

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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In re: ZYPREXA PRODUCTS LIABILITY : MDL No. 1596  
LITIGATION :  
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THIS DOCUMENT RELATES TO: :  
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ALL ACTIONS :  
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**ELI LILLY AND COMPANY'S MEMORANDUM IN RESPONSE TO MOTIONS FILED  
BY JOHN DOE, VERA SHARAV, DAVID COHEN, AND THE ALLIANCE FOR  
HUMAN RESEARCH PROTECTION**

This Court should continue to enforce its CMO-3 and deny the two separate motions filed by parties seeking to use and distribute Lilly's confidential documents in violation of this Court's CMO-3 protective order: (1) John Doe's *Motion For Reconsideration Or In The Alternative For Stay Pending Appeal*, filed on behalf of Mr. Doe by the Electronic Frontier Foundation ("EFF") (the "John Doe Motion"); and (2) the *Motion of Vera Sharav, Alliance for Human Research Protection and David Cohen For An Order Vacating CMO-3 In Part, Or, In The Alternative, Dissolving The Injunction In Part* (the "AHRP Motion").<sup>1</sup>

**FACTS AND PROCEDURAL BACKGROUND AND INCORPORATION OF  
ARGUMENTS**

On January 8, 2007, Lilly submitted a brief detailing the factual and procedural background surrounding the coordinated, unlawful attempts to distribute Lilly's documents in violation of this Court's orders. (*See Eli Lilly's Memorandum Of Points And Authorities On*

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<sup>1</sup> Ms. Vena Sharav, Dr. David Cohen, and the Alliance for Human Research Protection, in addition to opposing an extension of the temporary mandatory injunction, now also seek to vacate the application of CMO-3 to the documents at issue. The reasons for this legal maneuver are transparent, particularly in light of Ms. Sharav's repeated attempts to disseminate the unlawfully obtained Zyprexa documents even after entry of the Temporary Mandatory Injunction. Nevertheless, as the Court is aware, Special Master Woodin has been designated to assist in discovery matters, including issues relating to CMO-3. As a result, we respectfully suggest that the most efficient resolution of this matter is to refer the motion regarding CMO-3 to Special Master Woodin.

*Motion For Re-Argument Of The Court's Order Extending The December 29, 2006, Temporary Mandatory Injunction*, at 1–12.) That brief also provided a memorandum of points and authorities addressing several arguments that are raised or repeated in the John Doe Motion and the AHRP Motion. (*See id.* at 13–16, 22–24.)

On January 15, 2007, Lilly filed proposed Findings of Fact, which provides the documentary evidence of these coordinated, unlawful attempts to distribute Lilly's documents in violation of this Court's orders. (*See Eli Lilly and Company's Proposed Findings of Fact Concerning its Request to Extend the Temporary Mandatory Injunction.*) These proposed Findings of Fact include new documentary evidence, not previously submitted to the Court, including an affirmation from an attorney at The Lanier Law Firm relating to his interactions with – and swift termination of – David Egilman, M.D., M.P.H., and additional evidence of the coordination between David Oaks, the Director of MindFreedom International, and contributors to [zyprexa.pbwiki.com](http://zyprexa.pbwiki.com).

For purposes of brevity, Lilly incorporates that factual recitation and the accompanying legal arguments, in these prior filings (referenced herein as “Lilly Mem.” and “Lilly FOF”), and addresses Movants' additional legal arguments below.

### **ARGUMENT**

#### **A. An Injunction Against Disseminating Wrongly Obtained Confidential Discovery Materials Is Not A Prior Restraint And Is Subject Only To Intermediate Scrutiny**

John Doe seeks to justify violation or repeal of this Court's protective orders by arguing that a limitation on the ability of third parties to access and publish materials produced in discovery is a “prior restraint” that is subject to strict scrutiny under First Amendment caselaw. (*See John Doe Motion at 6.*) This argument is incorrect.

First, as Lilly explained in the attached *Memorandum Of Points And Authorities On Motion For Re-Argument*, the Supreme Court has specifically rejected the argument that the First Amendment confers a right to access documents produced between private parties in discovery. (See Lilly Mem. at 23-24 (citing *Seattle Times, Co. v. Rhinehart*, 467 U.S. 20, 31–37 (1984); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”)).) This is particularly true where access to those documents has been obtained in an illegal manner in the first instance. (See *id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[T]he truthful information sought to be published must have been lawfully acquired.”); *Seattle Times, Co.*, 467 U.S. at 37).)

