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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: ZYPREXA PRODUCTS LIABILITY LITIGATION	No. 04-MDL-01596 (JBW) NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR STAY PENDING APPEAL

This Notice of Motion and Motion for Reconsideration or, in the alternative, for Stay Pending Appeal, is brought by John Doe, who is not a party to the above-captioned action. Doe contributes to the website located at http://zyprexa.pbwiki.com (the "Wiki").[1] This Court's January 4, 2007, Order for Temporary Mandatory Injunction (the "January 4 Order") names the Wiki as one of the entities enjoined from publishing "documents produced by Eli Lilly and Company" and from "posting information to…facilitate dissemination of these documents."

Doe submits this short motion pursuant to the oral invitation of the Court to join in the hearing set by this Court for January 8, 2007, at 2 p.m. EST regarding the January 4 Order. Doe

[1] While he is not a party to this action, John Doe himself has personal experience with psychiatric misdiagnosis and, accordingly, would prefer to remain anonymous. The right to speak anonymously is clearly protected by the First Amendment. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). By this motion, Doe hereby seeks leave to remain anonymous for purposes of vindicating his rights as a nonparty. *See Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684-685 (11th Cir. 2001) (recognizing right to litigate anonymously where private information is at stake).

was not served with notice nor otherwise informed of this Court's proceedings prior to the issuance of the January 4 Order.

Doe respectfully requests that the Court reconsider and clarify its January 4 Order for two reasons: (1) as applied to nonparty Doe, the Order is beyond the Court's injunctive authority; and (2) as applied to nonparty Doe, the Order constitutes an unconstitutional prior restraint on speech in violation of the First Amendment.

Doe therefore asks the Court to clarify that its January 4 Order does not bind nonparties such as Doe who are not legally identified with, nor acting in concert with, a party or any other person bound by this Court's Case Management Order No. 3 ("CMO-3"). In the alternative, Doe requests that the Court stay its January 4 Order pending appellate review.

BACKGROUND

John Doe is an individual who has an interest in mental health care issues. In late December 2006, he became aware of the existence of the Wiki, a website located at http://zyprexa.pbwiki.com, where individuals interested in the controversy surrounding Zyprexa could collaboratively publish information relating to it. The Wiki is noncommercial; Doe and the other contributors volunteer their time and effort as citizen-journalists. In order to participate in the public debate regarding Zyprexa, Doe has published information on the Wiki, including links to other websites purporting to offer copies of internal Eli Lilly documents relating to the subject of the articles that appeared recently in *The New York Times* (the "Lilly Documents").

The Wiki is an example of a new, flourishing, collaborative publishing medium on the Internet. Unlike typical websites, a "wiki" is a website that permits visitors themselves to easily add, remove, and otherwise revise the content of the website on an ongoing basis.[2] Wikis thus

[2] For more on the history and characteristics of wikis, *see* Wiki, Wikipedia,

foster dynamic, collaborative authorship and publication of information to a global audience on the World Wide Web. The Wiki that Doe contributed to here is one of more than 100,000 wikis that are hosted by an online service known as "pbwiki," which allows anyone to start and edit a wiki for free.[3]

Thanks to the work of a variety of contributors, including Doe, the Wiki is today one of the most comprehensive and up-to-date public sources of information regarding the controversy surrounding Zyprexa. Contributors to the Wiki have never posted any copies of the Lilly Documents on it, but the Wiki has in the past included links to other websites and Internet sources that purported to have copies available for download. On December 29, 2006, an attorney for Eli Lilly sent an email to pbwiki demanding the immediate deletion of the Wiki, citing this Court's prior orders relating to the Lilly Documents, none of which mentioned the Wiki.[4] Since becoming aware of this Court's January 4 Order, contributors to the Wiki have amended it to remove all links to the Lilly Documents, as well as other information that might "facilitate dissemination of these documents." The Wiki currently remains available in this edited state.[5]

<http://en.wikipedia.org/wiki/Wiki>.

[3] Just as anyone interested in starting a "blog" can do so by visiting Google's Blogger.com, so too anyone interested in starting a wiki can do so by visiting <http://pbwiki.com>.

[4] The email was dated December 29, 2006, sent by Sean P. Faheys, Esq., of Pepper Hamilton LLP, and read in its entirety as follows: "The pbwiki listed above is facilitating the unlawful sharing of copyright protected material, and breach of a Federal Court order. Please shut it down immediately, and delete all cached material." The same day, the email was forwarded by pbwiki personnel to Doe.

