace  
Jackson, Dr. David Cohen, Bruce Whittington, Dr.  
Stephen Kruszewski, Will Hall, David Oaks And  
Eric Whalen, Respondents.

Docket No. 07–1107–cv. | Argued: Feb. 2, 2010. |  
Decided: Aug. 12, 2010.

#### Synopsis

**Background:** Multidistrict products liability action was brought against manufacturer of prescription drug used to treat schizophrenia. Following settlement, manufacturer sought permanent injunction to prevent third-party attorney from further disseminating confidential documents disclosed by manufacturer during pretrial discovery. The United States District Court for the Eastern District of New York, Weinstein, J., 474 F.Supp.2d 385, granted manufacturer's motion, and attorney appealed.

**Holdings:** The Court of Appeals, Richard D. Cudahy, Circuit Judge, held that:

[1] evidence was sufficient to establish, on motion for permanent injunction, that non-party attorney aided and abetted plaintiff's expert in violating protective order;

[2] permanent injunction did not violate rule governing enforcement of protective orders;

[3] district court had jurisdiction to enjoin non-party attorney from further disseminating confidential documents; and

[4] documents disseminated by attorney contained

information that could be subject to protective order.

Affirmed.

West Headnotes (8)

[1] **Federal Courts**  
⚡ Injunction

Court of Appeals reviews district court's factual conclusions in support of issuing permanent injunction for abuse of discretion, which may be found where the court, in issuing the injunction, relied on clearly erroneous findings of fact or an error of law.

1 Cases that cite this headnote

[2] **Federal Civil Procedure**  
⚡ Protective orders

Evidence was sufficient to establish, on motion to permanently enjoin non-party attorney's dissemination of documents produced by drug manufacturer in multidistrict products liability action, that attorney aided and abetted plaintiff's expert in violating protective order issued in that action; expert contacted attorney to explain that he possessed secret documents regarding drug that were under protective order, attorney understood that expert wanted to disseminate documents to public but would not produce documents without subpoena, attorney used unrelated case of state guardianship to generate subpoena to obtain confidential documents, and attorney strategized with expert on how best to facilitate dissemination of documents in manner ostensibly consistent with protective order to which expert was bound as a signatory.

2 Cases that cite this headnote



[3] **Federal Civil Procedure**

⚡Protective orders

Evidence was sufficient to establish, on motion to permanently enjoin non-party attorney's dissemination of documents produced by drug manufacturer in multidistrict products liability action, that attorney issued sham subpoenas in state guardianship case to obtain and disseminate confidential documents disclosed under protective order during pretrial discovery in the action; attorney intervened in state case and issued subpoenas for disclosure of confidential documents related to drug despite having no evidence that drug was relevant to case in which he had intervened, upon receipt of documents, attorney quickly disseminated documents without reviewing them or applying them to case in which he intervened, and subpoena issued through state court was without legal force in state it was served.

1 Cases that cite this headnote

[4] **Witnesses**

⚡Subpoena duces tecum

Causing a subpoena to be served, with notice that compliance with it by the complicit recipient would violate a court's lawful order, cannot be characterized as "legitimate," even if the improperly obtained documents might otherwise be useful had they been obtained appropriately.

1 Cases that cite this headnote

[5] **Federal Civil Procedure**

⚡Protective orders

**Injunction**

⚡Disclosure or use of trade secrets or confidential information

Permanent injunction prohibiting non-party

attorney from further disseminating confidential documents, consisting mainly of trade secrets and confidential commercial information, disclosed under protective order during pretrial discovery in multidistrict products liability action against manufacturer of drug used to treat schizophrenia did not violate rule governing enforcement of protective orders, since injunction did not purport to bind attorney to provisions of protective order, and injunction merely enjoined attorney from further disseminating confidential documents and required attorney to return any such documents and copies still in his possession. Fed.Rules Civ.Proc.Rules 26(c), 65, 28 U.S.C.A.

3 Cases that cite this headnote

[6] **Federal Civil Procedure**

⚡Protective orders

Substantive provisions of protective order, which facilitated litigants' sharing of confidential discovery in multidistrict products liability action against manufacturer of prescription drug used to treat schizophrenia, were sufficiently detailed, even if order failed to provide nonparties with specific and detailed description of the acts required or prohibited, since protective order did not need to dictate boundaries of permissible behavior by non-signatories to order, and non-signatories could only be enjoined if their actions amounted to aiding and abetting violation of order by person who was privy to it.

Cases that cite this headnote

[7] **Injunction**

⚡Aiding, abetting, or encouraging

District court had jurisdiction to permanently enjoin non-party attorney from further disseminating confidential documents that were subject to protective order in multidistrict products liability case against manufacturer of

prescription drug used to treat schizophrenia, which he obtained from plaintiff's expert witness through use of allegedly sham subpoenas in state guardianship proceeding, since attorney and expert shared common plan to violate protective order in products liability case and to disseminate drug manufacturer's confidential material. Fed.Rules Civ.Proc.Rules 26(c), 65, 28 U.S.C.A.

2 Cases that cite this headnote

[8]

**Federal Civil Procedure**

⚡Protective orders

**Privileged Communications and Confidentiality**

⚡Trade secrets; commercial information

Confidential documents disseminated by attorney and his co-conspirators, in multidistrict products liability action against manufacturer of drug used to treat schizophrenia, contained information that could be subject to protective order, since documents consisted entirely of materials exchanged by parties in discovery phase of litigation, publication of documents would be annoying, embarrassing, oppressive, and burdensome to manufacturer, and documents consisted mainly of trade secrets and confidential commercial information. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

Cases that cite this headnote

**Attorneys and Law Firms**

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Nina M. Gussack, (Sean P. Fahey, Paul V. Avelar, Pepper Hamilton, LLP, Philadelphia, PA, Samuel J. Abate Jr., Pepper Hamilton LLP, New York, NY, on the brief), Pepper Hamilton, LLP, Philadelphia, PA.

CALABRESI, RAGGI, and CUDAHY,\* Circuit Judges.

**Opinion**

RICHARD D. CUDAHY, Circuit Judge:

The present appeal arises from the flouting of a protective order entered in high-stakes litigation concerning Eli Lilly Co.'s anti-psychotic drug, Zyprexa. David S. Egilman, a plaintiff's expert witness and signatory to the protective order, received confidential documents produced by Eli Lilly. Finding much to dislike in the content of those documents, Egilman wished to distribute them to the media. Not wanting to release the documents to the public in a manner brazenly in disregard of the protective order, he needed a suitably minded individual to act as his partner and to subpoena those documents. Egilman contacted *New York Times* reporter Alex Berenson, who put him in touch with Alaska attorney and mental-health advocate James B. Gottstein, who readily agreed to help. Gottstein, who was not a signatory to the protective order, intervened in an unrelated Alaskan guardianship case, which he used to generate subpoenas purporting to require Egilman to produce all documents in his possession pertaining to Zyprexa. Failing to abide by the terms of the protective order, Egilman distributed a large volume of documents to Gottstein, who in turn copied and forwarded them to a variety of other interested parties. The next day, the *Times* began a series of front-page articles based on the information contained in those documents.

Understandably alarmed, Eli Lilly applied for and received a series of orders culminating in an injunction, which barred Gottstein from disseminating the documents and required their return. *In re Zyprexa Injunction*, 474 F.Supp.2d 385 (E.D.N.Y.2007). Gottstein now appeals that injunction, claiming that the district court erred in finding that his issuing subpoenas was part of a sham proceeding, that he aided and abetted the violation of the protective order, that the documents at issue were confidential, that the court could bind him under the protective order and that the court possessed personal jurisdiction to issue the injunction against him. We affirm the judgment of the district court in all respects.

**BACKGROUND**

Approximately twenty-million schizophrenia patients have taken the anti-psychotic drug Zyprexa, which some allege has produced negative side effects purportedly

known to, but not disclosed by, the drug's manufacturer, Eli Lilly Co. Some 30,000 lawsuits ensued, which were consolidated pursuant to 28 U.S.C. § 1407 and assigned to the Honorable Jack B. Weinstein of the United States District Court for the Eastern District of New York. *In re Zyprexa Prods. Liab. Litig.*, 314 F.Supp.2d 1380 (J.P.M.L.2004). That court entered a protective order, Case Management Order 3 (CMO-3), which facilitated litigants' sharing of confidential discovery. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2004 WL 3520247 (E.D.N.Y. Aug. 9, 2004). Among other things, CMO-3 allowed attorneys to share \*190 confidential documents with experts, required experts to sign an "Endorsement of Protective Order" and provided a mechanism to dispute whether a document marked confidential had been correctly designated. The protective order contemplated another court's subpoenaing produced materials, but required that the designee of the subpoena notify the producing party in writing prior to the production of confidential materials and allow it a reasonable opportunity to object.

At some point during the litigation, one of the plaintiffs' firms, The Lanier Law Firm, retained Dr. David Egilman as a potential expert witness. Having first attempted to modify it, Egilman signed the Endorsement of Protective Order.<sup>1</sup> The firm sent myriad documents produced by Eli Lilly to Egilman so that he could begin preparing his expert testimony. Egilman ultimately received some half-a-million documents and became quite determined to share their contents with the media. He contacted *New York Times* reporter Alex Berenson and explained his interest. Egilman understood that he was subject to CMO-3, however, and thus required an accomplice to subpoena the documents. Berenson put Egilman in touch with James B. Gottstein for that very purpose.

Gottstein is an Alaskan attorney and an advocate for patients' rights. After talking to Egilman about Eli Lilly's confidential documents and their mutual desire to see those materials disseminated to the public, Gottstein intervened in an unrelated case in which the Alaskan Office of Public Advocacy had been granted guardianship and the right to make treatment decisions for a patient, William Bigley. At that time, Gottstein had no idea if the patient had taken Zyprexa or if the state would use Zyprexa in its treatment of the patient. Yet within hours of intervening, he issued a subpoena that purported to compel Egilman to produce all documents in his possession relating to that particular drug. Despite being addressed to Egilman in Massachusetts, however, the subpoena issued from the Superior Court for the State of Alaska. Gottstein placed the request for documents

pertaining to Zyprexa in the middle of requests for documents relating to 14 other drugs, none of which he expected Egilman to possess. The subpoena, issued on December 6, 2006, called for production of the material by December 20.

In an effort to comply, however perfunctorily, with CMO-3, Egilman faxed a note and copy of the subpoena to Eli Lilly's corporate general counsel. He did not, however, inform the firm that retained him of the subpoena; nor did he apprise Eli Lilly's litigation counsel. Nevertheless, the fax was routed internally and, on December 13, the Lanier Law Firm told Egilman not to produce any documents until Eli Lilly's planned motion to quash the subpoena had been ruled upon in the Alaskan court. Unbeknownst to Lanier and Eli Lilly, however, Egilman had already begun to distribute a plethora of documents to Gottstein the day before.

This clandestine production of Eli Lilly's documents resulted from Gottstein's having served an amended subpoena on December 11, which called for the production of the documents prior to the date and time set for the deposition. This subpoena, \*191 again purporting to bind Egilman in Massachusetts, also issued from the Superior Court for the State of Alaska. In violation of the protective order, Egilman informed no one of this second subpoena and began transmitting documents electronically to Gottstein on December 12. Gottstein immediately disseminated the documents to a number of associates.

Realizing the magnitude of the information breach, Eli Lilly took the matter to the Special Master for Discovery, Peter H. Woodin, who ordered Gottstein and Egilman to return all material immediately. Gottstein refused to acknowledge the Special Master's authority over him, so Eli Lilly took the matter up with Magistrate Judge Roanne L. Mann, who determined that Gottstein had aided and abetted a breach of CMO-3. Eli Lilly then took the matter to District Judge Brian M. Cogan, who was sitting as a miscellaneous-duty judge and who issued a temporary injunction. The MDL court extended Judge Cogan's injunction pending a full hearing on the matter, which it conducted on January 16 and 17, 2007. The MDL court issued an injunction on February 13, from which Gottstein now appeals.

## DISCUSSION

**I. The district court did not abuse its discretion when it characterized the Alaskan subpoenas as a “sham” and found that Gottstein aided and abetted Egilman’s violation of the protective order**

<sup>[1]</sup> Gottstein challenges the district court’s factual determination that the subpoenas he caused to be served on Egilman were a “pretense.” He also contests the district court’s closely related finding that he aided and abetted the violation of CMO–3.<sup>2</sup> We review such factual conclusions for abuse of discretion, “which may be found where the Court, in issuing the injunction, relied on clearly erroneous findings of fact or an error of law.” *Knox v. Salinas*, 193 F.3d 123, 129 (2d Cir.1999); see also *In re Complaint of Messina*, 574 F.3d 119, 128 (2d Cir.2009) (holding that we will overturn the factual findings of the district court only where we have a “definite and firm conviction that a mistake has been committed”) (internal quotation marks omitted).

<sup>[2]</sup> The district court’s finding that Gottstein conspired with Egilman to violate CMO–3 is amply supported by the record. Egilman called Gottstein on November 28, 2006, explaining that he possessed secret Zyprexa documents produced through litigation and that they “contained some alarming things in them.” He informed Gottstein that the documents were under a protective order.<sup>3</sup> Understanding that Egilman would not produce the Zyprexa documents except pursuant to a subpoena, Gottstein needed to find an appropriate case as a vehicle with which to generate one. Gottstein obtained Egilman’s contact information for the subpoena, as well as the latter’s email and phone number. Egilman knew that Gottstein intended to distribute the Zyprexa documents when he obtained them.

\*192 There is therefore no question that Gottstein and Egilman were in close contact with one another and strategized how best to facilitate the dissemination of documents protected by CMO–3. The subpoenas served on Egilman merely formalized and facilitated what had already been agreed to. They both understood that issuing a subpoena was a necessary ploy for achieving that distribution in a fashion ostensibly consistent with the protective order to which Egilman was bound as a signatory. It is therefore unsurprising that the manner in which Egilman and Gottstein responded to the subpoenas and caused them to issue, respectively, was designed to delay Eli Lilly’s learning of them and taking action to prevent production. Neither Gottstein nor Egilman informed Eli Lilly’s litigation counsel or the Lanier Law Firm of the first subpoena—actions that both knew would have resulted in Eli Lilly’s learning of the subpoena’s existence promptly. Nor did either of Gottstein and

Egilman inform anyone else of the second, secret subpoena, which called for earlier production. They hindered Eli Lilly’s recognizing the purpose of the subpoenas by burying the request for Zyprexa documents in the middle of requests for documents for some 14 other drugs. This is all strong evidence of Gottstein and Egilman’s acting in concert.

<sup>[3]</sup> Further evidence of the subpoena’s being a sham abounds, and this similarly evidences the fact of concert between Egilman and Gottstein. When introduced to Egilman through Berenson, Gottstein wasted no time in planning an end run around the protective order. He searched for, found and then intervened in a case of state guardianship that was wholly unrelated the Zyprexa litigation. Gottstein admitted that he had no evidence at the time of causing the subpoenas to be served on Egilman that Zyprexa was relevant to the case in which he had intervened. On receipt of the material, Gottstein quickly disseminated it to a list of recipients without even reviewing it or applying it to his Alaskan patient’s case. It bears noting, too, that the subpoenas *duces tecum* issued through the Alaskan state court were presumably without legal force in Massachusetts, where Egilman resided and was served.<sup>4</sup> This further supports the district court’s determination that the subpoenas were a sham.

In sum, the record is unequivocal that Gottstein schemed with Egilman to bypass the protective order and, in fact, aided and abetted the latter’s violation of the same. It is equally clear that the subpoenas issued to Egilman were part of a sham proceeding. The district court did not err, let alone clearly err, in so finding.

\*193 Faced with these clear facts, Gottstein is forced to resort to a variety of unavailing assertions. First he contends that, because at least one of his two purposes was supposedly proper, the district court erred in characterizing the subpoenas as a pretense. He relies on *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir.1995) and focuses on that court’s holding that a party “should not be penalized for or deterred from seeking warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper.” *Id.* at 459. Of course, *Sussman* was concerned with the distinct issue of a plaintiff’s being subject to Fed.R.Civ.P. 11 sanctions for filing a nonfrivolous complaint pursuant to an improper purpose. *Id.* But even putting this distinction aside, Gottstein’s reliance on *Sussman* necessarily flounders on the fact that he is incapable of demonstrating that any of his purposes in subpoenaing and disseminating Eli Lilly’s confidential documents was proper.



<sup>[4]</sup> Gottstein asserts that his “dual purposes” were “to obtain evidence for use in Bigley’s case and other future cases, and [to] make evidence of suppressed hazards or illegal marketing or other evidence of Zyprexa hazards and Lilly [sic] misconduct known to the public.” However, the qualitative nature of a “purpose” cannot be divorced from the manner in which it is pursued. Even if we were to assume that either of his proffered goals in subpoenaing Egilman were otherwise legitimate, the fact of his aiding and abetting the violation of a lawful protective order to achieve that end precludes our finding a proper purpose. Gottstein appears to focus on the discrete act of his causing the two subpoenas to issue, essentially asking that we consider those actions divorced from the larger context of which they were a part. Yet we have already determined that the district court was on firm ground in finding that Gottstein’s actions—including his serving Egilman with the two subpoenas—aided and abetted Egilman’s violation of the protective order. Causing a subpoena to be served, with notice that compliance with it by the complicit recipient would violate a court’s lawful order, cannot be characterized as “legitimate,” even if the improperly obtained documents might otherwise be useful had they been obtained appropriately. Ultimately, Gottstein’s nebulous assertion that the subpoenas were somehow “grounded in law and fact” does not legitimize the manner in which they were employed to facilitate the violation of a court’s order; nor does it take away from their being part of a sham proceeding.