Second, under the Supreme Court’s cases, only content-based injunctions are subject to prior-restraint analysis. See *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 372 (1997). Injunctions against disseminating confidential discovery material are not content-based. See *Seattle Times Co. v. Reinehart*, 467 U.S. 20, 33 (1984) (“an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny”). Injunctions based on illegal conduct or the wrongful disclosure of trade secrets or copyrighted material are not content based. *Schenck*, 519 U.S. at 374 n. 6; *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (injunction enforcing Digital Millennium Copyright Act’s prohibitions against posting or linking to decryption computer program held content-neutral); *DVD Copy Control Assoc., Inc. v. Bunner*, 31 Cal. 4th 864, 75 P.3d 1 (Cal. 2003) (injunction against posting misappropriated trade secrets held content-neutral); see also *Dallas Cowboys Cheerleaders Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) (“This is not a case of government censorship, but a private plaintiff’s attempt to protect its property right.”).

“[T]he proper test for evaluating content-neutral injunctions under the First Amendment [is] ‘whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.’” *Schenck*, 519 U.S. at 372 (quoting *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 765 (1994)). Here, this Court’s injunctions are tailored to “serve purposes unrelated to the content of expression.” *See Universal City Studios*, 273 F.3d at 450. This Court did not select any type of speech to restrain due to a dislike of what is being said. Rather, the Court has sought to protect the litigants before it from the illegal, piecemeal appropriation of confidential information produced pursuant to this Court’s protective orders—a decidedly content-neutral purpose. *See Seattle Times*, 467 U.S. at 35; *DVD Copy Control Assoc.*, 31 Cal. 4th at 82, 75 P.3d at 12 (injunction based on content of information misappropriated is not content-based). That the injunctions have an incidental effect on the speech of those who have obtained Lilly’s stolen documents has no bearing on this Court’s inquiry. *See Universal City Studios*, 273 F.3d at 450. Even if the effect on speech was a relevant inquiry, however, this Court has made clear that no speech is prohibited:

I should like to emphasize again, as I did I thought on the 3rd, that no one is enjoined from discussing anything they wish to discuss. *New York Times* is not enjoined from doing anything it wishes to do. The injunction only covers the publication and the cooperation in publishing particular material which is alleged to have been stolen in violation of this Court’s orders.

(Tr. of Hearing before the Honorable Jack B. Weinstein (Jan. 8, 2007) at 28; attached Ex. A.)

The challenged provisions of the content-neutral Temporary Mandatory Injunction burden no more speech than necessary to serve a significant government interest. As noted above, the Temporary Mandatory Injunction prohibits only the publication of the confidential materials—the minimum burden required to protect those materials’ confidentiality—and has no effect on any discussion or publication otherwise. Moreover,

whatever minimum amount of speech is burdened is done so in the service of protecting the significant government interest in this Court's ability to administer justice, prevent abuses of its processes, and give effect to its own orders. *See Seattle Times*, 467 U.S. at 33–34; *see also DVD Copy Control Assoc.*, 31 Cal. 4th at 81–82, 84, 75 P.3d at 12, 14.

Moreover, there is no relevant difference between posting the illegally obtained documents and “merely” linking to them. Doe assumes, contrary to controlling Second Circuit precedent, that his linking activities constitute protected speech. But the Second Circuit recognizes that “a hyperlink has both a speech and a nonspeech component” and that an injunction against hyperlinking may be “justified solely by the functional capability of the hyperlink.” *Universal City Studios*, 273 F.3d at 456. Although a link may be formatted to convey information to readers, it also “has the functional capacity to bring the content of the linked web page to the user’s computer screen . . . .” *Id.* An injunction that prohibits linking to websites that contain illegally posted material, such as the Temporary Mandatory Injunction, “is content-neutral because it is justified without regard to the speech component of the hyperlink. The linking prohibition applies whether or not the hyperlink contains any information, comprehensible to a human being, as to the Internet address of the web page being accessed.” *Id.*

In *Universal City Studios*, the Second Circuit also recognized the reality of how quickly materials can be distributed on the Internet. The court rejected the defendant’s argument that a link to a website containing illegally posted materials is indistinguishable from a newspaper article informing readers where they might purchase obscene books. *Id.* at 457. As the court explained:

“[I]f others publish the location of the bookstore, preventive relief against a distributor can be effective before any significant

distribution of the prohibited materials has occurred. The digital world, however, creates a very different problem. If obscene materials are posted on one website and other sites post hyperlinks to the first site, the materials are available for instantaneous worldwide distribution before any preventive measures can be effectively taken.”