[5] Although changing the content of the Wiki requires the use of a password, the password has been made available in a variety of public locations on the Internet. Accordingly, Doe is only one of an unknown number of individual contributors to the Wiki. Consequently, there is no way that Doe (or any other contributor) can guarantee that links do not reappear on the Wiki. Nevertheless, in an effort to comply with the Court's January 4 Order, Doe has done what he can to remove links on the Wiki to the Lilly Documents as he becomes aware of them.

Doe has no connection to any party in this litigation, nor has he, to the best of his knowledge, had any communication with any person who is subject to CMO-3. As an interested member of the public, however, and in light of the importance of the revelations contained in the recent *New York Times* articles regarding the Lilly Documents, Doe believes continued public access to and analysis of the Lilly Documents is vital to a full public understanding of the medical, ethical, and health issues relating to Zyprexa. Accordingly, he would like to continue to post links to the Lilly Documents to the Wiki, in order to further contribute to and participate in the public discussion of these important issues.

The information that Doe desires to publish on the Wiki (including links to sites where the Lilly Documents can be obtained) plainly relate to a matter of overriding public concern. According to *The New York Times,* the Lilly Documents reveal a pattern of unlawful activities by Eli Lilly that may have left the 20 million individuals who have taken Zyprexa with incomplete information regarding the side effects of the drug. This matter is also an urgent one: the thousands of doctors and patients that are making daily decisions regarding the prescribing and use of Zyprexa stand to benefit from the information Doe would like to post to the Wiki. In addition, the national debate regarding Zyprexa is happening in the press right now, making this information particularly time-sensitive.

ARGUMENT

I. The Court Lacks the Authority to Bind Nonparties Acting Independently of Those Who are Subject to this Court's Protective Orders.

Rule 65(d) of the Federal Rules of Civil Procedure provides:

> Every order granting an injunction and every restraining order…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.

As the Second Circuit has recognized, "Rule 65(d) codifies the well-established principle that, in exercising its equitable powers, a court 'cannot lawfully enjoin the world at large.'" *People of N.Y. v. Operation Rescue Nat'l,* 80 F.3d 64, 70 (2d Cir. 1996) (quoting J. Learned Hand in *Alemite Mfring Corp. v. Staff,* 42 F.2d 832, 832 (2d Cir. 1930)); *accord Regal Knitwear Co. v. N.L.R.B.,* 324 U.S. 9, 14 (1945) (recognizing F.R.C.P. 65(d) as an expression of common law doctrine defining scope of a court's equitable powers).

Accordingly, in order for a nonparty to be bound by an injunction, "that entity must either aid and abet the defendant or be legally identified with it." *Paramount Pictures Corp. v. Carol Publishing Group, Inc.,* 25 F.Supp.2d 372, 374 (S.D.N.Y. 1998); *accord Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 112 (1969) ("[A] nonparty with notice cannot be held in contempt until shown to be in concert or participation."); *People of N.Y. v. Operation Rescue,* 42 F.3d at 70 (injunctions reach a nonparty only where the nonparty abets or is legally identified with a party); *Vuitton et Fils S.A. v. Carousel Handbags,* 592 F.2d 126, 129 (2d Cir. 1979) (refusing to enjoin nonparty until "acting in concert" is proven).

In other words, a court may not enjoin nonparties who are acting independently. In *Paramount Pictures v. Carol Publishing*, 25 F.Supp.2d 372 (S.D.N.Y. 1998), for example, a copyright owner obtained an injunction against an infringer barring the further distribution of a book entitled *The Joy of Trek.* When asked to extend the injunction to nonparty distributors and retailers who had already received copies of the book from the defendant, the court refused, holding that its injunctive powers could not reach "independent action taken by nonparties on their own behalf." *Id.* at 375. In reaching this conclusion, the court noted that "[b]ecause a court's power to enjoin is limited to the conduct of a party, it is the relationship between the party enjoined and the nonparty that determines the permissible scope of an injunction." *Id.* at

374; *accord Alemite Mfring,* 42 F.2d at 833 ("Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, …but what it has the power to forbid, the act of a party."). The court reached this conclusion despite the risk that these independent actions might result in further infringements of the copyright owner's rights. *Id.* at 375-76.

In light of these authorities, this Court's January 4 Order sweeps too broadly when it purports to enjoin nonparties, including the Wiki and its contributors, from disseminating or "facilitat[ing] dissemination" of the Lilly Documents. As a contributor to the Wiki, Doe is acting entirely independently, without any relationship to any party in this litigation or any person bound by CMO-3. Neither Eli Lilly nor any other party to the litigation has produced any evidence suggesting otherwise. *See People of N.Y. v. Operation Rescue,* 80 F.3d at 70 (burden of showing that a nonparty is within the scope of an injunction lies with party seeking enforcement). Accordingly, this Court may not enjoin Doe's publication on the Wiki of information relating to the Lilly Documents, including information intended to facilitate dissemination of the documents.