Gottstein’s second argument is no more fruitful. He submits that he acted independently as a lawyer in the interests of his client, which, he contends, precludes any finding that he aided and abetted Egilman’s violation of the protective order. To support this conclusion, Gottstein focuses on *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945), for the proposition that a nonparty who “act[s] independently” of a party found in violation of a court order cannot be an aider and abettor if the nonparty’s actions were based on a “genuinely independent interest.” Gottstein contends that he had an interest in the documents that was independent of Egilman’s. Of course, the record does not support a finding that Gottstein acted independently of Egilman, which is the end of the matter. Aiding and abetting a party is not acting independently, as Gottstein himself admits. We would also point to our prior decision in *N.Y. State Nat’l Org. for Women v. Terry*, where we held that a court’s inquiry into the fact of aiding and abetting is “directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation.” 961 F.2d 390, 397 (2d Cir.1992), *vacated*

on other \*194 grounds sub nom., *Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993).

Ultimately, the district court’s finding that Gottstein acted in concert with Egilman to release the confidential material, and related determination that Gottstein aided and abetted Egilman’s violation of CMO–3, seem to us the only reasonable conclusions in light of the facts in the record. The district court certainly did not abuse its discretion in so finding.

## II. Gottstein’s challenges to the protective order fail

<sup>[5]</sup> Gottstein challenges the protective order on a number of grounds, all of which fail. He asserts first that the “district court erred by assuming ‘inherent authority’ to use its power to enforce injunctions under Rule 65(d) to enforce a protective order under Rule 26(c) instead.” We reject this argument by virtue of the obvious fact that the district court did not enforce CMO–3 against Gottstein—an order to which Gottstein was not privy. Gottstein seems to miss the fact that the injunction against which he appeals merely “enjoined him from further disseminating” the “documents produced by Eli Lilly and Company subject to CMO–3” and required him “forthwith [to] return any such documents and copies still in his ... possession....” *In re Zyprexa Injunction*, 474 F.Supp.2d at 430. It did not purport to bind Gottstein to the provisions of the protective order. *Id.* at *passim*. Thus, Gottstein’s assertion that the court “enforce[d] a protective order under Rule 26(c)” against him is wholly mistaken. Nor, as Gottstein contends, did the court impose aiding-and-abetting “liability.” The district court made this abundantly clear, observing that “this is not a contempt proceeding, and the court is not now punishing anyone for any alleged violation of court orders. Rather, this proceeding seeks to prevent irreparable harm to Lilly by enjoining those persons whose actions threaten such harm.” *Id.* at 426.

<sup>[6]</sup> Gottstein next argues that the substantive provisions of the protective order were insufficiently detailed, since they did not delineate the acts sought to be restrained and failed “to provide nonparties with a specific and detailed description of the acts required or prohibited.” These contentions are unavailing. First, it is unclear why a protective order would seek to dictate the boundaries of permissible behavior by non-signatories. Such individuals can only be enjoined when their actions amount to aiding and abetting a violation of the order by a person who is privy to it. In that sense, Gottstein’s objection to the order’s supposed lack of specificity as to appropriate

third-party conduct collapses into his argument that the order's existing provisions are impermissibly vague. He argues on this latter ground that the order's requirement that parties be given a "reasonable opportunity" to object before any disclosure is effected is "too vague to be enforced." Gottstein's contention is border-line disingenuous, however, in light of his election not to read the protective order before aiding and abetting its violation. In any event, the challenged phrasing, familiar from other contexts, *see, e.g.,* Fed.R.Civ.P. 12(d); Fed.R.Crim.P. 5(d)(2), 6(e)(3)(G), 32.1(c)(2)(C), hardly constitutes abuse of what the district court accurately described as its "broad discretion to tailor protective orders to the circumstances of a particular litigation." *In re Zyprexa Injunction*, 474 F.Supp.2d at 413.

### III. Gottstein submitted himself to the personal jurisdiction of the Eastern District of New York when he aided and abetted a violation of the court's order

<sup>171</sup> Gottstein makes a further argument. He contends that the district court \*195 lacked jurisdiction to enjoin a nonparty who aided and abetted the violation of a protective order.

It is of course true that courts cannot enjoin the entire universe of potential violators of its orders. In *Regal Knitwear*, the Supreme Court held that those who are acting independently of the enjoined party and whose own rights have not been adjudged cannot be bound by an injunction. 324 U.S. at 13–14, 65 S.Ct. 478. Yet, third parties "who are in active concert or participation" with the parties, their officers, agents, servants, employees or attorneys, can be enjoined. Fed.R.Civ.P. 65(d)(2). This language gives force to injunctions and prevents parties from violating them by proxy. "[D]efendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear*, 324 U.S. at 14, 65 S.Ct. 478.

While the instant case deals with an injunction, it is an injunction founded on a nonparty's aiding and abetting the violation of a protective order. Thus, we must consider whether aiding and abetting the breach of such an order gives the issuing court jurisdiction over the nonparty aider and abettor to enjoin him from continuing those actions.

Gottstein contends that we should adopt a rule saying that district courts have jurisdiction only over parties and signatories to their discovery orders, such that courts are powerless to enjoin the actions of other entities that aid

and abet the violation of those orders. In support of his argument, Gottstein distinguishes orders created under Rule 26(c) from Rule 65 injunctions and points out that, while Rule 65 textually allows third-party aiders and abettors to be enjoined, Rule 26 does not.

His argument fails for multiple reasons. First, Rule 26 neither provides nor suggests that courts lack the power to enjoin nonparties or nonsignatories who aid and abet the violation of their discovery orders. Second, relevant case law is against Gottstein's position. *See, e.g., Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir.1985) ("Nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order."). Third, a protective order might be thought of as a form of injunction in this particular setting, in which case reading Rules 26 and 65 together would obviously foreclose Gottstein's argument. *See, e.g., Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir.1993) ("[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court...."). Fourth, if taken to its logical conclusion, Gottstein's proposed rule would render protective orders little more than liability-generating documents. If courts cannot bind third parties who aid and abet the violation of their protective orders, then any party, agent, attorney or expert who comes into possession of material he wanted to use against the producing party could simply disseminate the information quickly, then deal with the damages issue after the fact. We understand that the threat of a sizable damages award may deter this action in some cases, but Gottstein's proposed rule would eviscerate courts' ability to manage discovery and, hence, litigation.

Egilman and Gottstein shared the common plan to violate CMO-3 and to disseminate Eli Lilly's confidential material. This is the only reason Egilman sought Gottstein's involvement and is also clearly the reason that Gottstein intervened in the Alaska case and generated the subpoenas. As he issued the subpoenas, burned DVD \*196 copies, forwarded emails and sent packages containing the data to associates, Gottstein actively took part in and furthered that shared goal. Therefore, Gottstein aided and abetted Egilman's violation of the protective order. The resulting injunction is a perfectly appropriate device to foreclose further dissemination of the confidential documents produced under the protective order.

### IV. The district court did not clearly err in finding

**that the documents distributed by Gottstein and his conspirators included a substantial number that were confidential**

<sup>[8]</sup> The district court “examined a sampling of the documents distributed by the conspirators,” concluded that “[a]mong them [were] a substantial number whose publication would be annoying, embarrassing, oppressive, and burdensome to Lilly” and further observed that “they reveal trade secrets, confidential preliminary research, development ideas, commercial information, product planning, and employee training techniques.” *In re Zyprexa Injunction*, 474 F.Supp.2d at 404. The district court did not clearly err in reaching this conclusion.

Gottstein contends that the documents he transmitted were not confidential, as evidenced by a variety of subsequent developments outside the record on appeal. This argument is not properly before us and should be raised in front of the district court in the first instance. *See Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir.1972) (observing that “where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances”). Gottstein also devotes considerable pages to arguing that Eli Lilly’s mass designation of documents as confidential violated CMO–3 because such designation was not made in good faith. He unconvincingly attempts to bolster this conclusory assertion by arguing for “[t]he inference that one of Lilly’s motivations for over-designation of documents as confidential under CMO–3 was to avoid civil and criminal liability.” His argument is in any event misguided, since the question whether Eli Lilly designated its produced documents in good faith is distinct from the question whether those subject to the protective order were free to ignore it. If Egilman or Gottstein believed that particular documents were improperly designated as confidential, then the proper procedure was for either of them to avail himself of the procedure envisioned by CMO–3 for declassifying such

documents. What Gottstein was not entitled to do was to aid and abet Egilman’s violation of the protective order on the ground that that order had been improperly entered. *See In re Criminal Contempt Proceedings*, 329 F.3d 131, 138 (2d Cir.2003) (observing that “it is well settled that persons subject to an injunctive order ... are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order”) (internal quotation marks omitted).

#### **V. The motions for judicial notice and to strike are denied**

Gottstein moves for us to take judicial notice of materials not presented below. Eli Lilly moves in response to strike those portions of Gottstein’s brief referencing extra-record materials. We decline to take judicial notice of those materials and so deny Gottstein’s motion for judicial notice and also deny Eli Lilly’s motion to strike on the ground of mootness. In light of our foregoing discussion, however, it should be clear that our granting Gottstein’s \*197 motion would not change our analysis; nor would it affect the result we reach.

#### **CONCLUSION**

For the foregoing reasons, Gottstein’s motion for judicial notice is DENIED, Eli Lilly’s motion to strike is DENIED as moot and the judgment of the district court is AFFIRMED.

#### **All Citations**

617 F.3d 186

#### **Footnotes**

\* Circuit Judge Richard D. Cudahy of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

<sup>1</sup> Egilman first attempted to make significant modifications to the Endorsement of Protective Order, but the retaining firm quickly insisted that that was out of the question. They allowed, though, that he could follow the agreement not to disclose confidential materials with the written-in line “unless this conflicts with any other sworn statements.” This modification, while portending the later mass disclosure of confidential material, is not relevant to the present appeal.

<sup>2</sup> It is clear that Egilman violated the protective order by failing to inform Eli Lilly of the second subpoena, which required an earlier production date. *See In re Zyprexa Injunction*, 474 F.Supp.2d at 395. Egilman would also appear to have contravened CMO–3 by failing to provide Eli Lilly with a reasonable opportunity to object to production with respect to

the first subpoena.

- 3 As he testified, Gottstein understood Egilman's reluctance to send him a copy of the order as an effort to avoid his later being charged with knowledge of its contents. Gottstein did not try to convince Egilman to provide him with a copy of CMO-3.
- 4 See, e.g., *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988) (holding that "the subpoena power of a court cannot be more extensive than its jurisdiction"); *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C.Cir.1996) ("In general, a state-court litigant seeking to compel a non-party to produce documents must use the state court's subpoena power or, if the nonparty is beyond the jurisdiction of such court, use whatever procedures another state may provide."); *Jaynes v. Jaynes*, 496 F.2d 9, 10 (2d Cir.1974); *John Deere Co. v. Cone*, 239 S.C. 597, 124 S.E.2d 50, 53 (1962) (observing that a subpoena directed to an out-of-state entity is "ineffectual" because "the courts of this state are without jurisdiction over persons or property outside of its territory"); Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L.REV. 37, 67 n. 135 (1989) ("As a general rule, subpoenas *duces tecum*, like subpoenas *ad testificandum*, have been restricted to the territory of the state."). Cf. ALASKA STAT. § 12.50.010 (2010) (establishing procedures for recognition and enforcement of subpoenas issued by non-Alaska courts in criminal matters). This principle is enshrined in the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 45(a)(2), 45(b)(2), 45(c)(3)(A)(ii), 45(e).

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
ZYPREXA LITIGATION, et al.  
-----X

In re INJUNCTION  
-----X

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## **I. Introduction**

This case raises intriguing questions of when it is appropriate to conduct aspects of civil litigation in secrecy, and of what are appropriate limits on civil disobedience by newspaper reporters, forensic experts, and attorneys.

Over the past two and a half years, some thirty thousand related personal injury suits have been before this court as part of a large multidistrict litigation, and in state courts. People suffering from schizophrenia were prescribed the anti-psychotic drug Zyprexa distributed by

defendant, Eli Lilly & Company ("Lilly"). Plaintiffs allege that as a result of inadequate warnings by Lilly they became obese and suffered from diabetes.

The court ordered internal documents of Lilly sealed on consent of the parties so that discovery could be expedited and the individual cases promptly settled or otherwise disposed of on their merits. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2004 WL 3520247 (E.D.N.Y. Aug. 9, 2004) ("Case Management Order No. 3" or "CMO-3") (hereinafter "protective order"); *see also* Fed. R. Civ. P. 26(c)(7) ("the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way"); *S.E.C. v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) ("protective orders issued under Rule 26(c) serve the vital function of securing the just, speedy, and inexpensive determination of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant") (quotation omitted); Parts III.B and IV.A, *infra*.

Almost all of the cases have now been settled. Millions of documents obtained from Lilly by the court-appointed Plaintiffs' Steering Committees I and II ("PSC") have been made available to all plaintiffs' attorneys in pending federal and state cases. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2006 WL 3495667, \*3 (E.D.N.Y. Dec. 5, 2006) ("All materials obtained by PSC I and PSC II in pretrial discovery have been ordered to be made available to all plaintiffs, state and federal."). A large number of documents supplied by Lilly are subject to CMO-3; they are stamped, "Confidential - Subject to Protective Order." Other documents supplied by plaintiffs' counsel involving medical records of individual plaintiffs have been

sealed.

A New York Times reporter, Alex Berenson, was aware of the protective order. He discussed with a plaintiffs' expert, Dr. David Egilman, means of escaping the order's restrictions and obtaining protected documents in the expert's possession, *see* Part II.D, *infra*, — even though Egilman had agreed in writing to be bound by the order. *See* Part II.C, *infra*.

Both Berenson and Egilman were cognizant of the fact that paragraph 14 of CMO-3 took account of the possibility that the protected documents could be subpoenaed by courts or executive agencies. So Berenson provided Egilman with the name of an Alaska attorney, James Gottstein, unconnected to the instant litigation, who might be willing to employ a pretense to subpoena the documents and help disseminate them in violation of the protective order. *See* Part II.D, *infra*.

To carry out the scheme for obtaining and disseminating the protected documents, Gottstein intervened in a state case in Alaska wholly unrelated to Zyprexa. In that case, he then subpoenaed from Egilman confidential documents he knew to be under the protective order which bore no relevance to the Alaska litigation. The subpoenaed documents were sent by Egilman to Gottstein pursuant to an expedited amended subpoena about which Lilly was deliberately kept in the dark so that it would be unable to make a timely objection. *See* Part II.E, *infra*. Gottstein immediately sent the confidential documents on to Berenson and others. *See* Parts II.E and II.H.1, *infra*.

None of the three conspirators, Berenson, Egilman, and Gottstein, sought a lifting or modification of the protective order, despite the declassification procedures provided for in paragraph 9 of CMO-3. *See In re Zyprexa*, No. 04-MD-1596, 2004 WL at \*5.

Intending that they be published extensively, Gottstein distributed the sealed documents to various organizations and individuals. No distribution to newspapers other than the New York Times was made because of Berenson's explicit warning to his co-conspirators that if the Times was not given "an exclusive" on the story, it would not publish anything at all about the documents. *See* Part II.H.1, *infra*.

Almost at once, the New York Times published excerpts from, and summaries of, the protected documents in a series of lead articles under Berenson's byline. *See, e.g.,* Alex Berenson, *Eli Lilly Said to Play Down Risk of Top Pill*, N.Y. Times, Dec. 17, 2006, at A1; Alex Berenson, *Drug Files Show Maker Promoted Unapproved Use*, N.Y. Times, Dec. 18, 2006, at A1; Alex Berenson, *Disparity Emerges in Lilly Data on Schizophrenia Drug*, N.Y. Times, Dec. 21, 2006, at A1; *see also* Part II.J, *infra*.

Upon being informed of the breach, the court ordered Gottstein to retrieve the documents and return them to the court-appointed Special Master for Discovery. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2006 WL 3877528 (E.D.N.Y. Dec. 19, 2006). *See* Parts II.I and II.K.2, *infra*.

Learning that some of the individuals to whom the conspirators had sent the documents had refused to return them and were attempting widespread dissemination, the court issued a preliminary injunction. It enjoined individuals and organizations who had received the documents from Gottstein — except for Berenson; Snighda Prakash of National Public Radio; and congressional staffers Steve Cha and Amelia Desanto (none of whom had been included by Lilly among those from whom it sought return) — from further disseminating them.

The injunction also ordered specified websites not to publish the documents. *See In re*



*Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2007 WL 27117 (E.D.N.Y. Jan. 4, 2007); Parts II.K.5 and II.K.6, *infra*. The documents may possibly be available on other websites. Their gist can be obtained from stories in the press. *See, e.g.*, Alex Berenson, *Eli Lilly Said to Play Down Risk of Top Pill*, N.Y. Times, Dec. 17, 2006, at A1; Alex Berenson, *Drug Files Show Maker Promoted Unapproved Use*, N.Y. Times, Dec. 18, 2006, at A1; Editorial, *Playing Down the Risks of a Drug*, N.Y. Times, Dec. 19, 2006; Julie Creswell, *Court Orders Lawyer to Return Documents About an Eli Lilly Drug*, N.Y. Times, Dec. 20, 2006; Alex Berenson, *Disparity Emerges in Lilly Data on Schizophrenia Drug*, N.Y. Times, Dec. 21, 2006, at A1.