*Id.*

In sum, this Court’s Temporary Mandatory Injunction is content-neutral because it serves several purposes unrelated to the content of expression: prohibiting the continuing violation of this Court’s protective and injunctive orders, facilitating the orderly resolution of disputes through court-supervised discovery, and protecting Lilly’s property interest in its confidential information. As a content-neutral order, the Temporary Mandatory Injunction burdens the minimum amount of speech necessary to serve the significant government interests of preventing abuse of court processes, promoting confidence and legitimacy in the litigation discovery system, giving meaningful effect to this Court’s discovery orders, and protecting litigants’ confidential information and privacy. The Temporary Mandatory Injunction in no way violates the First Amendment.

**B. *Proctor & Gamble* Is Distinguishable From This Case And Contrary To Controlling Law**

Doe relies principally on one case: *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (“*P&G*”). That case, however, is distinguished from this case on its facts and procedures and is marked by errors of law.

In *P&G*, the parties to the litigation stipulated to a “protective order.” *Id.* at 222. That stipulated agreement permitted the “parties and not the court [to] determine whether particular documents met the requirements of Rule 26,” and allowed the parties to modify the terms of the protective order *without court approval*. *Id.* In *P&G*, therefore, the “protective order” was not entered pursuant to the requirements of Rule 26(c) and without any guarantee that

the information obtained was confidential. *See DVD Control Assoc.*, 31 Cal. 4th at 888, 75 P.3d at 19. In this case, however, this Court, after lengthy proceedings, crafted an appropriate protective order that is not subject to unilateral amendment by the parties. The parties are entitled to rely on the Court to protect them from abuses of the discovery system. Such court-sanctioned protective orders have long been sustained against First Amendment challenges. *See Seattle Times*, 467 U.S. at 32.

When *Business Week* later obtained documents in the *P&G* litigation, the parties obtained a temporary restraining order without any supporting evidence presented at a hearing. None of the parties knew how *Business Week* had obtained the documents, *i.e.*, whether *Business Week* was a good-faith, independent recipient of the documents or whether *Business Week* had aided and abetted those who obtained the documents. *P&G*, 78 F.3d at 222. Moreover, the TRO provided no date and time for a hearing. *Id.* Here, on the other hand, the parties have provided the Court at various hearings (many contested) with evidence sufficient to permit the Court to make findings of fact. Moreover, in specific reference to the Temporary Mandatory Injunction, this Court provided an injunction of limited duration and extended the Temporary Mandatory Injunction only after notice to all parties and an opportunity to be heard.

In *P&G*, facts developed later in that case revealed that *Business Week* had in fact obtained judicial documents (that is, documents submitted by P&G to the court in support of an argument for a judicial act, *i.e.* grant leave to amend a complaint) rather than documents merely exchanged in discovery. *Id.* at 222. This is a critical difference as documents actually used by the court in its decision-making process enjoy less protection than documents merely exchanged between the parties in discovery. Because the documents in *P&G* were judicial documents, there was a First Amendment presumption of public access. *See, e.g., Lugosch v. Pyramid Co. of*

*Onodaga*, 435 F.3d 110 (2d Cir. 2006). In contrast, Lilly's stolen documents have not been used by a party to support an argument for a judicial act—they are, therefore, not judicial documents—and there is a presumption *against* public access. See, e.g., *SEC v. TheStreet.com*, 273 F.3d 222 (2d Cir. 2001).

Moreover, in *P&G*, after a two day hearing the court determined that the documents were obtained by third-party publisher without knowledge of the protective order and without deception:

*Business Week's* editor on the story, Zachary Schiller, testified on the basis of his reporter's notes to a tantalizing, off-the-record phone call from an employee in the public relations department of P & G who suggested that some documents that would be of interest to *Business Week* were about to be filed at the courthouse .... Schiller notified several *Business Week* journalists that he was seeking information about the mysterious filing.