II. The Court's January 4 Order Constitutes an Unconstitutional Prior Restraint on Speech in Violation of the First Amendment.

The Court's January 4 Order is additionally improper because, as drafted and as applied to Doe, it is a prior restraint on speech in violation of the First Amendment. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). Accordingly, any prior restraint "bears a heavy presumption against its constitutional validity." *U.S. v. Quattrone,* 402 F.3d 304, 310 (2d Cir. 2005). Furthermore, "[a] prior restraint is not constitutionally inoffensive merely because it is temporary." *Id.*

In *Proctor & Gamble Co. v. Bankers Trust Co.,* 78 F.3d 219 (6th Cir. 1996), the court addressed a situation very nearly identical to the situation that now faces the Court. In that case, *Business Week*, which was not a party to the underlying civil dispute between two corporate litigants, obtained documents from the litigation that were subject to a protective order. *Id.* at 222. Without affording *Business Week* prior notice or an opportunity to be heard, the district court issued a series of temporary injunctions forbidding the magazine from publishing the documents. *Id.* at 222-23. Subsequently, the district court held a hearing inquiring into the manner in which *Business Week* came into possession of the documents and issued a permanent injunction against publication. *Id.*

On appeal, the Sixth Circuit concluded that all of the injunctions were impermissible prior restraints on pure speech in violation of the First Amendment. *Id.* at 225-27. The court held that a party seeking even a temporary injunction against pure speech must establish that "publication [would] threaten an interest more fundamental than the First Amendment itself." *Id.* at 227. While admitting that restrictions on the dissemination of information obtained in discovery may be permissible against parties, *see Seattle Times v. Rhinehart,* 467 U.S. 20 (1984), the court held that similar restrictions on independent nonparties is impermissible, *see Proctor & Gamble,* 78 F.3d at 225. Moreover, the court noted that although brief injunctions to facilitate judicial deliberation are generally proper, "when that approach results in a prior restraint on pure speech by the press it is not allowed." *Id.* at 226; *accord In re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986). Also deemed impermissible were injunctions designed to enable inquiry into how the documents were obtained or whether *Business Week* personnel were aware of the protective order: "[w]hile these might be appropriate lines of inquiry for a contempt proceeding or criminal prosecution, they are not appropriate bases for issuing a prior restraint."

Id. at 225. In addition, the issuance of the original injunction *ex parte* was error: "there is no place for such orders in the First Amendment realm where no showing is made that it is impossible to serve or notify the opposing parties and give them an opportunity to participate." *Id.* at 226 (internal quotation omitted).

The circumstance presented here is very nearly on all fours with *Proctor & Gamble*. The Court's January 4 Order, issued *ex parte* without notice to Doe, purports to forbid him from publishing the Lilly Documents or "posting information…to facilitate dissemination of these documents." This prohibition targets pure speech based on the content of the speech, and thus constitutes a prior restraint. *See U.S. v. Quattrone,* 402 F.3d at 309 (defining prior restraint as a "judicial order that suppresses speech…on the basis of the speech's content and in advance of its actual expression."). Neither Eli Lilly nor any other party has established that publication of the enjoined material would imperil "an interest more fundamental than the First Amendment itself." *Proctor & Gamble,* 78 F.3d at 227.

That the medium of expression here is the Internet does not change the analysis. *See Ford Motor Co. v. Lane,* 67 F.Supp.2d 745 (E.D. Mich. 1999) (applying *Proctor & Gamble* to reject prior restraint on website). Wikis are a part of the Internet's "vast platform from which to address and hear from a world wide audience of millions of readers, viewers, researchers and buyers." *ACLU v. Reno,* 521 U.S. 844, 852 (1997); *see also id.* at 870 (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."). Although the Wiki is not a commercial news outlet, nor Doe a professional journalist, these facts also do not change the analysis. *See Bridge C.A.T. Scan Assoc. v. Technicare Corp.,* 710 F.2d 940, 946 (2d Cir. 1983) ("[T]he First Amendment,…in addition to freedom of the press, also guarantees freedom of speech."); *Ford v. Lane,* 67 F.Supp.2d at 753 ("[W]hile the reach and

power of the Internet raises serious legal implications, nothing in our jurisprudence suggests that the First Amendment is circumscribed by the size of the publisher or his audience.").