A final injunction is now being issued against two of the conspirators — Egilman and Gottstein — and others who have not returned the documents they obtained from Gottstein; some of these individuals are mentioned in the court’s prior orders. *See* Parts IV.D and IV.H, *infra*.

No newspaper or website is directed to do anything or to refrain from doing anything. *See* Parts IV.F, IV.H.4, and IV.H.7, *infra*. No person is enjoined from expressing an opinion or speaking or writing about the documents. *See* Part VII, *infra*.

A perplexing issue is presented by Lilly’s request for an injunction against websites to which the conspirators sent the documents or which might have been used for further dissemination by those to whom the documents were originally sent. *See* Part IV.F, *infra*. The internet, with its almost infinitely complex worldwide web of strands and nodes, is a major modern tool of free speech and freedom both here and abroad. Its reach extends as far as, and perhaps exceeds, that of newspapers and other traditional media. The law is rightly hesitant about allowing government — including the courts — to inhibit and restrict the use of such

modern instruments of communication. See U.S. Const. amend. I. Cf. Jeffrey S. Klein and Nicholas J. Pappas, *When a Private Sector Employer Fires Worker for Blogging*, N.Y. L.J., Feb. 5, 2007, at 3 (pointing out that with over 60 million blogs in existence — a blog being a type of online diary posted to a website — whistleblowing via the internet, on and off business and government premises, is becoming increasingly common).

Irresponsible people may exercise their own right and opportunity to speak in a manner abusive and constrictive of the rights of others on the internet, in the press, and in other fora. Those whose rights have been abused by the conspirators in violation of the court's protective order include Lilly and tens of thousands of plaintiffs and their attorneys who depended upon CMO-3 and sealing orders of the court to effectively prosecute this important litigation without unnecessary breach of the parties' privacy. It is significant that both the PSC and Lilly support the issuance of the injunction now being issued.

Problems with restrictions by authorities on dissemination of knowledge are not new. They trace back to the Garden of Eden and Socrates' Athens. Most recently they were manifested when people physically disrupted a meeting at Columbia University, preventing speakers from exercising an opportunity to convey their views in an academic setting on a controversial matter. Columbia's President, Lee C. Bollinger, himself a student of free speech, remarked:

[T]he disruption of that event constituted a serious breach of faith against an academic community built on the freedom to think, speak, debate, and disagree. . . . [E]very idea poses a risk of action, for good or bad. But what is hard to learn and hard to live by is the single idea that words are the better way in which to work through conflict and danger. This is certainly true for universities, but also for healthy, free societies. . . .

See Paul Hond, *Fighting Words*, Columbia, Winter 2006-07, p. 13, 16 (sidebar). Notably, in the Columbia University case, the disrupters were sought out for discipline to prevent future assaults on the freedoms of others. *Id.*

Orders for sealing of documents are designed to permit litigants and the courts to examine a party's internal records, which may include embarrassing personal medical information, or valuable business secrets and commercial data, without unnecessarily exposing them to the public's and competitors' view. See Fed. R. Civ. P. 26(c)(7); Parts III.B and IV.A, *infra*. Cf. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (holding compelled disclosure of organization's membership list unconstitutional given "inviolability of privacy in group association").

Such protective orders take account of the public's interest in seeing the documents. After balancing the public's right to know and the parties' privacy rights, should the documents sealed by an order such as CMO-3 be found not to warrant continued protection, the order can be modified. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 572 (E.D.N.Y. 1985) (declassifying documents upon a showing "that the need for disclosure outweighs the need for further protection"), *aff'd* 821 F.2d 139 (2d Cir. 1987). On motion of a party — or of a non-party — who can demonstrate a need to know, sealed documents may be unsealed pursuant to general policy and the terms of the protective order itself. See CMO-3 at ¶¶ 9, 16; Part IV.A, *infra*; see also *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987) ("It is undisputed that a district court retains the power to modify or lift protective orders that it has entered."); Monograph, *Individual Justice in Mass Tort Litigation*, 66-72 (1995); Aaron Twerski, et al., *Secrecy and the Civil Justice System*, 9 J. of L. & Pol'y, 51, 51-107 (2000);

Note, *Secrecy in Civil Trials: Some Tentative Views*, 9 J. of L. & Pol’y, 53 (2000); Catherine Wimberly et al., *Secrecy in Law and Science*, 23 Cardozo L. Rev. 1 (2001).

Conspirators in the instant case who deliberately thwarted a federal court’s power to effectively conduct civil litigation under the rule of law, as well as those in concert with them, should be enjoined to deter further violations of this and other courts’ orders. *See* Part IV.D, *infra*. In a democracy it is important to craft any injunction as narrowly as possible so that in protecting essential court processes free speech is not unnecessarily restricted. *See* Parts IV.E-F, *infra*; *Cf.*, e.g., Ronald L. Goldfarb, *The Contempt Power*, 3 (1963) (“The summary and comparatively unlimited exercise of the [contempt] power compounds the danger to individual freedom which its mere existence implies.”). *But cf. id.* at 89 (finding a “sound reason” to use contempt power to prevent dissemination by the media of evidence which will be used at trial because of adverse impact on the right to a fair trial).

Here, an expert hired by plaintiffs agreed in writing not to distribute documents sealed by court order. *See* Part II.C, *infra*. He was given access to those documents so that he could assist plaintiffs — people suffering from serious disabilities, mental and physical — in pressing their civil suit against defendant, a major pharmaceutical company. The litigation resulted in an enormous cache of documents made available, subject to CMO-3, to plaintiffs and courts — state and federal — across the country. Tens of thousands of cases have been settled based on these documents with the assistance of all the states and the federal government. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2006 WL 3501263, at \*1 (E.D.N.Y. Dec. 4, 2006) (“In compliance with this court’s instructions . . . all fifty states as well as the federal government have resolved their Medicare and Medicaid liens.”); *In re Zyprexa Prods. Liab.*

*Litig.*, 451 F. Supp. 2d 458 (E.D.N.Y. 2006) (Memorandum Order & Judgment Regarding Liens and Disbursement Procedures).

Egilman, in violation of his legal obligations, and in conspiracy with a reporter, Berenson, and an attorney unconnected to the litigation, Gottstein, deliberately violated this court's protective order and published sealed documents, intending that they be widely distributed. *See* Part II.D, *infra*. Conspirators Egilman and Gottstein took particular pains to deny Lilly an opportunity to prevent the breach; they made the documents public before Lilly could move to preclude their release, after they had in effect assured Lilly that it had time to protect itself in court before any release would occur. Egilman, in violation of his obligations under CMO-3, did not inform Lilly about a second subpoena procured by Gottstein that contained an accelerated production date.

It is not necessary now to decide whether in the long run the public was better served by this conspiracy to flout CMO-3 than by seeking direct and open revelation through amendment of the court's protective order. Even if one believes, as apparently did the conspirators, that their ends justified their means, courts may not ignore such illegal conduct without dangerously attenuating their power to conduct necessary litigation effectively on behalf of all the people. Such unprincipled revelation of sealed documents seriously compromises the ability of litigants to speak and reveal information candidly to each other; these illegalities impede private and peaceful resolution of disputes.

This is not a case of a government employee, whistleblower, protestor, or juror who faces the difficult choice of "conform[ing his] behavior to the official 'law' while protesting that the law was 'wrong' . . . or . . . conform[ing] to [his] interpretation" of the law, absorbing

whatever legal sanctions are a consequence of the choice. Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 47 (1983); *see also*, e.g., Mark Juergensmeyer, *Gandhi vs. Terrorism*, Daedalus, 30 (Winter 2007); Note, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239, 254 (1993) ("There is . . . a deep and profound sense of many Americans that they have the duty to revolt in large and small ways. This is our ultimate protection against tyranny and injustice. Nullification is one of the peaceful barricades of freedom."). For here, the "law," i.e. the protective order, contained an explicit means of escape for those who believed they had a reasonable justification for not complying; the court reserved the power to modify and declassify sealed documents in the public interest. *See* CMO-3 at ¶¶ 9, 16. In any event, the whistleblower or concerned citizen "defense" should be raised during possible contempt, rather than injunction, stages of this proceeding.

Nor is this a case of a newspaper obtaining, with clean hands, documents provided to it by government employees, whistleblowers, or protestors. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) ("[I]f a newspaper *lawfully obtains* truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.") (emphasis supplied). It is unlike *New York Times Co. v. United States*, 403 U.S. 713 (1971) (hereinafter "*Pentagon Papers*"). In the *Pentagon Papers* case, there was no suggestion that the documents were purloined at the New York Times' or Washington Post's instigation. Here, a reporter was deeply involved in the effort to illegally obtain the documents. *See* Part II.D, *infra*. Affirmatively inducing the stealing of documents is treated differently from passively accepting stolen documents of public

importance for dissemination. See III.D.3, *infra*. But see *Bartnicki v. Vopper*, 532 U.S. 514, 528-29 (2001) (noting that the issue has been left open). The New York Times itself appears to recognize the distinction. See The New York Times, *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, 9 (Sept. 2004) (“Staff members must obey the law in pursuit of news. They may not break into buildings, homes, apartments, or offices. They may not purloin data, documents or other property, including such electronic property as databases and e-mail or voice mail messages. They may not tap telephones, invade computer files or otherwise eavesdrop electronically on news sources. In short, they may not commit illegal acts of any sort.”). But see Parts II.D. and II.K.7(b), *infra* (noting Berenson’s and the Times’ position in the instant case).

In the United States the media is, in effect, the fourth branch of government. It enables the people to knowledgeably exercise their sovereignty. But neither members of the media, nor of any other branch of our government, are authorized to violate court orders. See *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering.”). Cf. *Pentagon Papers*, 403 U.S. at 733 (White, J. concurring) (“Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication.”).

At this point in the litigation there is no need to measure the actions of the conspirators against the ethics rules for journalists, forensic experts, or lawyers. Holmes’ punitive view of the law prevails when a specific order of the court is deliberately flouted. See, e.g., John C.

Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 Ford. L. Rev. 1563 (2006) (discussing “morality,” Holmes’ “bad man” rule, and Hart’s “internalization” view). It is enough to find that three individuals — Berenson, Egilman, and Gottstein — conspired to obtain and publish documents in knowing violation of a court order not to do so, and that they executed the conspiracy using other people as their agents in crime. *See* Parts II.D–II.H, *infra*.

The injunction requires the return of the protected documents. *See* Parts IV.B and VIII, *infra*. It is limited to individuals who participated in the conspiracy or aided the conspirators. *See* Parts II.D–II.F, II.H, and VIII, *supra*. No one is restricted from discussion of documents already revealed.

To extend the reach of the injunction further might involve the court in attempting to control a constantly expanding universe of those who might have, or will have, access by reason of the original breach. That such an amplified injunction could be enforced effectively is doubtful. Even if enforcement were possible, on policy grounds the risk of unlimited inhibitions on free speech should be avoided when practicable. *See People of N.Y. v. Operation Rescue Nat’l*, 80 F.3d 64, 70 (2d Cir. 1996) (“in exercising its equitable powers, a court ‘cannot lawfully enjoin the world at large’”) (*quoting* Judge Learned Hand in *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930)).

## **II. Facts**

### **A. The Litigation**

Litigation against Eli Lilly & Co. for injuries allegedly caused by the use of the anti-psychotic drug Zyprexa was initiated in this court in March 2004. *See Benjamin v. Eli Lilly &*



Co., Docket No. 04-CV-00893. Many thousands of other cases were then transferred to this court from federal district courts throughout the United States pursuant to an order of the Judicial Panel on Multidistrict Litigation. *See* Letter from Multidistrict Litigation Panel to Clerk of the Eastern District of New York, No. 04-MD-1596 (Apr. 14, 2004). In addition, there are pending in state courts a considerable number of related cases. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2007 WL 160923 (E.D.N.Y. Jan. 18, 2007) (“Memorandum on Cooperation Between Federal and State Judges”).

B. Protective Order, Case Management Order No. 3

To facilitate prompt discovery in these cases, a protective order agreed to and submitted by the parties was issued in August 2004 pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2004 WL 3520247, \*1 (E.D.N.Y. Aug. 9, 2004) (stating purposes of protective order are “[t]o 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 . . .”). Preventing disclosures of documents served the added purpose of protecting a vulnerable plaintiff patient population and avoiding prejudice of potential jurors in any jury trial. *See* Tr. of Hr’g on Application to Issue CMO-3 (July 2, 2004) (magistrate judge Chrein: “material that might be misunderstood by the lay reader . . . might do some harm or prejudice a case that is still pending”). CMO-3 was signed by both the district judge and magistrate judge.

The protective order permits parties to designate as “confidential” materials produced in discovery that the producing party believes in good faith are properly protected under Rule 26(c)(7) of the Federal Rules of Civil Procedure. CMO-3 at ¶ 3. All confidential documents

are required to be stamped, “Zyprexa MDL 1596: Confidential-Subject to Protective Order.” *Id.* at ¶ 4(b). Once a document is so marked, it “shall be used by the receiving party solely for the prosecution or defense of this Litigation, to the extent reasonably necessary to accomplish the purpose for which disclosure is made.” *Id.* at ¶ 2.

Except with the prior written consent of the producing party, or in circumstances described in paragraphs 6 and 14 of CMO-3, “no [c]onfidential [d]iscovery [m]aterials, or any portion thereof, may be disclosed to any person.” *Id.* at ¶ 5. Parties are permitted to share confidential materials with “outside consultants or outside experts retained for the purpose of assisting counsel in the Litigation.” *Id.* at ¶ 6(i). An expert to whom disclosure is made must “sign, prior to such disclosure, a copy of the Endorsement of Protective Order, attached as Exhibit A” to CMO-3. *Id.* at ¶ 6(m).

Should a court or administrative agency subpoena the confidential discovery materials, CMO-3 provides a specific procedure for the subpoenaed person to follow:

[T]he person to whom the subpoena . . . is directed shall promptly notify 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 . . . number or other designation identifying the litigation . . . in which the subpoena . . . has been issued. *In no event shall confidential documents be produced prior to the receipt of written notice by the designating party and a reasonable opportunity to object.* Furthermore, the person receiving the subpoena or other process shall cooperate with the producing party in any proceeding relating thereto.

CMO-3 at ¶ 14 (emphasis supplied).

Paragraph 6 of CMO-3 describes thirteen situations, apart from the issuance of a subpoena, where confidential documents may be disclosed to listed persons. When the person

receiving the confidential materials is a customer or competitor of the producing 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.” *Id.* at ¶ 6. The terms “customer” and “competitor” are defined by the order. *Id.*

The designation of particular discovery material as confidential does not require that it permanently remain subject to the protections of CMO-3. Rather, any party or aggrieved entity (even if not a party) can petition the court for declassification of confidential discovery materials at any time.

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 within 20 days of receiving this notification.

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.

If the time for filing a motion . . . 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.

CMO-3 at ¶ 9(b)-9(d).

A petition for wholesale modification of the protective order is expressly 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.” *Id.* at ¶ 16.

C. Agreement by Egilman to be Bound by Protective Order

In August of 2006, The Lanier Law Firm (“Lanier”), representing plaintiffs in this litigation, began consulting with Dr. David Egilman, M.D., M.P.H. Aff. of Richard D. Meadow at ¶ 3 (January 2, 2007) (“Meadow Aff.”). Lanier decided in October of 2006 that Egilman’s active involvement would assist plaintiffs. Before granting Egilman electronic access to the document depository maintained by the PSC, the firm asked him to sign the “Endorsement of Protective Order” attached to CMO-3. *Id.* at ¶¶ 4-5.

On November 10, 2006, Egilman signed the protective order after making numerous deletions and edits to its text. The following line had been crossed out by him: “I also understand that my execution of this Endorsement of 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.” After the sentence reading “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,” he added the words “unless release is needed to protect public health.” Tr. of Hr’g on Preliminary Injunction at 203 (January 16-17, 2007) (“Tr.”).

Lanier immediately informed Egilman that his amendments to the executed protective order were unacceptable, and that he was required to sign an unamended copy of the order if he wished to gain access to the confidential discovery documents. *Id.* at 205; Meadow Aff. at ¶ 6.

On November 14, 2006 Egilman signed a fresh Endorsement of Protective Order. The order was unedited except for the addition of a clause after the line beginning “I further agree that I shall not disclose to others . . .,” reading “unless this conflicts with any other sworn statements.” When questioned by Richard Meadow of the Lanier Law Firm about why the addition of this clause was made,

Dr. Egilman explained that if he were to be subpoenaed by the FDA or Congress, he wanted to ensure that the Protective Order would not preclude providing testimony concerning Zyprexa. Since that explanation did not conflict with my [Meadow’s] understanding of the purposes behind the Protective Order, nor did it conflict with my understanding that the Protective Order would not — in any event — have precluded such testimony by Dr. Egilman, and because Dr. Egilman assured me that he understood the Protective Order, [the Lanier Law Firm] accepted this Protective Order [signed by Egilman].