While Schiller was away from his office, a New York-based journalist for *Business Week* contacted an acquaintance who was a partner at the New York law firm representing Bankers Trust. Neither the partner (who was not working on the P & G case) nor the journalist (who had not previously been covering the story), appeared to know that the material was under seal. The journalist simply asked for the documents, and the partner obtained copies and gave them to her.

*P&G*, 78 F.3d at 223.

This case stands in stark contrast to *P&G*. Here, Lilly has shown that its confidential documents have been obtained only through the knowing violation of CMO-3 and that, since this discovery, the enjoined parties have worked in concert to exploit that violation and evade this Court's efforts to give effect to its orders.

Aside from these critical distinctions, *P&G* rests on several errors of law that are not controlling in this Circuit. First, in holding that that the district court's injunctive relief violated *Business Week's* First Amendment rights, the Sixth Circuit emphasized that no



legitimate protective order had been entered in that case—the protective order in *P&G* was merely stipulated by the parties and the district court made no findings in relation thereto. Thus, the Supreme Court’s holding *Seattle Times* was not implicated in the Sixth Circuit’s *P&G* decision, and the Court’s commentary on *Seattle Times* is dicta.

Second, the district court in *P&G* apparently prohibited the publication of an article that discussed the documents in question and did not distinguish, as has this Court, between prohibiting the publishing of protected documents and absolutely prohibiting any publication of news, articles, or discussions on the same topic.

Third, the Sixth Circuit assumed, without argument, analysis, or citation, that the injunctive order at issue in *P&G* was a prior restraint. *See P&G*, 78 F.3d at 225. In this case, as noted above, the Temporary Mandatory Injunction is content-neutral and burdens no more speech than is necessary to serve significant government interests. It is therefore not a prior restraint and is permitted by the First Amendment.

Finally, the Sixth Circuit incorrectly held, again without argument, analysis, or citation, that any inquiry into how *Business Week* obtained the documents was irrelevant. *Id.* Contrary to that view, the Supreme Court has held that the First Amendment does not grant a license to violate legal restrictions in order to receive and publish information. Rather, “the truthful information sought to be published must have been lawfully acquired.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *see also Seattle Times, Co.*, 467 U.S. at 37. “The press may not with impunity break and enter an office or dwelling to gather news.” *Cohen*, 501 U.S. at 669. Similarly, Movants may not violate this Court’s carefully crafted protective orders to gather documents. *Seattle Times, Co.*, 467 U.S. at 37. Accordingly, the issue of how documents

are obtained is undoubtedly relevant to the issue of whether the publication of those documents may be restrained. *See id.*

### C. *Seattle Times* And Not *Bartnicki* is Controlling In This Case

In his recently-filed supplemental brief, John Doe now argues that this Court must excuse the repeated violation of its orders because doing so would serve his desire to publish Lilly's documents. (John Doe Supp. Br. for Clarif. Inj. at 7–8.) None of the cases Doe or AHRP cite addresses the situation at bar: an attempt to publish confidential information wrongly acquired through abuse of this Court's discovery processes.

For example, Doe relies on *Bartnicki v. Vopper*, 532 U.S. 514 (2001). However, that case is not on point and it does not call into question the Supreme Court's governing decision, *Seattle Times*.

In *Bartnicki*, the Supreme Court addressed a case where a publisher of information obtained an intercepted phone conversation in a manner lawful in itself but from a source who had obtained it unlawfully. *Id.* at 528. In that circumstance, the Court held that the First Amendment protected the publication of the phone conversation. *Id.* at 535.

*Bartnicki* does not apply to this case for several reasons. First, the Supreme Court noted the "important interests to be considered on *both* sides of the constitutional calculus" in *Bartnicki* and explicitly reserved judgment in cases presenting different factual scenarios, such as the publication of confidential business information. *Id.* at 529. In fact, the Court explicitly reserved judgment whether the outcome would be different in a case involving "disclosures of trade secrets or domestic gossip or other information of purely private concern." *Id.* at 533. Accordingly, under the very terms of *Bartnicki*, its holding does not encompass the publication of Lilly's confidential business documents.