Whether discussion, publication, or dissemination of the Lilly Documents may implicate other legal rights enjoyed by Eli Lilly is also irrelevant here. First, because Eli Lilly has not asserted any such rights in the underlying action, this Court has no basis for protecting those interests by issuing orders against nonparties. *See Bridge C.A.T. Scan,* 710 F.2d at 946 ("[A]ny issue as to trade secrets was completely collateral to the underlying dispute, and the court had no basis for granting [injunctive] relief as an incident to any rights asserted in the action."); *Paramount Pictures,* 25 F.Supp.2d at 375-76 (refusing to expand injunction to reach nonparties despite likelihood of copyright infringement). Second, a party's sensitivities regarding its trade secrets and other commercial interests do not outweigh the First Amendment's abhorrence of prior restraints on pure speech. *See Proctor & Gamble,* 78 F.3d at 225 ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as a grounds for imposing a prior restraint."); *Ford v. Lane,* 67 F.Supp.2d at 750 (rejecting prior restraint against a party, even where likelihood of trade secret misappropriation had been shown).

In light of the overriding public concern in the information that Doe desires to publish on the Wiki (including links to sites where the Lilly Documents can be obtained), and the fact that the national debate on Zyprexa is taking place in the press right now, *see In re Providence Journal,* 820 F.2d at 1351 ("News is a constantly changing and dynamic quantity. Today's news will often be tomorrow's history."), the issuance of even a temporary prior restraint against Doe gravely offends the fundamental purposes of the First Amendment.

III. The Court Should Clarify the Scope of Its January 4 Order.

In light of the preceding arguments, Doe respectfully asks that the Court clarify the scope of its January 4 Order, *see Paramount Pictures,* 25 F.Supp.2d at 374 ("It is undoubtedly proper for a district court to issue an order clarifying the scope of an injunction…."), by striking "zyprexa.pbwiki.com" from its January 4 Order.[6] This would lift the prior restraint against Doe, while leaving intact the restriction on persons subject to CMO-3, who are already prohibited from disseminating the Lilly Documents on the Wiki or in any other medium.

Even with this clarification, Doe remains concerned that Eli Lilly will use this Court's Order in its efforts improperly to censor the Lilly Documents off the Internet. As mentioned above, counsel for Eli Lilly had—prior to the January 4 Order—already sent an email to pbwiki demanding complete deletion of the Wiki. In order to forestall this censorial misuse of this Court's orders in the future, Doe respectfully asks this Court to add the following clarification to its January 4 Order:

> "Notwithstanding the foregoing, this Order only binds nonparties who have notice of this Order and (a) are legally identified with a party or person directly bound by CMO-3; or (b) are in active concert with, participating with, or aiding and abetting a party or person directly bound by CMO-3. Nothing in this Order restrains independent actions taken by nonparties on their own behalf."

This additional language simply restates the outer legal limit of this Court's authority, and may help dispel any improper chilling effect that the Order may have when delivered to third parties (such as pbwiki.com).

[6] The preceding arguments would appear to apply with equal force to the other 4 websites named in the January 4 Order to the extent they are not acting in concert with, or legally identified with, a party bound by CMO-3. The undersigned counsel does not represent any other individual or entity mentioned in the January 4 Order, and thus cannot presume to speak on their behalf. Nevertheless, if the Court adopts the clarification suggested herein, the changes should vindicate the free speech rights of all those named in the January 4 Order.

Finally, Doe respectfully requests that the Court add the following additional language to its January 4 Order:

> "In addition, Eli Lilly is hereby enjoined from representing to any third party that this Order prohibits anyone other than those enjoined above from disseminating any documents produced by the Eli Lilly and Company."

This language is necessary to prevent Eli Lilly and its counsel from misusing this Court's Order to chill protected speech by invoking the Order in cease-and-desist letters sent to individuals and intermediaries. As described above, Eli Lilly has already shown a willingness to do just that.[7] The Court should not permit its Orders to be misused in this manner. The proposed additional language is intended to afford the Court contempt power over Eli Lilly should it continue to do so.

Finally, if the Court denies this request for reconsideration and clarification of its January 4 Order, Doe respectfully requests that the Court stay the order as applied to any nonparty not legally identified with, acting in concert with, in participation with, or aiding and abetting, a person bound by CMO-3 pending appellate review of the Order.

[7] Eli Lilly is, of course, entitled to send cease-and-desist notices invoking other sources of legal authority, subject to applicable legal limits. *See Online Policy Group v. Diebold, Inc.,* 337 F.Supp.2d 1195 (N.D. Cal. 2004) (copyright owner not entitled to send notices invoking the DMCA where activity clearly qualifies as a fair use).

CONCLUSION

For the reasons above, Doe asks that the Court reconsider and clarify its January 4 Order or, in the alternative, stay its Order pending appellate review.

Date: January 9, 2007

Respectfully submitted,

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