*Id.* at ¶ 7; *see also* Tr. at 208, 221-22. Lanier did not inform Lilly about the addition Egilman made. *Id.* at 207.

After he executed the Endorsement of Protective Order, Egilman was given access to the PSC-maintained database of materials produced in discovery. The confidential materials maintained in that database were stamped, as already noted, “Zyprexa MDL 1596: Confidential-Subject to Protective Order.” *See* CMO-3 at ¶ 4(b).

#### D. Conspiracy of Berenson, Egilman, and Gottstein

About the time that Egilman was retained as a plaintiffs’ expert in the Zyprexa litigation, he began discussing Zyprexa with New York Times reporter Alex Berenson. Berenson wanted to review the confidential Zyprexa documents, which he knew were subject to this court’s protective order. The two conferred about the possibility of obtaining the protected documents by subpoena.

Neither Berenson nor Egilman were aware of any pending case where the Zyprexa documents were likely to be subpoenaed. To circumvent this barrier, Berenson suggested that Egilman contact James Gottstein, an attorney in Alaska who heads the Law Project for Psychiatric Rights (“PsychRights”). Tr. at 94-97. Gottstein had spoken to Berenson in the past about drug-related news items. *Id.* at 95. Based on these conversations, Berenson believed that Gottstein would be a willing ally in an attempt to avoid the court’s protective order by finding a case which could be used as a pretense for subpoenaing the protected documents. *Id.* at 96 (Gottstein: “[Berenson] said that Dr. Egilman had some documents that he wanted to get to the New York Times and that [Berenson] had, you know, thought that I might be someone who would subpoena them.”). *But cf.* Tom Zeller, Jr., *Documents Borne by Winds of Free Speech*, N.Y. Times, Jan. 15, 2007 (“[Gottstein] somehow got wind (and precisely how is the subject of separate legal jujitsu) that Dr. Egilman had some interesting documents . . . . Mr. Gottstein was also apparently in a sharing mood, which is how hundreds of pages ended up with a Times reporter, Alex Berenson.”).

On November 28, 2006, Egilman called Gottstein. *See* Tr. at 23. After telling Gottstein that Berenson had suggested that Egilman contact him, Egilman indicated that he had access to confidential Lilly documents pertaining to Zyprexa, and was in possession of those documents subject to a protective order that precluded him from disseminating them.

Q: [Y]our understanding based on your conversation with Dr. [Egilman] was that he called you so that you could assist him in disseminating the documents that were subject to a protective order, right?

. . . .  
[Mr. Gottstein]: I think that is probably correct.

*Id.* at 24-26.

E. Subpoenas Issued by Gottstein

Egilman informed Gottstein that under the terms of the protective order the documents could be produced pursuant to a subpoena if certain procedures were followed including notifying Lilly. *Id.* at 24-30, 73-74 (Gottstein: “[Egilman] suggested that I subpoena [the documents] . . . I think because he thought they should become public.”). Gottstein asked Egilman to send him a copy of the protective order, but according to Gottstein, “[Egilman] said I didn’t want it and I didn’t push it . . . My kind of sense of [Egilman’s reasoning] was that if I didn’t have it, then I wouldn’t be charged with the knowledge of it.” *Id.* at 27-28.

Gottstein was not involved in any litigation in which it would have been appropriate to subpoena the Zyprexa documents. *Id.* at 31-32, 76. He told Egilman, however, that he would try to find a case in which it would be possible to justify a subpoena directed to Dr. Egilman. On December 5, 2006, Gottstein filed intervention papers in a proceeding where the public guardian, the Alaska Office of Public Advocacy, had been granted guardianship over an individual, including the power to approve administration of psychotropic medications; the administration of Zyprexa was not at issue. *Id.* at 33.

Pursuant to Gottstein’s request, the Alaska superior court ministerially and *ex parte* issued a deposition subpoena in the guardianship proceeding on December 6, 2006 to Egilman requiring him to participate in a telephonic deposition on December 20, 2006 and “*bring with him*” all documents in his possession relating to fifteen drugs, including Zyprexa. *Id.* at 34-35. Egilman faxed a copy of this subpoena to Lilly’s General Counsel on December 6, 2006. He did not notify the Lanier Law Firm, which had retained him as an expert, about the subpoena.

On December 11, 2006, Gottstein — *ex parte* and without notice to Lilly — procured an “amended subpoena” that required Dr. Egilman to deliver the documents to Mr. Gottstein “*prior to*” his deposition on December 20, 2006. Gottstein emailed a copy of the second subpoena to Dr. Egilman, asking him to “please deliver the subpoena’d [sic] materials to me as soon as you can.”

Neither Egilman nor Gottstein informed Lilly, or Lanier, about the second subpoena or the revised earlier production date.

Q: [Y]ou had told Dr. [Egilman] repeatedly that he should send the second subpoena to Lilly, correct?

[Mr. Gottstein]: Yes.

Q: And you knew he planned not to send it to Lilly, correct?

[Mr. Gottstein]: Yeah, I think — he told me he didn’t see that it made any difference.

Q: And you decided that it was not important for you to send the subpoena to Lilly either, correct?

[Mr. Gottstein]: My . . . position is that it was his responsibility under the CMO and not mine.

*Id.* at 43-44.

The excuse offered to justify the issuance of the second “forthwith” subpoena — that Gottstein needed to study the documents before the telephonic appearance of Egilman took place — was a subterfuge. Tr. at 47-48. Gottstein and Egilman deliberately misled Lilly and violated the terms of CMO-3 by not informing Lilly about the second subpoena. Gottstein attempted to justify his pretense as follows:

Q: You moved the date of the production of documents up, correct?



[Gottstein]: Well, I mean, what it said was — it's like I put in the E-mail, it didn't make any sense for him to bring the documents with him in Attleboro, Massachusetts for me to try to examine them in Anchorage, Alaska. So I had an amended one that said to give it to me prior to the deposition and [to] give it to me as soon as he could so I would have a chance to review them before the deposition.

....

Q: When you issued the subpoena . . . you . . . said you needed the subpoena . . . so that you could review the documents in advance of [Egilman's] deposition, correct?

[Gottstein]: Yes.

Q: And instead of reviewing the documents you start making copies of them as soon as you received them, correct?

[Gottstein]: Yes.

Q: And you proceeded to make copies for the next two days and send them out to the people on your and [Egilman's] list, correct?

[Gottstein]: I made two batches.

....

Q: This is the question I want to make clear. You were so busy [making] copies of these documents that you never got to review them, did you?

[Gottstein]: I looked at some of them. The deposition was quite — a few days off which is, I think, your complaint. So I would pull up some of them and look at them and I — and it wasn't that I was so busy making copies. I had my laptop burning DVDs and my main computer burning DVDs, another laptop . . . .

*Id.* at 42-43, 47-48.

#### F. Response to the Subpoenas

On December 13, 2006, Lilly contacted the Lanier Law Firm to discuss the first subpoena issued to Dr. Egilman, the only subpoena about which Lilly had been informed. Upon

ascertaining that Lilly intended to file a motion to quash that subpoena in the Alaska Superior Court, Richard Meadow of the Lanier Firm spoke to Egilman and instructed him “not to do anything” in response to the subpoena until Lilly had a chance to address the Alaska court. Egilman agreed, *see* Meadow Aff. at ¶ 9, although he had already begun the transfer to Gottstein. *See* Part II.E, *supra*.

The next day, December 14, 2006, Lilly sent a letter to Egilman and Gottstein, asking “Dr. Egilman to refrain from producing [the confidential documents] and Mr. Gottstein to refrain from further seeking production of the materials unless and until the Superior Court [of Alaska] rules that production is required.” Egilman, as a signatory to the protective order, was further asked to confirm to Lilly that he would refrain from producing the materials.

Unbeknownst to Lilly or Lanier, Egilman had already begun transferring the documents to Gottstein on December 12, 2006, supposedly pursuant to the second subpoena, immediately after that subpoena was issued. In response to Lilly’s letter of December 14th, Egilman wrote to Lilly’s counsel that he had already produced the confidential documents that were subject to the subpoena. Egilman stated his view that he had given Lilly a “reasonable opportunity to respond” to the subpoena as required by CMO-3, and was therefore not in violation of his obligations when he produced the documents six days (out of which three were business days) after he had received the first subpoena. He did not address the question of why he never notified Lilly about the second subpoena with its revised production date.

On December 15, 2006, after learning that Egilman had produced the documents to Gottstein pursuant to a second subpoena about which Lilly had never been informed, Lilly wrote to Gottstein, asking him to (1) identify the protected materials in his possession and return them

to Lilly, (2) refrain from further publishing or publicizing the protected materials, (3) request the return of the materials from anyone to whom he had sent them, and (4) identify those individuals to whom he had sent protected materials.

#### G. Discharge of Egilman by Lanier

As soon as Lanier learned of Egilman's disclosure of the confidential documents to Gottstein, the firm demanded that Egilman return all Zyprexa-related documents in his possession. It terminated his consultancy. *Id.* at ¶ 11; Tr. at 200.

#### H. Dissemination of the Documents Pursuant to Conspiracy

##### *1. Acts of Conspirators*

During their initial conversation in November 2006, Egilman told Gottstein that when he eventually received the documents — pursuant to a yet-to-be-procured subpoena issued in a yet-to-be-determined case — he should pass them along to certain individuals. That group included Berenson of the New York Times, Steve Cha from the United States House of Representatives Committee on Government Reform, United States Senate staffer Amelia Desanto, and Snighda Prakash of National Public Radio. *Id.* at 35-37.

Q: Dr. Egilman understood that once [the documents] were subpoenaed, that you were going to disseminate them to the individuals that you later certified as having disseminated them to?

[Mr. Gottstein]: Yes . . .

Q: Did he share with you anybody that he would like to have them disseminated with?

[Mr. Gottstein]: Yes.

*Id.* at 35-36.

As soon Egilman started electronically transferring the documents to Gottstein via

Gottstein's file transfer protocol ("FTP") server on December 12, 2006, Gottstein began sending them to individuals to whom he thought they would be of interest. He had spoken with some of these people beforehand to inform them that an arrangement to obtain and publish confidential Lilly documents was underway. *Id.* at 57 (Gottstein: "Some people knew [the documents] were coming"). That group included Berenson, Steve Cha, Vera Sharav, Will Hall, and Robert Whitaker. *Id.* at 93.

On December 12<sup>th</sup>, 13<sup>th</sup>, and 14<sup>th</sup>, Gottstein provided DVDs containing the documents to Berenson, as well as Dr. Peter Breggin, Steve Cha, Judi Chamberlin, Dr. David Cohen, Terri Gottstein, Will Hall, Dr. Grace Jackson, Dr. Stephen Kruszewski, Snigdha Prakash, Vera Sharav, Robert Whitaker, Bruce Whittington, James Winchester, and Laura Ziegler. *Id.* at 47-48.

Q: [Y]ou were anxious to get [the documents] out as quickly as you could, right?

[Mr. Gottstein]: Anxious, yes, I thought it would be good to get them out.

Q: Before the Court could enter an order telling you you shouldn't?

[Mr. Gottstein]: Well, I don't know. I mean I guess . . . I knew that Eli Lilly would want to try to stop it.

Q: Right, and you wanted to get them out as quickly as you could to make that harder?

[Mr. Gottstein]: Well, I would say yeah, I wanted to get them out [in a] way that would make it impossible to get them back.

*Id.* at 48-49. To simplify and hasten co-conspirator Berenson's review and use of the documents, Gottstein had provided Berenson with a password to Gottstein's personal FTP server

on which he had electronically posted the documents.

Gottstein and Berenson spoke to each other repeatedly during the week of December 12th. *Id.* at 99. Berenson urged Gottstein not to send the documents to any news or media outlets, because he wanted to ensure that the New York Times would have a “scoop” on the story. *Id.* at 82-83. He threatened that the Times would not write about the Zyprexa documents if any news organization published a story based on them before the Times printed its first article. *Id.* at 83 (Gottstein: “[Berenson] said basically that if anybody else breaks it, they are not going to run the story.”).

Because he wanted a newspaper with an outstanding national reputation such as the New York Times to publish the documents, Gottstein acceded to Berenson’s request. *Id.* at 82-83 (Gottstein: “[T]here were other news outlets that I was going to send them to. And I ended up not doing that . . . [t]o accommodate the New York Times’s desire to break the story.”). Egilman agreed with the decision to refrain from sending the documents to any other news organizations until Berenson was able to break the story. *Id.* at 83.

## *2. Protectable Distributed Documents*

The court has examined a sampling of the documents distributed by the conspirators. It has viewed portions of the materials returned to the Special Master for Discovery, Peter Woodin, pursuant to his and the court’s orders. Among them are a substantial number whose publication would be annoying, embarrassing, oppressive, and burdensome to Lilly; they reveal trade secrets, confidential preliminary research, development ideas, commercial information, product planning, and employee training techniques. *See also, e.g.,* Alex Berenson, *Eli Lilly Said to Play Down Risk of Top Pill*, N.Y. Times, Dec. 17, 2006, at A1; Alex Berenson, *Drug Files Show*

*Maker Promoted Unapproved Use*, N.Y. Times, Dec. 18, 2006, at A1; Editorial, *Playing Down the Risks of a Drug*, N.Y. Times, Dec. 19, 2006; Alex Berenson, *Disparity Emerges in Lilly Data on Schizophrenia Drug*, N.Y. Times, Dec. 21, 2006, at A1.

These documents are covered by CMO-3. They are included within the kind of documents protectable under Rule 26(c) of the Federal Rules of Civil Procedure. *See* Part IV.A, *infra*.

A small portion of the documents disseminated have been, or may be, declassified under CMO-3. Lilly has taken steps towards declassifying them. *See* Pet'r Br. at 12 n.10 ("Prior to this dispute, Lilly had de-designated following [sic] bates ranges, each of which is among those at issue here: [listing bates ranges]").

#### I. Attempts by Special Master Woodin to Retrieve Documents

On December 15, 2006, Lilly informed the Special Master for Discovery, Peter Woodin, that confidential documents subject to CMO-3's protection had been disseminated pursuant to a subpoena of which Lilly had never been notified. Lilly and the PSC *jointly* requested that the Special Master issue an order requiring return to him by Gottstein of the confidential documents.

After trying unsuccessfully to reach Gottstein by telephone, Special Master Woodin issued the order requested by the parties. A copy of that order was emailed to Gottstein by the Special Master. Upon receiving it, Gottstein replied that he had voluntarily ceased disseminating the documents after reading Lilly's faxed letter of December 15th. *See* Part II.F, *supra*. He objected to the *ex parte* nature of the order, and questioned both this court's jurisdiction over him and Special Master Woodin's authority to issue such an order. Gottstein informed Berenson

about the Special Master's order, but made no further efforts to comply with its terms. Tr. at 100.

#### J. Publication by N.Y. Times

On December 17, 2006, the New York Times began publishing front page articles under Berenson's byline about information contained in the confidential Lilly documents. *See* Alex Berenson, *Eli Lilly Said to Play Down Risk of Top Pill*, N.Y. Times, Dec. 17, 2006, at A1; Alex Berenson, *Drug Files Show Maker Promoted Unapproved Use*, N.Y. Times, Dec. 18, 2006, at A1; Alex Berenson, *Disparity Emerges in Lilly Data on Schizophrenia Drug*, N.Y. Times, Dec. 21, 2006, at A1; *see also* Editorial, *Playing Down the Risks of a Drug*, N.Y. Times, Dec. 19, 2006; Julie Creswell, *Court Orders Lawyer to Return Documents About an Eli Lilly Drug*, N.Y. Times, Dec. 20, 2006.

#### K. Formal Court Intervention

Since Gottstein had not complied with Special Master Woodin's order by December 18th — although Gottstein had provided a lengthy response to the order detailing some of the facts of his collaboration with Egilman and suggesting jurisdictional objections — Lilly and the PSC jointly petitioned the court for an injunction requiring Gottstein to return the documents.

##### *1. Argument Before Magistrate Judge Mann*

The parties first sought an injunction from magistrate judge Mann. At the hearing the magistrate judge made the following comment:

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

I personally [as a magistrate judge, without authority to grant injunctive relief] am not in a position to order you [Gottstein] to return the documents. I can't make you return [the documents], but

I can make you wish you had because I think this is highly improper not only to have obtained the documents on short notice without Lilly being advised of the amendment but then to disseminate them publicly before it could be litigated. It certainly smacks [of] bad faith.

Tr. of Hr'g on Preliminary Injunction at 10 (Dec. 18, 2006).

*2. Temporary Restraining Order by Judge Cogan*

On the basis of Judge Mann's findings, the parties brought their request for an injunction on December 18<sup>th</sup> to Judge Cogan, who, as emergency judge, acted in the absence of Judge Weinstein. After hearing from Lilly, the PSC, and Gottstein through his counsel, Judge Cogan issued a temporary restraining order based upon his finding that "Mr. Gottstein has deliberately and knowingly aided and abetted Dr. David Egilman's breach of CMO-3." *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2006 WL 3877528, \*1 (E.D.N.Y. Dec. 19, 2006). Judge Cogan declared:

I think it's clear not only that the facts are as stated in the Magistrate's report and recommendation, but I can tell from the December 17<sup>th</sup> draft letter from Mr. Gottstein that he was aware that these documents were restricted, and that he undertook procedures to help the expert[], Mr. Egilman, try to circumvent the restrictions that were on him. He deliberately aided and abetted Dr. Egilman in getting these documents released from the restriction that they were under, under the protective order. He knew what he was doing, and he did it deliberately. Those are my findings, and it's on that basis that I grant the relief.