Second, unlike the Supreme Court's decision in *Seattle Times*, *Bartnicki* did not address a situation where the information at issue was only available because it was produced in discovery subject to a preexisting court-issued protective order. In *Bartnicki*, the parties voluntarily communicated the information that was illegally obtained—the government did not order either party to the communication to so communicate. *See Bartnicki*, 532 U.S. at 514. Here, however, the Court's discovery processes have compelled Lilly to communicate with others over its objection. As the Supreme Court stated in *Seattle Times*, this Court, through its discovery processes, has "coerced production of information" that Lilly would otherwise have the right to keep private. *Seattle Times Co.*, 467 at 36. Accordingly, as the Supreme Court has recognized, the government interest in this case is much greater than in *Bartnicki*—by forcing Lilly to disclose information "for the sole purpose of assisting in the preparation and trial, or the settlements of litigated disputes" *id.* at 34, "the government," and this Court in particular, "clearly has a substantial interest in preventing this sort of abuse of its processes," *id.* at 35. Thus, compared to the balance struck in *Bartnicki*, the balancing of interests in this case must take account of Movants' reduced First Amendment interests, this Court's greater interests in protecting litigants and its processes from abuse, and Lilly's greater interest its protecting its property rights. *Seattle Times* and not *Bartnicki* is controlling here.

Finally, as set forth in Lilly's prior filings, (*see Lilly Mem.*, at 1-12, and *Lilly FOF*), Lilly has demonstrated that those persons, organizations, and entities named in each order of this Court have worked in concert to violate this Court's protective order. *Bartnicki* is, therefore, inapplicable to this case even on the terms that Movants assert. *See Bartnicki*, 532 U.S. at 518—25 (emphasizing that the publisher in that case had no role in the unlawful interception of the phone conversations at issue).

At bottom, the First Amendment does not compel this Court to allow Movants to make a mockery of its protective orders. Had Movants sought to lawfully obtain the confidential discovery materials in this case in the first instance, they would have enjoyed no First Amendment right to do so. *See TheStreet.com*, 273 F.3d at 233 (no presumption of public access to confidential discovery materials). Movants now attempt to claim greater rights by virtue of their aiding and abetting of a violation of this Court's orders. Their argument demeans the Court's authority and, if adopted, would undermine confidence in the discovery process.

**D. Lilly Would Suffer Irreparable Harm From Movants' Distribution Of Its Confidential Documents**

Movants' suggestion that Lilly cannot show irreparable harm because the "cat has been let out of the bag" is too clever by half. *See* AHRP Motion at 9. Simply put, Movants have distorted the irreparable harm inquiry in order to shield their own misconduct.

As explained above, the Lilly documents improperly disclosed by Dr. Egilman contain sensitive and confidential business information. And as the Second Circuit has made clear, irreparable harm is presumed when confidential business information is at issue. *See, e.g., Carpetmaster of Latham, Ltd. v. Dupont Flooring Sys., Inc.*, 12 F. Supp. 2d 257, 263 (N.D.N.Y. 1998) (citing *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984)); *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624, 628 (E.D.N.Y. 1996). This presumption stems from the fact that monetary damages often are hard to calculate when a business' confidential information is disclosed, given the difficulty in predicting what future benefit the business would have enjoyed had the protected information not been revealed. *See Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 177 (S.D.N.Y. 2006); *Carpetmaster of Latham, Ltd. v. Dupont Flooring Sys., Inc.*, 12 F. Supp. 2d 257, 263 (N.D.N.Y. 1998) (citing *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984)); *Freedberg v. Landman*, 930 F. Supp. 851, 854

(E.D.N.Y. 1996) (“The conclusion that money damages are inadequate to remedy plaintiffs’ injuries is further reinforced in view of the difficulty in placing a price tag on lost trade secrets or goodwill....”); *see also Gulf & Western Corp. v. Craftique Productions, Inc.*, 523 F. Supp. 603, 607 (S.D.N.Y. 1981) (granting preliminary injunction in breach of contract action because “even in situations where damages are available, irreparable harm may be found if damages are ‘clearly difficult to assess and measure’”) (quoting *Danielson v. Local 275, Laborers Int’l Union of N. Am.*, 479 F.2d 1033, 1037 (2d Cir. 1973)).