Tr. of Hr'g on Preliminary Injunction at 19-20 (Dec. 18, 2006).

Gottstein was ordered not to further disseminate the documents; to return them to Special Master Woodin; to provide a list of all individuals and organizations to whom he had sent them; to identify to Special Master Woodin which of the confidential documents he passed on to other individuals; to take steps to retrieve them; and to preserve all communications relating to them or



Egilman. *In re Zyprexa, supra*, 2006 WL 3877528.

Over the next few days, Gottstein took steps to comply with the terms of the court's order. He emailed or called each of the people to whom he had sent the documents informing them of the court order and asking that the documents be returned to Special Master Woodin. Tr. at 101-02. Those individuals included: Dr. Peter Breggin, Steve Cha, Judi Chamberlin (of MindFreedom International), Dr. David Cohen, Terri Gottstein, Will Hall, Dr. Grace Jackson, Dr. Stephen Kruszewski, Snigdha Prakash, Vera Sharav (of the Alliance for Human Research Protection), Robert Whitaker, Bruce Whittington, James Winchester, and Laura Ziegler. *See* Part II.H.1, *supra*.

On December 21, 2006, Gottstein issued a written certification stating he had complied with the terms of Judge Cogan's injunction. Dr. Peter Breggin, Dr. Grace Jackson, Dr. Stephen Kruszewski, Bruce Whittington, Laura Ziegler, and the House Committee on Government Reform (through Congressman Henry Waxman, for Steve Cha) returned the documents they had received from Gottstein to Special Master Woodin. *See* Letter of Rep. Henry A. Waxman (Dec. 21, 2006); Letter of Special Master Woodin (Feb. 1, 2007). Gottstein also retrieved the copies he had given to Terri Gottstein, Jerry Winchester, and Will Hall and sent them to the Special Master. *See id.* Berenson, Dr. David Cohen, Judi Chamberlin, Vera Sharav, Robert Whitaker, and Snigdha Prakash have not returned their copies of the confidential documents. At the court's direction, Ms. Sharav gave her attorney the DVDs containing her copies of the documents to be held in escrow. Tr. at 194; *see* Part IV.H.8, *infra*.

### 3. *Order to Show Cause for Deposition of Egilman by Judge Weinstein*

On December 26, 2006, Lilly petitioned for an order requiring Egilman to show cause

why he should not submit to a deposition and produce documents relating to his possession and dissemination of the confidential Zyprexa documents. A hearing was held on December 28, 2006 by Judge Weinstein at which Egilman was ordered to be deposed within five days and to produce the requested documents.

Egilman began producing documents to Lilly on January 1, 2007. An as-yet-unresolved question is whether this production has been complete.

Egilman has invoked what he claims to be a Fifth Amendment privilege against self-incrimination. *See* Letter of Edward W. Hayes (Jan. 23, 2007). He has neither been deposed nor testified in court.

#### *4. Evasive Actions of Enjoined Persons*

Individuals to whom Gottstein sent the documents began devising schemes to evade court orders to return the documents even before any such orders had been issued. In an email dated December 16, 2006, Robert Whitaker wrote to Gottstein: "I would consider building a website that would, ahem, make all the documents available. What could they do to me? And how could they know how the documents got to me? There are several channels apparently that could be the source. You should proceed now in whatever way makes it easiest for you, and let others worry about getting this information out or making it public." Pet'r Findings of Fact, supporting ex. 30.

On December 29, 2006, Lilly learned that despite Gottstein's communication of the court's order requesting the documents' return by those to whom Gottstein had sent them, some recipients had declined to comply and were attempting to widely distribute the documents. In particular, MindFreedom, an organization whose board of directors includes Judi Chamberlin,

Tr. at 236, to whom Gottstein had sent the documents in his attempt to “get [the documents] out [in a] way that would make it impossible to get them back,” *id.* at 49, was attempting widespread dissemination.

David Oaks, the Director of MindFreedom, sent an email alert to the organization’s members informing them of a “grassroots internet campaign” to disseminate the documents. *See* Pet’r Findings of Fact, supporting ex. 24. The email, which included a link to a website from which the documents could be downloaded, was sent on December 25, 2006. According to this message, the organization was “counting on the fact that many courts are closed today.” *Id.* Eric Whalen, a member of MindFreedom, made the documents available for downloading at the website [www.joysoup.net](http://www.joysoup.net). Tr. at 229.

After the preliminary injunction was issued on December 29, 2006, several of the enjoined persons continued their efforts to ensure that the documents remained publicly accessible. In an email exchange on January 2, 2007 among Robert Whitaker, Vera Sharav, Will Hall, David Oaks, and Gottstein, Whitaker offered his gratitude to those who had helped disseminate the documents notwithstanding court orders prohibiting them from doing so: “[K]udos should go to others who have helped get this information out – Will Hall, David Oaks, Vera Sharav, MindFreedom. This is a fight very much worth fighting.” *See* Pet’r Findings of Fact, supporting ex. 28. Sharav responded, “It’s important to keep track of where/when the documents may surface again on cyberspace and *let people know*.” *Id.* (emphasis supplied). Will Hall added, “what a great new years gift . . . massive eli-lilly psych drug scandal.” *Id.*

#### *5. Preliminary Injunction by Judge Cogan*

Lilly and the PSC jointly applied for an injunction ordering the people who had received

the documents directly from the conspirators (omitting, however, Berenson and the New York Times) to refrain from disseminating them. On December 29th, a preliminary injunction was issued by Judge Cogan barring Terri Gottstein, Jerry Winchester, Dr. Peter Breggin, Dr. Grace Jackson, Dr. David Cohen, Bruce Whittington, Dr. Stephen Kruszewski, Laura Ziegler, Judi Chamberlin, Vera Sharav, Robert Whitaker, and Will Hall from disseminating the documents, requiring that they remove the documents from any website to which they had posted them, and instructing them to communicate the terms of the order to anyone to whom they had sent the documents. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2006 WL 3923180, \*1 (E.D.N.Y. Dec. 29, 2006).

After receiving notice of the injunction, Vera Sharav put the following message on AHRP's website:

See the court injunction several of us received below but the internet is an uncontrolled information highway. You never know where and when the court's suppressed documents might surface. The documents appear to be downloadable at [two websites for which the addresses are provided].

Tr. at 182.

#### *6. Hearing on Permanent Injunction by Judge Weinstein*

The December 29, 2006 preliminary injunction issued by Judge Cogan expired by its terms on January 3, 2007, on which date a hearing was commenced by Judge Weinstein to consider whether the injunction should be extended or modified. The parties who were present — Lilly, the PSC, Terri Gottstein and Judi Chamberlin — agreed to extend the preliminary injunction until January 16, 2007, at which time a full evidentiary hearing would be held. Tr. of Preliminary Injunction Hr'g at 15-18 (Jan. 3, 2007).

On January 4, 2007, at Lilly's request, Judge Weinstein expanded the enjoined parties to include two organizations — MindFreedom and AHRP —, five websites — www.joysoup.net, www.mindfreedom.org, www.ahrp.org, www.ahrp.blogspot.org, and zyprexa.pbwiki.com —, and one individual, Eric Whalen, all of whom were allegedly attempting to disseminate the confidential documents. *Id.* at 18, 28-30; *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2007 WL 27117, \*1 (E.D.N.Y. Jan. 4, 2007). On January 12, 2007, Lilly indicated to the court its intent to initiate contempt proceedings against both Egilman and Gottstein.

The scheduled evidentiary hearing was held on January 16 and January 17, 2007. All enjoined parties, with the exception of Jerry Winchester, Dr. Peter Breggin, Dr. Grace Jackson, Dr. Stephen Kruszewski, Laura Ziegler, Will Hall, Eric Whalen, and the five websites, were represented at the hearing. Counsel for "John Doe," an anonymous person who yearned to post the documents on the enjoined website zyprexa.pbwiki.com, was present.

Lilly called four witnesses: James Gottstein, Richard Meadow of the Lanier Law Firm, Vera Sharav, and David Oaks. No other party called witnesses. The witnesses were allowed to be cross-examined by attorneys for each of the parties, including Egilman.

On January 16, 2007, the expanded preliminary injunction of January 4<sup>th</sup> was extended until there was a decision on the motion for a permanent injunction. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2007 WL 160925, \*1 (E.D.N.Y. Jan. 16, 2007) ("The temporary mandatory injunction issued on January 4, 2007 is extended until the court rules on the motion to modify the injunction which is currently pending.").

#### *7. Invitation to Berenson to Appear by Judge Weinstein*

##### *a) Invitation*

Berenson had not appeared in these injunction proceedings. To allow him to appear and confront the evidence of conspiracy offered against him at the January 16-17, 2007 hearing, the court invited him to appear and testify as to his involvement. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2007 WL 276185 (E.D.N.Y. Jan. 29, 2007).

The invitation issued to Berenson in the form of an order is set forth below:

Alex Berenson, reporter for the New York Times, is invited to voluntarily appear on February 7, 2007 at 10:00 a.m. in the Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 10B South, to explain the circumstances of his obtaining documents sealed by the court. If Mr. Berenson chooses to appear, he may be accompanied by his attorney, will be sworn, and will be subject to cross-examination.

This invitation is intended to permit Alex Berenson to confront testimony received at a hearing in this court on January 16-17, 2007 implicating him in a conspiracy to obtain and publish confidential documents sealed by this court.

The attention of Mr. Berenson is directed to the following portions of a transcript of the January 16-17, 2007 hearing. References to "Gottstein" are to James Gottstein, an attorney in Alaska who allegedly forwarded documents received from Dr. David Egilman to Mr. Berenson. Dr. Egilman was a plaintiffs' expert who had agreed not to violate this court's order sealing these documents, but who then sent them to Mr. Gottstein, who in turn transmitted them to Mr. Berenson and others.

Q [attorney for Eli Lilly & Company]: . . . Did you ever have communications with Dr. Egilman between the time that you received the documents and December 17 when the New York Times published a portion?

A [Gottstein]: Did I have communications with Dr. Egilman?

Q: Yes.

A: Yes.

....

Q: What did you talk about?

A: I think most of it was around the New York Times

story and their desire to have – to break it.

\* \* \* \*

The Court: You say their, who do you mean?

A: The New York Times desire to be able to break the story.

Q: What did Dr. Egilman say about that?

A: That was basically it . . . .

\* \* \* \*

I mean there were other news outlets that I was going to send them to. And I ended up not doing that.

Q: Why?

A: To accommodate the New York Times's desire to break the story

Q: Who communicated that desire?

A: Well, Alex Berenson called me about that.

Q: What did he say?

A: He said basically that if anybody else breaks it, they are not going to run the story.

Q: So what? Why was that important to you?

A: Well, because I think the New York Times is maybe the best place to have had this happen from my perspective.

Q: And from Dr. Egilman's perspective also?

\* \* \* \*

A: I think he wanted the New York Times to be the first to publish it.

Q: Why do you think that?

A: Because he wanted me to not send it to other news outlets.

Q: What did he tell you about why you shouldn't send it to other news outlets?

A: Basically, the same thing, that the New York Times wouldn't run it if someone else broke it.

Tr. of Hr'g, 81-83 (January 17, 2007).

Q: . . . . Before you talked to Dr. Egilman on November 28, did you have any discussions with Alex [Berenson] about the Zyprexa documents in this litigation?

A: No.

Q: After that conversation with Dr. Egilman on November 28th, how soon after that conversation did you start to have communications with Alex Berenson about the Zyprexa documents?

A: Within a few days, I think.

Q: How did that communication start? Did you call him or did he call you?

A: I believe he called me.

Q: And how did he get your name, do you know?

...

A: Do I know how? I think that he was independently aware of what I was doing.

Q: How do you think he became independently aware of what you were doing?

A: I believe that I had e-mailed him before.



Q: Before what?

A: Maybe earlier in the year or a couple of years ago sometime because I had been trying to get publicity about this stuff for years really. So I made contacts with a lot of reporters and I believe that I had contacted Mr. Berenson before.

Q: What caused him to call you three days after your conversation with Dr. Egilman?

A: This would be around what? The second of December or something?

Q: Early December.

A: What caused him to call me? . . . . I think he was working on a story on this.

Q: Why did he call you? What did he tell you when he called you?

A: He told me that he had given Dr. Egilman my name.

Q: Alex Berenson had given Dr. Egilman your name?

A: Yes.

Q: Is that how Dr. Egilman came to contact you on November 28?

A: I think so.

Q: And you said that he had told you that he had given Dr. Egilman your name. Help me understand that. What did he say?

A: He said that Dr. Egilman had some documents that he wanted to get to the New York Times and that he had, you know, thought that I might be someone who would subpoena them.

Q: . . . . Alex Berenson told you that Dr. Egilman

thought you would be someone who would help him, meaning Dr. Egilman, get the Zyprexa documents to the New York Times, right?

A: Well . . . what I said was that he thought I was someone who might subpoena the documents.

Q: And so how – so Alex Berenson gives Dr. Egilman your name, correct, that's what he said?

A: That's what he said.

Q: Then Dr. Egilman calls you on November 28 and says I have some documents you might want to subpoena, right?

A: Did he say that exactly? I think that's the import of it.

Q: And did the two of you when you were talking on November 28 talk about this relationship you both had with Alex Berenson?

A: I may have mentioned that I tried to contact him before, that I might have tried to contact him before.

The Court: Him is who?

A: Mr. Berenson.

Q: Did you tell Dr. Egilman that you had spoken with Alex [Berenson] and that you understood that he had given Dr. Egilman your name?

A: Yes, I think at some point that was communicated one way or another.

. . . .

Q: . . . But . . . you learned that [Dr. Egilman calling you] was not out of the blue, it was actually orchestrated by Dr. Egilman and Alex Berenson, right?

A: Well, I don't know how that is inconsistent with what I wrote in my letter. It was out of the blue.

Q: It was out of the blue for you, right?

A: Yes.

Q: But it was not out of the blue for Dr. Egilman or Alex Berenson?

....

A: So I mean out of the blue — I mean — it seemed that — it's like I said, what Alex Berenson told me was that he had told Dr. Egilman that I might be someone who would subpoena the documents so I don't know where out of the blue comes into that.

....

Q: After the conversation that you had with Dr. Egilman on November 28, you agreed to subpoena the documents, correct?

A: Yes. Well, to at least try to. To try and find a case to do that.

Q: Okay. And you continued to communicate with Alex Berenson prior to your receipt of the documents relating to the articles that he was planning or hoping to write about Zyprexa, correct?

A: Prior to?

Q: Yes.

A: There may have been some.

Tr. of Hr'g, 95-99 (January 17, 2007).

Lilly shall forthwith serve a copy of this invitation on Alex Berenson, together with all papers filed in the current proceedings to obtain an injunction, including the full transcript of the January 16-17, 2007 hearing. Copies of this order, but not the accompanying papers, shall be served by Lilly via fax, email, or

mail on all attorneys who appeared at the January 16-17, 2007 hearing.

SO ORDERED.

/s/  
Jack B. Weinstein

Date: January 29, 2007  
Brooklyn, N.Y.

*In re Zyprexa Prods. Liab. Litig.*, 2007 WL 276185 (E.D.N.Y. Jan. 29, 2007).

b) Response

By letter dated February 5, 2007, the New York Times responded on behalf of Berenson as follows:

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

*Re: In re Zyprexa Products Liability Litigation*  
04-MDL-1596

Dear Judge Weinstein:

I write in response to your Invitation and Order of January 29, 2007 ("1/29 Order") which, in accordance with Your Honor's instructions, was provided to us by counsel for Eli Lilly, together with other materials pertinent to the motion for a preliminary injunction now pending before the Court.

We have reviewed the materials forwarded to us by counsel and most particularly the 1/29 Order and understand that there has been testimony presented to the Court by others concerning their perceptions of the circumstances that gave rise to The New York Times's receipt of certain materials referenced in a series of articles published in the Times over the course of the last several weeks concerning Zyprexa and the controversy concerning it. On behalf of The Times and Alex Berenson, I would like to thank the Court for offering Mr. Berenson the opportunity voluntarily to appear before the Court and, in Your Honor's words, to "confront [that] testimony."

We know that Your Honor will appreciate the reasons that lead us to decline your invitation. As a matter of long-held principle, we believe that it would be

inappropriate for any of our journalists voluntarily to testify about news gathering at the Times, our reporters' communications with their sources or the editorial judgments that are made in deciding what is and what is not published by the Times, just as we would vigorously resist any effort by any party to compel such testimony. We guard quite zealously our role as a member of a free and independent press and believe quite passionately that, consistent with the principles embodied in the First Amendment, it is not the role of the newspaper or its reporters to submit to cross-examination about such matters even where it may otherwise serve our particular interests in a particular case to do so. I want to emphasize as clearly as I can that in declining Your Honor's invitation we mean absolutely no disrespect whatsoever to the Court.

Consistent with the procedures set forth in the 1/29 Order, by copy of this letter I am requesting counsel for Eli Lilly to forward this correspondence to all interested counsel as I do not have contact information for all concerned.

Thank you for your time and consideration.

Respectfully submitted,

/s/

George Freeman

[Assistant General Counsel, N.Y. Times]

### **III. Law**

#### **A. Public Right of Access to Documents Produced in Discovery**

A presumption of public access applies to judicial proceedings and documents.

Open courts are critical to a democratic society. Access to judicial proceedings and documents is necessary for federal courts to have a measure of accountability and for the public to have confidence in the administration of justice. The rule of law and public acquiescence in judicial decisions demand that courts reveal the bases for their rulings. Without monitoring, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

*In re NBC Universal, Inc.*, 426 F. Supp. 2d 49, 51 (E.D.N.Y. 2006) (quotations and citations omitted). *See also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents"); *United States v. Amodeo*, 71 F.3d 1044,

1048 (2d Cir. 1995).

The presumption of access varies according to the nature of the judicial document to which access is sought. “Unlimited access to every item turned up in the course of litigation would be unthinkable.” *United States v. Amodeo*, *supra*, at 1048. The Court of Appeals for the Second Circuit has held that “the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.” *Id.* at 1049.

The claim of public access is strongest when the documents play a substantial role “in determining litigants’ substantive rights.” *Id.* Fitting squarely within this definition are “documents that served as the principal basis for a summary judgment motion; were introduced at trial; or were material and important to a decision to approve a consent decree.” *In re NBC*, 426 F. Supp. 2d. at 53 (*quoting Amodeo*) (quotation marks omitted).

Falling outside the definition are documents produced by the parties in discovery.

Documents that play no role in the performance of Article III functions, *such as those passed between the parties in discovery*, lie entirely beyond the presumption’s reach, and stand on a different footing than a motion filed by a party seeking action by the court or, indeed, than any other document which is presented to the court to invoke its powers or affect its decisions.

*Amodeo*, 71 F.3d at 1050 (emphasis added) (quotation omitted). *See also S.E.C. v.*

*TheStreet.com*, 273 F.3d 222, 232-33 (2d Cir. 2001); *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) (“Those documents which play no role in the adjudication process . . . such as those used only in discovery, lie beyond reach [of the presumption of access].”);

*Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (“There is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be

incongruous with the goals of the discovery process.”).

The entry of a protective order for documents produced in discovery does not affect the assumption of non-access which attaches to those documents. *See S.E.C. v. TheStreet.com*, 273 F.3d 222, 223 (2d Cir. 2001) (rejecting argument that “the very exercise by the District Court of its power to enter a protective order and to seal the Confidential Testimony transformed the Confidential Testimony into a ‘judicial document’ presumptively open to the public”); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994) (“[W]hen a court enters an order of protection over documents exchanged during discovery, and these documents have not been filed with the court, such documents are not, by reason of the protective order alone, deemed judicial records to which the right of access attaches.”).

## B. Protective Orders

### *1. Generally*

The inherent equitable power of courts to grant confidentiality orders is well-established. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (“we have no question as to the court’s jurisdiction to [enter protective orders] under the inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices”) (quotation omitted); *Int’l Prods. Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (“Courts have inherent power to grant orders of confidentiality . . . whether or not such orders are specifically authorized by procedural rules.”). Courts are endowed with broad discretion to tailor protective orders to the circumstances of a particular litigation. *See Seattle Times*, 467 U.S. at 36 (“The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.”).

The power to seal extends to court filings and documents produced in discovery. *See Pansy*, 23 F.3d at 785 (rejecting the argument “that the district court lacked the power to enter an order of confidentiality over a document which is not in the court file nor incorporated into an order of the court”). As civil discovery rules became more expansive over the course of the last century, the role of the courts in protecting producing parties from undue invasions of privacy has correspondingly increased:

The adoption of the Federal Rules of Civil Procedure in 1938 fundamentally changed . . . American procedure. In particular, the discovery system in Rules 26 through 37 revolutionized pretrial preparation. The prior system had limited a litigant’s ability to acquire information largely to what was admissible at trial; since 1938, a litigant has been able to secure the production of information on a vastly broadened scale — essentially, any information that conceivably could be of help in preparing the case . . . . The goals underlying the expansion of the discovery process were to facilitate preparation, to avoid surprise at trial, and to promote the resolution of cases on their merits — not to enlarge the public’s access to information. Nonetheless, the expanded scope of discovery under the Federal Rules and the increased amounts of information they generated created side effects outside the adjudicatory system — it posed a threat to privacy and confidentiality. To meet this new problem, the discovery rules contain provisions, such as the authorization for protective orders in Rule 26(c), to limit the discovering party’s use of information beyond the litigation context.

Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 447 (1991); *see also* 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2036 (2d ed. 1994) (“Rule 26(c) was adopted as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b)(1).”).

Protective orders serve essential functions in civil adjudications, including the protection of the parties’ privacy and property rights. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-



35 (“It is clear from experience that pretrial discovery . . . has a significant potential for abuse.

This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.”); *see generally* Miller, *Confidentiality*, at 463-77.

“Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless annoyance, embarrassment, oppression, or undue burden or expense.” *S.E.C. v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (*citing* Fed. R. Civ. P. 1).

## 2. Rule 26(c)

### a) Generally

The Federal Rules of Civil Procedure govern the issuance of protective orders covering discovery materials in civil cases. *See* Fed. R. Civ. P. 26(c). “[F]or good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.* This rule, like the remainder of the Federal Rules of Civil Procedure, must be interpreted in a manner consistent with Rule 1: “These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” Fed. R. Civ. P. 1; *see also* *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979) (“the vital function of a protective order issued under Rule 26(c) . . . is to secure the just, speedy, and inexpensive determination of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant”) (citation omitted).

The permissible scope of discovery in the federal courts is very broad: “Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of

any party.” Fed. R. Civ. P. 26(b)(1). Much of the material produced in discovery is neither incorporated in motions made to the court nor admissible at trial. In order to mitigate the substantial risk to litigants’ privacy and other rights posed by the expansive scope of pretrial discovery, courts are given broad discretion in Rule 26(c) to craft sealing orders “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c); Part II.B.1, *supra*; *see also* Fed. R. Civ. P. 26 comment (“The information explosion of recent decades has greatly increased . . . the potential for discovery to be used as an instrument for delay or oppression.”).

Rule 26(c) provides a non-exhaustive list of eight types of protective orders that courts may issue. *See* Fed. R. Civ. P. 26(c)(1)–(c)(8). “[A] court is not limited to the eight specified types of orders . . . . [it] may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of the rule.” 8 Wright & Miller at § 2036; *see also Ann L. v. X Corp.*, 133 F.R.D. 433, 435 (W.D.N.Y. 1990) (“an order of suppression is a permissible remedy under the ‘catch all clause’ of Fed. R. Civ. P. 26(c)”). “Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times*, 467 U.S. at 36. The touchstone of the court’s power under Rule 26(c) is the requirement of “good cause.” The burden to establish good cause is placed on the party seeking protection. *See* 8 Wright & Miller at § 2035.

To determine whether good cause exists, courts balance “the need for information against the injury that might result if uncontrolled disclosure is compelled.” *See Pansy*, 23 F.3d at 787 (*quoting* Miller, *Confidentiality*). Balancing requires taking into account litigants’ privacy rights as well as the general public’s interest in the information. *See TheStreet.com*, 273 F.3d at

234. The balance struck should incorporate consideration of the overarching purpose of the discovery process: “Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public.” *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *see also* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 57 (1983) (“The speculative possibility that in some cases the public would benefit from dissemination of information garnered through discovery hardly warrants the conversion of the process into an investigatory tool for inquisitive litigants.”).

b) Subsection 7

Subsection (7) of Rule 26(c) provides for the issuance of a protective order requiring “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.” This “open-ended series of terms . . . need not be limited to ‘true’ trade secrets.” 8 Wright & Miller at § 2043. “Documents falling into categories commonly sealed are those containing trade secrets, confidential research and development information, marketing plans, revenue information, pricing information, and the like.” *Cumberland Packing Corp. v. Monsanto Co.*, 184 F.R.D. 504, 506 (E.D.N.Y. 1999). Examples of protective orders covering commercial documents include: *Sullivan Mktg. v. Valassis Commc’ns*, 1994 U.S. Dist. LEXIS 5824 (S.D.N.Y.1994) (granting protective order to defendant publisher that restricted access to sensitive business contracts, proposals and negotiations); *Moore U.S.A., Inc. & Toppan Forms Co., Ltd. v. Standard Register Co.*, 2000 U.S. Dist. LEXIS 9137 (W.D.N.Y. 2000) (protecting documents containing trade secrets and confidential research and development information); *Vesta Corset Co. v. Carmen Founds.*, 1999 U.S. Dist. LEXIS 124, at \*5 (S.D.N.Y.1999) (refusing disclosure of confidential commercial

information such as “pricing, profits, costs, overhead, manufacturing specifications, customer lists, price structure, and dealings with a common customer”); *DDS, Inc. v. Lucas Aero. Power Transmission Corp.*, 182 F.R.D. 1 (N.D.N.Y. 1998) (protecting trade secrets of manufacturing process and customer lists, and breakdown of annual sales figures).

### 3. Umbrella Protective Orders

In large complex cases, courts often enter “umbrella” protective orders, which permit parties to designate in advance a large volume of discovery material as confidential. *See Campbell, Protective Order, supra* at 777-79 (“The use of umbrella orders in complex litigation has become commonplace.”); *Pansy*, 23 F.3d at 787 n.17 (“[B]ecause of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad umbrella protective order upon a threshold showing by the movant of good cause.”). Parties are permitted to challenge that designation, and the burden of establishing that there is good cause to protect the designated materials rests at all times with the party seeking protection.

In complicated mass cases the use of umbrella protective orders is recommended by the Manual for Complex Litigation:

When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication. Umbrella orders provide that all assertedly confidential material disclosed (and appropriately identified, usually by a stamp) is presumptively protected unless challenged. Such orders typically are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged.

Manual for Complex Litigation, § 11.423 (4th ed. 2004).

The value of umbrella orders has been well-documented:

[T]he propriety and desirability of protective orders securing the confidentiality of documents containing sensitive commercial information that are the subject of discovery in complex cases is too well established to belabor . . . . We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.

*Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981). *See also* 8 Wright & Miller at § 2035.

#### 4. *First Amendment Implications of Protective Orders*

The leading Supreme Court case addressing the question of how the First Amendment's protection of speech applies to protective orders is *Seattle Times Co. v. Rhinehart*. 467 U.S. 20 (1984); *see also* Part III.D.4, *infra*. During discovery in a state court action against a newspaper for defamation, the defendant requested the production of documents relating to the financial affairs of the plaintiff and his religious organization. *Id.* at 23-25. Plaintiffs sought a protective order for the financial documents to limit their publication and dissemination by the newspaper. *Id.* at 25.

The trial court entered a protective order prohibiting defendant “from publishing, disseminating, or using the information [produced by plaintiffs] in any way except where necessary to prepare for and try the case.” *Id.* at 27. Upholding the order, the Supreme Court of Washington declared: “the information to be discovered concerned the financial affairs of the plaintiff . . . in which he and his associates had a recognizable privacy interest . . . and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression.” *Id.* at 28 (quotation and citation omitted).

In an appeal to the United States Supreme Court, the *Seattle Times* argued that the

protective order contravened rights under the First Amendment:

Petitioners argue that the First Amendment imposes strict limits on the availability of any judicial order that has the effect of restricting expression. They contend that civil discovery is not different from other sources of information, and that therefore the information is ‘protected speech’ for First Amendment purposes. Petitioners assert the right in this case to disseminate any information gained through discovery . . . . They submit [that] [w]hen a protective order seeks to limit expression, it may do so only if the proponent shows a compelling government interest.

*Id.* at 30-31 (quotation omitted). Responding, the Court acknowledged that most information obtained in civil discovery would rarely fall into the classes of speech unprotected by the First Amendment, such as obscenity, defamatory statements, threats, and the like. *Id.* at 31. Yet, it wrote, it “does not necessarily follow . . . that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery.” *Id.*

Rejected by the unanimous Court was the contention that information obtained through civil discovery is no different from information obtained through other means:

As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court’s discovery processes. As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.

*Id.* at 32; *see also Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”).

Protective orders prohibiting dissemination of materials discovered before trial are “not the kind of classic prior restraint that require[] exacting First Amendment scrutiny.” *Seattle Times* at 33. The type of restrictions deemed permissible are those that apply to information obtained through the civil discovery process. While parties may be restrained from

disseminating information obtained through the discovery mechanism, they “may disseminate the identical information . . . as long as the information is gained through means independent of the court’s processes.” *Id.* at 34.

### C. Court Authority to Enforce Orders

#### *1. Generally*

Courts have the inherent authority to enforce their orders. “[T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order.” *In re Debs*, 158 U.S. 564, 594 (1895); *see also In re Lafayette Radio Elec. Corp.*, 761 F.2d 84, 93 (2d Cir. 1985) (“ancillary jurisdiction is recognized as part of a court’s inherent power to prevent its judgments and orders from being ignored or avoided with impunity”). The power is a necessary prerequisite to the administration of justice; without it, courts would be ill-equipped to ensure the rule of law in a democratic society.

“It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process.” *See Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co.*, 249 U.S. 134, 146 (1919); *see generally Anderson v. Dunn*, 6 Wheat. 204, 227 (1821) (“Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose . . . submission to their lawful mandates”); *In re Lafayette Radio*, 761 F.2d at 92 (“it is established that a federal court sitting in equity that has jurisdiction to issue a decree necessarily has ancillary and supplemental jurisdiction to enter orders and judgments designed to effectuate that decree”).

#### *2. National Scope*

The jurisdiction of a court to enforce its orders extends nationwide. “Nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court’s jurisdiction if, with actual notice of the court’s order, they actively aid and abet a party in violating that order.” *Waffenschmidt v. Mackay*, 763 F.2d 711, 714 (5th Cir. 1985); *see also Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963) (“Violation of an injunctive order is cognizable in the court which issued the injunction, regardless of where the violation occurred.”).

#### D. Injunctions

##### 1. *Generally*

The authority to issue injunctions is derived from the courts’ inherent equity powers and Rule 65 of the Federal Rules of Civil Procedure. “In most cases the determination whether to issue an injunction involves a balancing of the interests of the parties who might be affected by the court’s decision — the hardship on plaintiff if relief is denied as compared to the hardship to defendant if relief is granted.” 11A Wright & Miller at § 2942. Decision as to whether an injunction is warranted on the facts of a particular case is committed to the sound discretion of the trial court. *See id.*; *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (“In shaping equity decrees, the trial court is vested with broad discretionary power”).

At common law, chancery courts in England provided extraordinary relief such as injunctions and specific performance only when the parties could not obtain an effective remedy from the courts of law. 11A Wright & Miller at § 2944; McClintock, *Equity*, § 21 (2d ed. 1948). “Even though there no longer are separate law and equity courts . . . injunctive relief continues to be viewed as ‘extraordinary’ and courts are reluctant to award it if the claimant can secure



adequate rectification of his grievance by an award of damages.” *Id.*

“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). “A plaintiff seeking an injunction must show that there is an imminent threat of harm and that the threatened harm is ‘irreparable.’” Owen Fiss, *Injunctions* 59 (2d ed. 1984).

## *2. Persons Bound*

Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction “is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Fed. R. Civ. P. 65(d). The rule “is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them, or subject to their control. In essence it is that [persons bound] may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.” *Regal Knitwear Co. v. Nat’l Labor Relations Bd.*, 324 U.S. 9, 14 (1945). *See, e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law*, § 13.2(a) (2d ed. 2003) (discussing criteria for aiding and abetting); *id.* § 13.2(b) at 344; 4 Wharton’s *Criminal Law* § 685 (15th ed. 1996) (same).

“[A]n issue of privity in the context of determining who is bound by an injunction . . . in a particular case is often not easy to resolve.” 11A Wright & Miller at § 2956. A fact-sensitive inquiry must be undertaken to determine whether persons not named in an injunction can be bound by its terms because they are acting in concert with an enjoined party. *Id.*; *Vuitton et Fils*

*S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979) (“Whether one not named in an injunctive decree may nevertheless be bound by it depends on the facts of each case.”).

Those persons named in an injunction are considered “parties” for the purpose of Rule 65(d). *See Madsen v. Women’s Health Ctr., Inc.* 512 U.S. 753, 775 (1994). The party seeking enforcement of an injunction against persons not named bears the burden of demonstrating that those persons are bound by the order. *See People of the State of N.Y. by Vacco v. Operation Rescue Nat’l*, 80 F.3d 64, 70 (2d Cir. 1996).

### *3. Enjoining Dissemination of Stolen Protected Documents*

Recovering stolen documents obtained in violation of a court discovery order when needed to protect a party to a litigation is well within the equitable power of a federal district court. *See* 28 U.S.C. § 1651(a) (district courts “may issue all writs necessary or appropriate in aid of their . . . jurisdiction and agreeable to the usages and principles of law”); *Egri v. Conn. Yankee Atomic Power Co.*, 68 Fed. Appx. 249, 255-56 (2d Cir. 2003) (finding injunction enforcing protective order permissible under the All Writs Act) (unpublished opinion); Fed. R. Civ. P. 16(f) (failure to obey a pretrial order); *see generally* Part III.C, *supra*. Even if the order were improperly issued, it must be modified or overturned and not deliberately violated when in force. *See, e.g., Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967) (“One may sympathize with the petitioners’ impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.”).