It is no answer to suggest that injunctive relief is unavailable here because the documents improperly disclosed by Dr. Egilman have been mentioned in the *New York Times* or posted on obscure Internet websites by Movants and others who hoped to achieve broader dissemination in violation of this Court’s orders. As the Second Circuit explained in *A.H. Emery Co. v. Marcan Products Corp.*, 389 F.2d 11, 16 (2d Cir. 1968):

In any context “secrecy” is a relative term and, as used in the law of trade secrets, it is not an absolute but an equitable concept. The rule is only that a “substantial element of secrecy must exist” and this means so much that “except by the use of improper means, there would be difficulty in acquiring the information.”

Lilly’s documents meet this test. First, to the extent that any information in the Lilly documents has been revealed to a few individuals, such disclosures have occurred through the flagrant violation of CMO-3’s protective order. Thus, it would be contrary to “equitable concept[s]” to allow Movants to perpetuate and broaden the scope of injury by allowing further dissemination of Lilly’s confidential and proprietary materials. *Id.*; *see also Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475-76 (1974); *PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004) (“Courts apply the maxim requiring clean hands where the party asking for the invocation of an equitable doctrine has committed some unconscionable act that is directly related to the subject matter in litigation and has injured the party attempting to invoke

the doctrine. The Supreme Court, explaining the rationale behind the doctrine of unclean hands, has stated that “[t]he equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity.”) (internal quotation marks and citation omitted, bracket in *PenneCom*, quoting *Bein v. Heath*, 47 U.S. (6 How.) 228, 247 (1848)).

Second, simply because documents may have been discussed in a general way in newspaper articles or posted on an obscure Internet website does not mean that the secrecy of Lilly’s protected materials has been destroyed. In the context of confidential business information, the critical question is not whether the information is an absolute secret, but rather whether the information has been disseminated so widely that it is a matter of “public knowledge or of a general knowledge in the trade or business.” *Kewanee Oil*, 416 U.S. at 475; see *Estee Lauder*, 430 F. Supp. 2d at 175. See also *Estee Lauder*, 430 F. Supp. 2d at 175. Approximately 500 documents were wrongfully disclosed by Dr. Egilman, yet only a handful of these documents were discussed in the *New York Times* articles and none of the Lilly documents were reprinted in full. In addition, even though the protected materials may have been available on the Internet for a period of time, the websites where these materials were posted appear to have been chosen precisely because of their difficulty to locate and access. Moreover, once it became aware of Dr. Egilman’s breach of the CMO-3 protective order, Lilly took swift and immediate action in obtaining injunctive relief from the Court, which included removal of the protected documents from the offending websites and return of the protected documents to the Court.

Indeed, Movants and others who have violated this Court’s orders have complained to this Court about Lilly’s vigorous and successful efforts to stop any further

violations. Thus, by taking prompt remedial measures, Lilly preserved the confidentiality of its proprietary materials. In fact, Movants impliedly concede that Lilly's documents are still confidential when they assert to this Court that they should be allowed to inform the public of the still-confidential information. *See AHRP Br. at 4* ("Mr. Cohen has reviewed the Documents and believes, based upon his review of them, 'that ... the public must have access to in order to better understand how the risks and likely adverse effects of medications prescribed to them are not always fully disclosed'") (quoting Affidavit of David Cohen at ¶ 13)); 5 ("Ms. Sharav also believes, based upon her experience, that the Documents constitute invaluable primary sources to which the public must have access.... In Ms. Sharav's view, it is time for the public to be able to see the Documents in black and white.").

The cases cited by Movants in no way establish that injunctive relief should be denied because "no further 'harm' will come to Lilly." (*AHRP Motion at 9 n.26*). Rather, these cases merely recite the familiar test for preliminary injunctive relief: "In order to obtain a preliminary injunction the plaintiffs must show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party seeking preliminary relief." *Suthers v. Amgen Inc.*, 372 F. Supp. 2d 416, 423, 429 (S.D.N.Y. 2005) (denying preliminary injunction based on evaluation of likelihood of success on the merits and declining to rule on the "hotly contested" issue of irreparable harm); *accord Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *cf. Capital Ventures Int'l v. Republic of Argentina*, 443 F.3d 214, 219 (2d Cir. 2006). Lilly has met that test and, as this Court has previously determined, is entitled to injunctive relief to maintain the confidentiality of the documents it has produced in good faith under the protections of this Court's orders.

**E. The Public Interest Supports Maintaining The Integrity And Reliability Of This Court's Discovery Process**

Movants assert that the public interest supports their attempts to defeat the intent of this Court's protective orders, but in fact the Second Circuit has repeatedly recognized that full and effective enforcement of protective orders is essential to the public interest. Protective orders are intended "to 'secure the just, speedy, and inexpensive determination' of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant." *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979). Unless protective orders are "fully and fairly enforceable," persons relying upon such orders will be inhibited from providing essential documents and testimony in civil litigation, "thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences." *Id.* Further, "if previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future." *The Street.com*, 273 F.3d at 230. Thus, parties that produce documents under a protective order are entitled to rely upon its enforceability.

For these reasons, this Court should not modify the CMO-3 protective order to allow Movants to retain and distribute documents that Lilly produced in good faith. To do so would "unfairly disturb the legitimate expectations of litigants." *Id.* Indeed, in the Second Circuit, "[w]here there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) 'absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.'" *Id.* at 229 (quoting *Martindell*, 594 F.2d at 296); *see also Palmieri v. State of New York*, 779 F.2d 861, 862 (2d Cir. 1985) (finding that the parties' reasonable reliance on the protective order in engaging in settlement negotiations rendered the modification burden heavier).



Movants have failed to show that the Court acted improvidently in extending the protective order. Indeed, as the plaintiffs to the litigation against Lilly readily agree, this Court's orders have facilitated the production of more than fifteen million pages of documents relating to thousands of separate claims. That orderly document production has allowed for the expeditious litigation of the allegations against Lilly. As this Court knows, the Court's processes have allowed the parties to resolve thousands of cases.

Further, Movants can demonstrate neither an extraordinary circumstance nor a compelling need for Lilly's documents. The Second Circuit has made clear that "extraordinary" circumstances and "compelling" needs extend far beyond Movants' generalized assertions about their alleged right to inform the public. For example, Movants assert a personal interest in using Lilly's commercially sensitive documents to "undertake analysis and dissemination of some information contained in the Documents, in the form of articles and other publications destined for professional or popular audiences." (See *Aff. of David Cohen*, ¶ 17.) In *Martindell*, the Second Circuit denied the government's request for access to pretrial deposition transcripts—taken in a civil action to which it was not a party—for the purposes of assisting a criminal investigation into the same matters underlying the civil action. It held that, despite "the public interest in obtaining all relevant evidence required for law enforcement purposes," the protective order's encouragement of full disclosure outweighed the government's interest. *Martindell*, 594 F.2d at 295–96.

In this case, Movants desire to privately disseminate Lilly's documents is certainly less compelling than the government's interest in obtaining information for criminal law enforcement purposes in *Martindell*. In fact, despite Movants' assertions to the contrary, the Second Circuit has clarified that there is no public right to access or disseminate materials

produced during the initial stages of discovery. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). Whatever presumption of public access exists as to documents filed with the Court as part of the evidentiary record for motions or trial, “[d]ocuments 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.” *Id.* (emphasis added) (internal quotations, citations, and alteration omitted).

Simply put, the Movants’ interest does not justify undermining the integrity of the judicial process and upsetting the legitimate expectations of the litigants who acted in reliance on this Court’s orders. Accordingly, the Court should deny the Movants’ motion to modify the CMO-3 protective order.

**F. Doe Does Not Have The Right To Challenge This Court’s Temporary Mandatory Injunction Without Disclosing His Identity And Factual Involvement**

On a closely related point, Doe should not be permitted to maintain his anonymity and assert unsupported facts by ignoring Lilly’s offer to stipulate to an order that will keep his identity under seal. There is a “customary and constitutionally-embedded presumption of openness in judicial proceedings” that mandates that parties to a proceeding provide their identification. *EW v. New York Blood Center*, 213 F.R.D. 108, 110 (E.D.N.Y. 2003) (quoting *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992)). By seeking to intervene in these proceedings, Doe has made himself a party to them, and cannot maintain his anonymity absent a “substantial privacy right” that outweighs the constitutional presumption of openness between the parties and the Court. *Id.*