The Supreme Court, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), provided some guidance on the right to publish material of public significance illegally obtained by a third

party. *See also* Part III.B.4, *supra*, on First Amendment implications of protective orders. A cell phone conversation had been illegally intercepted by private parties in violation of a state wiretapping statute, and then turned over to a third person who published it. The third person was considered to be in legal possession of the recorded conversation.

The Court held unconstitutional as applied state legislation prohibiting intentional disclosure of the illegally intercepted communication by the third person. The majority emphasized its reluctance to definitively answer “the question whether, in cases where information has been acquired *unlawfully* by a newspaper . . . government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” *Id.* at 528-29 (internal quotation and citation omitted) (emphasis in original). It listed some of the criteria it weighed in deciding to protect the third party’s publication: First, the third party played no part in the illegal interception, but found out about it “only after it occurred.” *Id.* at 525. Second, access to the information was “lawfully” obtained by the third party even though the information itself was “unlawfully” obtained by another. *Id.* Third, the subject matter was a matter of public concern.

#### 4. *Content Neutral*

Supporting the power to prevent publication in *Bartnicki* was the injunction’s “content neutral” form. *Id.* at 525-29.

Applicability of the First Amendment to an injunction generally depends upon whether any restriction on speech it contains is “content-based” or “content-neutral.” *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 450 (2d Cir. 2001). In an assessment of content-neutrality, “[t]he government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on

some speakers or messages but not others.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) (“The government may not regulate [speech] based on hostility — or favoritism — towards the underlying message expressed.”).

The Court of Appeals for the Second Circuit has defined as content-neutral those regulations that do “not depend on the nature or content of the idea that [a person] wishes to express but only on the materials that would be the medium of expression.” *Lindsey v. Bloomberg*, \_\_\_ F.3d \_\_\_, slip op. at 18-19 (2d Cir. Feb. 1, 2007); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.”) (emphasis and internal quotation marks omitted).

Injunctions “issued not because of the content of petitioners’ expression . . . but because of . . . prior unlawful conduct” are content neutral. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764-65 (1994). Content neutral injunctions must “burden no more speech than necessary to serve a significant government interest,” *Madsen*, 512 U.S. at 765, but they are not required to “employ the least restrictive means of accomplishing the governmental objective.” *Universal City Studios*, 273 F.3d at 455. Because such injunctions do not enjoin speech based on its content, they do “not arouse the fears that trigger the application of constitutional ‘prior restraint’ principles.” *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979).

“The First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right.” *DVD Copy Control Ass’n Inc. v. Bunner*, 31 Cal 4th. 864, 881; *see also Dallas Cowboys*, 604 F.2d at 206 (“This is not a case of government

censorship, but a private plaintiff's attempt to protect its property rights.”). “The mere fact that [one] claims an expressive . . . purpose . . . does not give [one] a right, under the First Amendment to the United States Constitution, to appropriate to [oneself] the harvest of those who have sown.” *San Francisco Arts & Ath., Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 526 (1987) (quotation and citation omitted).

#### **IV. Application of Law to Facts**

##### **A. The Documents are Properly Protected Under CMO-3**

###### ***1. CMO-3 is a Valid Umbrella Protective Order***

CMO-3 is an umbrella protective order which permits parties to designate as confidential materials that they “in good faith believe[] [are] properly protected under Federal Rule of Civil Procedure 26(c)(7).” CMO-3 at ¶ 3. The designation of a document as “confidential” can be challenged by an opposing party, or any aggrieved entity, and the burden of establishing confidentiality rests on the producing party. *Id.* at ¶ 9. The use of such umbrella orders, which allow parties to designate substantial volumes of discovery materials as confidential upon a threshold showing of good cause, is permitted in large complex litigations, such as the instant multidistrict litigation consisting of thousands of cases. *See* Manual for Complex Litigation, § 11.423; *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 n.17 (3d Cir. 1994); Part III.B.3, *supra*.

###### ***2. Documents Contain Information Protectable by CMO-3 and Rule 26(c)***

The sealed documents disseminated by Gottstein and his co-conspirators consist entirely of materials that were exchanged by the parties in the discovery phase of this litigation. For purposes of the presumption to public access, they play no role in the adjudication process. *See*

*United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995); *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987). See Part III.A, *supra*.

This case is distinguishable from *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), relied upon by respondents. In *Procter & Gamble*, an injunction prohibiting publication of “standard litigation filings” — consisting of a memorandum of law, complaint, and case statement —, rather than documents produced in discovery and not relied upon by the court, was overturned. *Procter & Gamble* at 222, 225.

In this litigation, a substantial amount of sensitive material, including medical records and trade and proprietary information, has been produced for discovery purposes in accordance with Rule 26(b)(1)’s relatively low threshold of relevance to any claim or defense. See Part III.B.1, *supra*. Such information is not generally appropriate for public consumption. The court entered its protective order covering confidential materials under both its general equitable powers and the authority granted by Rule 26(c). The order was essential to protecting litigants from the embarrassment and oppression that would result from unnecessary pretrial public disclosure of their private information.

The court’s review of a sample of the documents disseminated by the conspirators in violation of CMO-3 as well as the articles in the New York Times provide clear and convincing evidence that they contain information properly protected as confidential under Rule 26(c). See Part II.H.2, *supra*. They consist mainly of trade secrets and confidential commercial information of defendant Lilly; revelation has the potential to impinge on the company’s privacy and property rights and inflict commercial harm. See Fed. R. Civ. P. 26(c)(7) (permitting protective orders that seal “trade secret or other confidential information”); *Cumberland Packing Corp. v.*

*Monsanto Co.*, 184 F.R.D. 504, 506 (E.D.N.Y. 1999) (“Documents falling into categories commonly sealed are those containing trade secrets, confidential research and development information, marketing plans, revenue information, pricing information, and the like.”); *see, e.g., Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) (sealing internal documents which “constitute potential negative publicity about [defendant’s] marketing tactics” because of “their potential to do commercial harm”).

Any person, whether or not a party to this litigation, who believes documents designated as confidential under CMO-3 have been improperly sealed or should be disclosed in the public interest may take advantage of the order’s declassification provisions and petition the court for declassification of certain documents. *See* CMO-3 at ¶ 9; *see also id.* at ¶ 16 (“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.”).

#### B. Court has the Power to Order Return of Stolen Documents

A large number of documents sealed by the court have been obtained illegally by the conspirators and those to whom they sent the documents. *See* Part II.H, *supra*. These confidential documents were procured solely by use of the court’s discovery process; there has been no suggestion that anyone was able to retrieve them from any other source before revelation by the three conspirators — Berenson, Egilman, and Gottstein. *See Int’l Prods. Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963).

As in all civil litigation, [respondents] gained the information they wish to disseminate only by virtue of the trial court’s discovery processes. As the Rules authorizing discovery were adopted by the [federal] legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.

*Seattle Times Co. v. Rhinehart*, 467 US 20, 32(1984). Respondents here have no right to possession of the confidential documents given to them by the conspirators. *Cf.* Restatement (First) of Torts § 757, *Liability for Disclosure or Use of Another's Trade Secret* (1939; current through Sept. 2006) ("One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other . . ."); *Conmar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 155-56 (2d Cir. 1949).

"It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co.*, 249 U.S. 134, 145-46 (1919). This power encompasses the authority to order the return of the documents stolen by the conspirators in violation of the protective order. *See generally Anderson v. Dunn*, 6 Wheat. 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose . . . submission to their lawful mandates."); *In re Lafayette Radio Elec. Corp.*, 761 F.2d 84, 92 (2d Cir. 1985) ("it is established that a federal court sitting in equity that has jurisdiction to issue a decree necessarily has ancillary and supplemental jurisdiction to enter orders and judgments designed to effectuate that decree"); *see also Egri v. Conn. Yankee Atomic Power Co.*, 68 Fed. Appx. 249, 255-56 (2d Cir. 2003) ("Pursuant to the All Writs Act, a district court is authorized to bind non-parties where such action is necessary to preserve its ability to



adjudicate proceedings already before it or to enforce its own prior decisions.”) (unpublished opinion).

### C. Restrictions on Dissemination Do Not Violate First Amendment Rights

#### *1. CMO-3's Restriction on Dissemination of Confidential Documents Does Not Implicate First Amendment Rights*

CMO-3's restriction on dissemination of confidential materials produced in discovery does not implicate the parties' freedom of speech; “[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit.” *Id.* at 32. Litigants do not have “an unrestrained right to disseminate information that has been obtained through pretrial discovery.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984).

Nonparties who are prohibited from accessing confidential documents by CMO-3 cannot claim an infringement on their freedom of speech: “The right to speak and publish does not carry with it the unrestrained right to gather information.” *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *see also Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (“Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public.”). Those who can demonstrate a substantial need to know information contained in confidential documents must utilize CMO-3's declassification provisions. *See* CMO-3 at ¶ 9; *see also In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 572 (E.D.N.Y. 1985) (declassifying documents upon a showing “that the need for disclosure outweighs the need for further protection”), *aff'd* 821 F.2d 139 (2d Cir. 1987).

#### *2. The Injunction's Restriction on Dissemination Does Not Impinge on First Amendment Rights*

The instant injunction prohibiting further dissemination of confidential documents is content neutral. Its restriction does “not depend on the nature of the content of the idea that [the enjoined individuals wish] to express but only on the materials that would be the medium of expression.” *Lindsey v. Bloomberg*, \_\_ F.3d \_\_, slip op. at 18-19 (2d Cir. Feb. 1, 2007). The injunction is justified not by reference to the content of the covered documents, but rather by their unlawful acquisition. See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764-65 (1994) (holding injunctions “issued not because of the content of petitioners’ expression . . . but because of their prior unlawful conduct” are content neutral).

Only a minimal burden on speech results from the instant injunction since it restricts dissemination of documents only if those documents were obtained in the first instance by use of the court’s processes. It does not restrict anyone from discussing any topic or publishing or expressing any opinion. It is content neutral and does not “burden . . . speech [more] than necessary to serve a significant government interest.” *Madsen* at 765. While the court is not required to “employ the least restrictive means of accomplishing the governmental objective,” the injunction here is the least restrictive practicable method available to protect Lilly, the plaintiffs, and the court. *Universal City Studios, Inc., v. Corley*, 273 F.3d 429, 455 (2d Cir. 2001).

Several important governmental interests are served by this injunction. It allows the court to protect the privacy and property rights of litigants appearing before it, which is essential to a fair and efficient system of adjudication. By prohibiting dissemination in violation of the court order the court’s ability to enforce its own orders is preserved. Many of the protected documents contain trade secrets and commercial information, whose privacy the government has

a stake in maintaining: “Trade secret law promotes the sharing of knowledge and the efficient operation of industry.” *See DVD Copy Control Ass’n v. Bunner*, 31 Cal. 4th 864, 878 (Cal. 2003) (discussing “governmental purpose behind protecting trade secrets”).

Respondents’ claims that the injunction represents an impermissible prior restraint are without merit. Content neutral injunctions such as the present one do “not arouse the fears that trigger the application of constitutional prior restraint principles.” *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979).

The instant case is readily distinguishable the Sixth Circuit Court of Appeals’ decision primarily relied upon by respondents, *Procter & Gamble v. Bankers Trust*, *supra*. In *Procter & Gamble*, the court held an injunction prohibiting a news magazine from publishing litigation filings that had been improperly sealed in the first instance to be an impermissible infringement upon First Amendment rights. *Procter & Gamble*, 78 F.3d at 225. Here, the documents at issue are not litigation filings, but documents produced in discovery, to which the right of public access has not attached. *See* Parts III.A and IV.A, *supra*; *Procter & Gamble*, 78 F.3d at 225 (“the documents in question are standard litigation filings”). The documents were never unsealed under CMO-3, unlike the filings at issue in *Procter & Gamble*, which were unsealed at the time the district court granted the injunction. *See* Parts II.H.2 and IV.A, *supra*; *Procter & Gamble*, 78 F.3d at 223, 223 (“the District Court determined that, because the parties could not provide a substantial government interest in keeping the documents confidential, the sealed documents should no longer be protected and should be released into the public domain”) (quotation marks omitted). Finally, the enjoined party in *Procter & Gamble* was a member of the media, Business Week magazine. *See id.* at 225. (describing the overturned injunction as

part of “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*”) (emphasis supplied). The enjoined persons here are private, non-media-connected individuals.

The injunction here is content neutral, places only a minimal burden on speech, and serves significant government interests. It does not restrict freedom of speech under the First Amendment.

D. Enjoining Persons Who Refuse to Return the Documents is Necessary to Prevent Irreparable Harm to Lilly

Disclosure of confidential proprietary material and trade secrets poses a significant risk of harm to Lilly, a pharmaceutical company operating in a competitive marketplace. Both Lilly’s competitors’ and detractors’ use of the materials has the potential to inflict severe commercial harm on the company. *See* Dec’l of Gerald Hoffman, ¶ 18 (“If Lilly’s internal documents were to be publicly disseminated, every pharmaceutical company in the world, including competitors to all of Lilly’s marketed medications, including Zyprexa, would have access to a treasure trove of competitive intelligence, in an organized and assembled manner.”). The disclosure of its trade secrets can be considered tantamount to appropriation of the company’s property. *See, e.g., Conman Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 155 (2d Cir. 1949) (finding trade secrets to be property).

The harm faced by Lilly is amplified by the fact that the protected documents which respondents seek to disseminate are segments of a large body of information, whose selective and out-of-context disclosure may lead to confusion in the patient community and undeserved

reputational harm — “what appears damning may, in context after difficult proof, be shown to be neutral or even favorable to the defendant.” Note, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & Pol’y 53, 58 (2000).

In granting this injunction, the court has balanced the harm to petitioner if relief is denied against the harm to respondents if relief is granted. *See generally* 11A Wright & Miller at § 2942. The harm imposed by the injunction on respondents is minimal. They are required to return stolen documents over which they enjoy no property rights. *See* Part IV.B, *supra*. Their freedom of speech is not impinged upon. *See* Part IV.C, *supra*. To the extent they believe access to the protected documents is essential to their pursuit of the public interest, they may petition the court for declassification of the documents or modification of the protective order. *See* Part IV.C.1, *supra*; *see also Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967) (“One may sympathize with the petitioners’ impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.”).

Some of the individuals who have thus far refused to comply with requests to return the stolen documents have shown a resolute desire to flout court orders and inflict economic and reputational harm on Lilly. If not enjoined, it is highly probable that these individuals will widely disseminate the documents they know to be protected by a court order, in a form unnecessarily damaging to Lilly. *See, e.g.,* Tr. at 48-49, 193-94; Part II.K.4, *supra*. The injunction against them is therefore necessary to prevent irreparable harm to Lilly.

E. Enjoining Persons Who Returned the Documents is Not Necessary to Prevent Irreparable Harm to Lilly

As discussed *supra* in Part IV.D, dissemination of its confidential documents poses a significant risk of harm to Lilly's privacy, proprietary, and commercial interests. Nonetheless, those individuals who have returned the documents they received from the conspirators, and who have not themselves been implicated in the conspiracy, are unlikely to cause harm to Lilly.

It is not necessary in this case to burden respondents who have demonstrated compliance with and respect for court orders in order to prevent future harm to Lilly. An injunction should be no more burdensome to respondents than necessary to provide complete relief to petitioner. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). No individual who has returned the documents, and is not a member of the conspiracy to illegally procure the documents, is enjoined.

#### F. Websites Should Not Be Enjoined

A difficult issue is presented by Lilly's request to enjoin certain websites from posting the confidential documents. *See* Part I, *supra*. The websites in question had posted or linked to the documents prior to being enjoined from doing so by the preliminary injunction of January 4, 2007. No site has violated the January 4th order.

A user of one of the enjoined websites, "John Doe," has appeared in this action to contest the injunction's applicability to him. The injunction has no application to him since he apparently received no documents from the conspirators.

Prohibiting five of the internet's millions of websites from posting the documents will not substantially lower the risk of harm posed to Lilly. Websites are primarily fora for speech. Limiting the fora available to would-be disseminators by such an infinitesimal percentage would be a fruitless exercise of the court's equitable power. A more effective use of the court's

equitable discretion is to impose restraints on the individuals who pose the greatest risk of harm to Lilly — those who have not returned the documents despite knowledge that they were illegally procured. *See* Part IV.D, *supra*.

Mindful of the role of the internet as a major modern tool of free speech, *see* Part I *supra*, in the exercise of discretion the court refrains from permanently enjoining websites based on the insubstantial evidence of risk of irreparable harm. Restrictions on speech, even in the context of content-neutrality, should be avoided if not essential to promoting an important government interest. No website is enjoined from disseminating documents.

#### G. All Named Persons are Bound by the Injunction

The court's power is being exercised to enjoin all persons whose conduct poses a significant risk of irreparable harm to Lilly which cannot be remedied except by injunction. *See* Part III.D, *supra*; Note, *Developments in the Law: Injunctions*, 78 Harv. L. Rev. 994 (1965).

Respondents place great emphasis on Judge Hand's statement in *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930), that "the only occasion when a person not a party *may be punished*, is when he has helped bring about . . . an act of a party [in violation of a prior court decree]." *Id.* at 832-33 (emphasis supplied). In *Alemite*, the Court of Appeals for the Second Circuit was considering an appeal from a conviction of contempt by an individual whose alleged violation of an injunction in which he had not been named formed the basis of the contempt proceeding. *Id.* at 832.

*Alemite* speaks to the question of who may be held in contempt for violating an injunction. *See Developments in the Law: Injunctions, supra*, at 1028-29. It does not bear on the question presented in this case of who the court may enjoin by name in the first instance. Unlike

*Alemite*, this is not a contempt proceeding, and the court is not now punishing anyone for any alleged violation of court orders. Rather, this proceeding seeks to prevent irreparable harm to Lilly by enjoining those persons whose actions threaten such harm. *See* Owen Fiss, *Injunctions*, 109 (2d ed. 1984) (“The traditional office of an injunction is to prevent harm.”). The relief granted is not punitive, but preventative. *See generally* Part III.D.1, *supra*.

The necessity of enjoining dissemination and requiring return of the sealed documents is not limited to those who were bound by the terms of CMO-3. The power to enjoin extends to persons and organizations whose activities present a risk of irreparable harm to petitioner that can not be alleviated by means other than injunction.

The parties to these injunction proceedings are the petitioner, Eli Lilly, and respondents, including James Gottstein, David Egilman, Dr. David Cohen, Judi Chamberlin, Vera Sharav, Robert Whitaker, Eric Whalen, and David Oaks. *See* Civil Docket for Case No. 1:07-CV-00504-JBW-RLM. Even if the injunction proceedings are considered part of the more general series of actions, 04-MDL-01596, the respondents who are bound by this order have either been served or have appeared and should return documents illegally obtained that are in their possession. They cannot claim to be bona fide purchasers. *See* Part IV.B, *supra*.

The injunction issued here is binding on all persons named within it as well as “their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Fed. R. Civ. P. 65(d). *See, e.g., Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979) (“Whether one *not named* in an injunctive decree may nevertheless be bound by it” is governed by Rule 65(d).) (emphasis supplied).



## H. Persons Bound

### *1. Recipients of Documents*

Persons who received documents from Gottstein, but against whom Lilly is not seeking a permanent injunction, are: Alex Berenson (of The New York Times); Snighdha Prakash (of National Public Radio), Amelia Desanto, Steve Cha, Jerry Winchester, Dr. Grace Jackson, the Alliance for Human Research Protection, and MindFreedom International.

Persons and websites against whom Lilly seeks a permanent injunction are: Dr. Peter Breggin, Judi Chamberlin, Dr. David Cohen, Terri Gottstein, Will Hall, David Oaks, Vera Sharav, Eric Whalen, Robert Whitaker, Bruce Whittington, Laura Ziegler, [zyprexa.pbwiki.com](http://zyprexa.pbwiki.com), [www.mindfreedom.org](http://www.mindfreedom.org), [www.ahrp.org](http://www.ahrp.org), [www.ahrp.blogspot.org](http://www.ahrp.blogspot.org), and [www.joysoup.net](http://www.joysoup.net). The individuals named received the documents, but proof that the websites received the documents is lacking.

Persons who have returned the documents and need not be enjoined are: Dr. Peter Breggin, Steve Cha, Terri Gottstein, Will Hall, Dr. Grace Jackson, Dr. Stephen Kruszewski, Bruce Whittington, Jerry Winchester, and Laura Ziegler.

Persons who the evidence demonstrates received, but have not returned, the documents, and against whom Lilly is seeking a final injunction, are: Judi Chamberlin, Dr. David Cohen, David Oaks, Vera Sharav, Eric Whalen, and Robert Whitaker.

### *2. Amelia Desanto*

Documents provided by Gottstein to Senate staffer Amelia Desanto have not been returned. Lilly has not sought an injunction against Desanto. Accordingly, and in light of the comity and respect due a coequal branch of government, Desanto is not enjoined.

### *3. N.Y. Times, National Public Radio, and Snighdha Prakash*

No injunction has been sought against the New York Times. No showing has been made that any of its employees other than Berenson possessed the documents. No showing has been made that the Times knew they had been stolen. The reasoning applicable to the New York Times applies to National Public Radio.

Snighdha Prakash of National Public Radio is not enjoined because no injunction against her is sought. The New York Times and National Public Radio are not enjoined.

### *4. Berenson*

While Berenson's conduct in assisting in the stealing of the protected documents was reprehensible, Lilly has sought no injunction against him. Accordingly, Berenson is not enjoined.

### *5. Gottstein and Egilman*

Gottstein and Egilman have appeared by counsel in these proceedings and are therefore bound. *See* Tr. at 243, 252. Since their irresponsible conduct suggests further restraints to protect the parties and the court, they are included in this injunction.

### *6. Websites*

For the reasons stated in Parts I and IV.F, *supra*, it is unlikely that the court can now effectively enforce an injunction against the internet in its various manifestations, and it would constitute a dubious manifestation of public policy were it to attempt to do so. No internet site is enjoined.

### *7. Persons Who Have Not Returned the Documents*

The following individuals have been asked to return the documents they received from

Gottstein to the Special Master, but have thus far failed to do so: Dr. David Cohen, Judi Chamberlin, Vera Sharav, Robert Whitaker and Eric Whalen. David Oaks is highly likely to have in his possession copies of the documents that he received directly or indirectly from Gottstein, but he has not returned them. All persons listed in this paragraph are being ordered to return any copies of the documents in their possession to the Special Master immediately. *See Part VIII, infra.*

The attorney for Vera Sharav, who is holding her copies of the documents, is considered to hold them on behalf of Ms. Sharav. He is bound to return them on her behalf.

Berenson, Snighdha Prakash and Amelia Desanto have also not returned the documents. The application of this order to Berenson is discussed in Part IV.H.4, *supra*; the application of this order to Snighdha Prakash is discussed in Part IV.H.3, *supra*; the application of this order to Amelia Desanto is discussed in Part IV.H.2, *supra*.

#### *8. Persons Restrained*

Berenson's, Egilman's, and Gottstein's brazen flouting of this court's protective order raises serious questions about their responsibility. The court, based on the evidence before it, is not satisfied that they can be counted on to return all copies of the documents they may have in their possession or control. Egilman and Gottstein are therefore being permanently enjoined as noted in Part IV.H.5, *supra*. Berenson is not being enjoined since no injunction against him has been sought by Lilly. *See Part IV.H.4, supra.*

Those individuals who received documents and from whom Lilly seeks return but who have not returned them are ordered to return them. *See Part IV.B.7, supra.* Their disregard for the court's processes poses a significant risk of irreparable harm to Lilly of further dissemination

by them of protected documents. They are enjoined from further attempts at dissemination. *See* Part VIII, *infra*.

## **V. Findings of Fact and Law**

### **A. Embodied in this Memorandum**

This Memorandum and Order contains at various points the court's findings of fact and law. *See, e.g.*, findings in Parts II and IV, *supra*; *see also* Fed. R. Civ. P. 65(d) ("Every order granting an injunction...shall set forth the reasons for its issuance"); Fed R. Civ. P. 52(a).

Petitioner and respondents have submitted extensive formal findings of fact and law. The court sees no need to adopt them in view of this comprehensive memorandum.

### **B. Irreparable Harm to Lilly**

Publication of the protected documents has already created irreparable harm to Lilly by revealing its trade secrets, confidential preliminary research, and merchandising techniques. It has made settlement of the remaining MDL and state cases and trials more difficult by creating probable prejudice largely irrelevant to the issues posed by the pending cases and by making impartial juror selection more difficult. It may have adversely affected prospective plaintiffs who may be less willing to sue if their intimate medical problems can be revealed through violation of the court's protective orders. And, of course, flouting the court's orders weakens the judicial structure.

As noted in Part IV.D, *supra*, there remains the substantial probability of further abuse of CMO-3 by the conspirators and individuals who have not returned the protected documents. This danger constitutes a continuous overhanging threat of harm which is likely to affect Lilly's standing in the marketplace and the value of the corporation as a whole.

There has already been sufficient revelation in the New York Times so that if Congress, the Food and Drug Administration, or the Federal Trade Commission wish to investigate or act they have grounds for doing so, subpoenaing protected documents as necessary for their purposes.

#### C. Lack of Appreciable Harm to Those Bound

There is little or no harm to anyone bound by the injunction. None are harmed in their private person. To the extent that they wish to protect the public welfare by their revelation of protected documents, CMO-3 provides a vehicle for doing so. *See* Part IV.D, *supra*.

#### D. Conclusion

The balance of benefits and harms leads overwhelmingly to support of the injunction now being issued. *See* Part IV.D, *supra*.

### **VI. Conclusion**

The preliminary injunction was justified. The references and restrictions upon various sites on the internet are not carried over to the final injunction in the exercise of discretion.

### **VII. Stay**

This final judgment and injunction is stayed for ten days to permit an application to the Court of Appeals of the Second Circuit for reinstatement of this court's order of January 4, 2007 including within a preliminary injunction various websites, or for other relief. The preliminary injunction shall remain in effect for ten days.

### **VIII. Injunction**

It is hereby

ORDERED that the following individuals who have received documents produced by Eli

Lilly and Company subject to CMO-3 (including all copies of any electronic documents, hard copy documents and CDs/DVDs) are enjoined from further disseminating these documents: Judi Chamberlin, Dr. David Cohen, David Egilman, James Gottstein, David Oaks, Vera Sharav, Eric Whalen, and Robert Whitaker. He or she shall forthwith return any such documents and copies still in his or her possession or control to Peter Woodin, Special Master for Discovery, at JAMS, 280 Park Avenue, West Building, 28<sup>th</sup> Floor, New York, N.Y. 10017.

SO ORDERED.

---

Jack B. Weinstein  
Senior United States District Judge

Dated: February 13, 2007  
Brooklyn, N.Y.

**In the Matter Of:**

**ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC**

---

**JAMES GOTTSTEIN - VOLUME I**

*October 16, 2015*

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1	IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2	THIRD JUDICIAL DISTRICT AT ANCHORAGE
3	
4	ALASKA BUILDING, INC., an
5	Alaska corporation,
6	Plaintiff,
7	vs.
8	716 WEST FOURTH AVENUE LLC,
9	and LEGISLATIVE AFFAIRS
10	AGENCY,
11	Defendants.
12	Case No. 3AN-15-05969 CI
13	DEPOSITION OF JAMES B. GOTTSTEIN
14	VOLUME I
15	Pages 1 - 58, inclusive
16	Friday, October 16, 2015
17	2:00 P.M.
18	
19	Taken by Counsel for
20	Defendant 716 West Fourth Avenue LLC
21	at
22	ASHBURN & MASON
23	1227 West 9th Avenue, Suite 200
24	Anchorage, Alaska
25	

CERTIFIED  
TRANSCRIPT



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2

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25 Court Reporter:

26 Gary Brooking, RPR  
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29 Anchorage, Alaska 99501

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1 Q. Okay. How much were you asking for?

2 A. For what?

3 Q. For compensation. And I'm just talking  
4 about the whole pot here.

5 A. Well, my big concern was catastrophic  
6 damage to the Alaska Building, and there was not  
7 really a satisfactory resolution of that in my mind,  
8 from my perspective. So from my perspective, that's  
9 a big mess.

10 And, you know -- and I suffered two hundred  
11 and fifty -- or Alaska Building, Inc. has suffered  
12 \$250,000 worth of damage and has gotten fifty so far  
13 and may probably get another fifty, and then have to  
14 litigate for the rest. So I don't recall in terms of  
15 those other pieces. I think the other specific pieces  
16 probably were pretty close to what I asked for.

17 Q. Okay. Have you contacted anyone from the  
18 press about this case?

19 A. Yes.

20 Q. Who?

21 A. Well, I have this e-mail list that I  
22 sent -- I can't remember if I sent anything out to  
23 the whole list, but basically it's been Nathaniel  
24 Herz, Lisa Demer, Rich Mauer at the Alaska Dispatch  
25 News. I must have sent something out to the whole

1 list, because I got calls from, like -- what, like,  
2 Fox 4. And ABC, Channel 13, I think, did a story on  
3 our argument over standing.

4 Q. Aside from e-mail contacts, have you also  
5 had phone contacts with members of the press about  
6 this case?

7 A. Yes.

8 Q. Who have you spoken with?

9 A. Lisa Demer and Nathaniel Herz and Rich  
10 Mauer.

11 Q. What did you say?

12 A. I mean, I talked about -- I've had various  
13 conversations. Talked about the illegal nature of  
14 the lease. I mean, my big effort was I wanted -- I  
15 felt that it would be good to have people show up at  
16 the standing hearing, and so it was some effort to  
17 get them to actually put anything in about it.

18 Q. Any other reasons why you've contacted  
19 press about this case?

20 A. Well, I think it's a matter of public  
21 importance, so that's the reason.

22 Q. Okay. You published all of the discovery  
23 that you received in this case on line. Is that  
24 right?

25 A. I'm not sure all of it's up there yet, but

1 I -- I have been posting it.  
2 Q. And why do you do that?  
3 A. I think it's a matter of public interest.  
4 Q. You were involved, Mr. Gottstein, with the  
5 release of the Zyprexa papers?  
6 A. Yes.  
7 Q. If you had to do it over again, would you  
8 release those papers?  
9 A. Not -- no, not in the way that I did.  
10 Q. You can object to this characterization,  
11 but you boast about it a bit on your website, do you  
12 not, for Law Project for Psychiatric Rights?  
13 A. Well, the -- these were documents that had  
14 been sealed, kept -- you know, made secret that  
15 showed tremendous harm being done by Zyprexa that  
16 Eli Lilly had -- you know, was keeping -- that knew  
17 about this huge amount of damage that was kept  
18 secret from the public, so it also was a matter of  
19 great public importance.  
20 So there was a protective order that said  
21 that if the documents were subpoenaed in another case,  
22 that Eli Lilly had to be given notice of it and a  
23 reasonable opportunity to object before the person who  
24 was subpoenaed could produce it.  
25 And I followed that. And I think that it

1     he?

2           A.     Correct.

3           Q.     And he thought that you had deliberately

4     misled Eli Lilly and violated the terms of the

5     protective order?

6           A.     I don't -- no, I don't think that's a fair

7     characterization. I mean, that I deliberately

8     misled Eli Lilly? No. I don't think that. He --

9     he determined that I had violated the protective

10    order, of which I was not a party, but in any

11    event --

12          Q.     Judge Weinstein found that you used a

13    subpoena as a subterfuge to get around the

14    protective order. Isn't that right?

15          A.     You'd have to show me the language. I'm

16    not sure that -- I'd have to look at the exact

17    language of his decision. That doesn't sound right.

18          Q.     Leaving aside the language of the decision,

19    was it a subterfuge?

20          A.     No.

21          Q.     Did you deliberately violate the terms of

22    the protective order?

23          A.     No.

24          Q.     You sent these protected materials to

25    contacts at The New York Times. Is that right?

1           A.    Yes.  They were not protected at that time  
2   in my mind, because the terms of the protective  
3   order had been complied with.  I mean, the  
4   obligation was on the person I subpoenaed, who was  
5   an expert in the case, expert witness in the case,  
6   to comply with the protective order.  And he  
7   determined that Eli Lilly had been given an adequate  
8   opportunity to object, and then provided them to me.  
9   And at that point I believe that they were no longer  
10  protected.

11          Q.    Magistrate Judge Mann also reviewed some of  
12  this information and your conduct in the Zyprexa  
13  proceeding.  Is that right?

14          A.    So, first off, I don't see how this -- I'm  
15  going to object to this line of questioning, just  
16  for the record, as I don't see how it's relevant or  
17  likely to lead to admissible evidence.

18                What was the question again?

19          Q.    Did a magistrate judge, Mann, also get to  
20  oversee some of the Zyprexa proceedings and your  
21  conduct with respect to the protective order?

22          A.    I'm not -- I don't recall the name.  It  
23  might have been Mann.  I don't know why it wouldn't  
24  have been.

25          Q.    Was there a magistrate judge involved?

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska  
corporation,

Plaintiff,

vs.

716 WEST FOURTH AVENUE LLC and  
LEGISLATIVE AFFAIRS AGENCY,  
Defendants.

Case No.: 3AN-15-05969 CI

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Original Received

OCT 27 2015

Clerk of the Trial Court

**[PROPOSED] ORDER DENYING PLAINTIFF'S MOTION TO COMPEL  
RESPONSES TO PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO  
716 WEST FOURTH AVENUE, LLC**

Having considered the parties' briefing regarding Plaintiff's Motion to Compel Responses to Plaintiff's First Requests for Production to 716 West Fourth Avenue, LLC, the motion is DENIED.

Alternatively, the Court shall perform an *in camera* review of 716 West Fourth Avenue LLC's Operating Agreement. In the event the Court finds this document relevant to the instant action, it will release this document to Plaintiff only under a confidentiality and protective order to be drafted by 716 and approved by the Court within ten days of the issuance of the order. If the Court finds that the Operating Agreement is not relevant to this action, it will not release the document to Plaintiff. No other documents pertaining to 716's financial operations are ordered to be released at this time.

ASHBURN & MASON P.C.  
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ANCHORAGE, ALASKA 99501  
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A brief hearing regarding unresolved discovery issues relating to Plaintiff's Motion to Compel will be held, if necessary, following the conclusion of oral argument addressing 716's Motion for Summary Judgment under the Laches Doctrine, which 716 has joined.

DATED: \_\_\_\_\_

\_\_\_\_\_  
HON. PATRICK J. McKAY  
Superior Court Judge

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger ☐ facsimile ☒ U.S. Mail on the 27 day of October 2015, on:

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By: \_\_\_\_\_



Heidi Wyckoff