Doe's request to proceed anonymously is without merit. Any legitimate interest that Doe has in proceeding anonymously can be adequately protected by keeping his name under seal. *See Roe v. Aware Woman Center for Choice, Inc.*, 253 F.3d 678, 687 (11th Cir. 2001) (finding disclosure of anonymous plaintiff's "name to the defendants for discovery purposes on condition that they do not disclose it to the general public" to be "a reasonable way to reconcile the competing interests"). Doe offers no argument to the contrary, but simply ignores Lilly's offer to stipulate to an order that will keep his identity under seal. Accordingly, Doe's request to proceed anonymously appears intended only to frustrate the Court's and Lilly's ability to discover the true extent to which Doe is participating in a concerted effort to aid and abet violations of the Court's orders. *See New York v. Operation Rescue National*, 80 F.3d 64, 71 (2d Cir. 1996) (recognizing the difficulties faced by a trier of fact where "similarly constituted groups of individuals move fluidly between multiple unincorporated associations that share the same basic leadership and goals"). Moreover, it is Doe himself, not Lilly, who has gratuitously included references to his mental health history in court filings. Having voluntarily announced his mental health history in his own court filings, it is pure bootstrapping for Doe to claim that he must be permitted to proceed anonymously to protect his health history from being discovered.

Unlike Doe's interest in remaining anonymous, which can be easily addressed by keeping his identity under seal, the interests of the parties and the Court in ensuring that judicial decisions are based on a reliable factual record cannot be satisfied unless Doe's identity is known. *See EW*, 213 F.R.D. at 110. The *entire* premise of Doe's legal argument rests on the truth of his counsel's unverified factual assertions that Doe, a poster on the Wiki website, is not involved in any concerted effort to aid or abet violations of this Court's orders and that Doe's actions are completely independent of the actions of the individuals and entities mentioned by

name in the Temporary Mandatory Injunction. But as detailed in Lilly's Proposed Findings of Fact, Lilly has presented substantial evidence of coordination and concerted action by David Oaks, "Rafael," and other wiki posters to aid and abet violations of this Court's orders and to do so in a manner that provides anonymity for the violators. Doe has not submitted so much as an affidavit and expects the Court and Lilly to simply take his counsel's unverified factual assertions on faith, both that he actually exists and that he has no connection to those named in the Temporary Mandatory Injunction.

Doe's legal argument collapses entirely if he has been engaged in concerted efforts to aid the violation of this Court's orders. The collateral bar doctrine makes clear that Movants cannot aid and abet the violation of this Court's orders and then (as they have done here) seek a post-violation modification of those orders. See *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995) ("a party may not challenge a district court's order by violating it."). Instead, parties who seek to modify a court's order must proceed in good faith by seeking to vacate or modify the order *before* it is violated. As Movants failed to do either prior to becoming party to violations of the order, Movants may not challenge the order "unless it was transparently invalid or exceeded the district court's jurisdiction." *Id.* See also *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) (stating that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."); *Minpeco S.A. v. Commodity Servs., Inc.*, 832 F.2d 739 (2d Cir. 1987) (noting that court-imposed protective orders are enforceable against parties and non-parties alike). In light of the importance of Doe's involvement with the others who have attempted to use the Wiki website to cloak their violations of this Court's orders, Doe's claim that he "has not

asked this Court to make any factual findings regarding his (or anyone else's) relationship to any individuals bound by CMO-3" is puzzling. (John Doe Supp. Br. for Clarif. Inj. at 5).

Nor does Doe's mental health history provide any basis for allowing him to proceed anonymously. Whether Doe has a history of psychiatric misdiagnosis is irrelevant to his legal arguments and thus there is no reason why his mental health history will be publicized by revealing his identity. Lilly is not opposed to keeping Doe's identity under seal. Rather, Doe's concern about the importance of confidentiality for his sensitive information is mirrored by Lilly and the thousands of mental health patients who have submitted to discovery in this case based on their faith in the protection of this Court's orders. In fact, Doe's request for anonymity proves that this Court must give full effect to its protective orders to facilitate the exchange of information that is essential to litigation. The difference between Lilly and the thousands of mental health patients involved in this case (on the one hand) and Doe (on the other) is that the parties to this case have been willing to exchange the information necessary for litigation while Doe insists on withholding such information for fear the Court's confidentiality will not be effective to protect him. There could be no more eloquent testimony why faith in Court-imposed confidentiality orders must be maintained. *See Seattle Times Co.*, 467 at 35–37.

**CONCLUSION**

For the foregoing reasons, the Court should deny the John Doe Motion and the AHRP Motion and should enforce the numerous orders of this Court protecting the confidentiality of Lilly's documents.

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Respectfully submitted,



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