UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE ZYPREXA LITIGATION, No. 07 Civ. 0504 (JBW)

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MEMORANDUM OF LAW ON BEHALF OF DAVID EGILMAN, M.D., M.P.H., IN OPPOSITION TO ELI LILLY AND COMPANY'S JANUARY 31, 2007, MEMORANDUM OF POINTS AND AUTHORITIES

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Dr. David Egilman in response to petitioner Eli Lilly and Company's ("Eli Lilly" or "petitioner") memorandum of law in support of its request to modify and extend the Court's mandatory injunction entered January 3, 2007. As Eli Lilly concedes, and as has been noted by this Court, Dr. Egilman is not a party to the instant proceedings, nor is he a subject of petitioner's request for a mandatory injunction. (See Petitioner's Proposed Order for Mandatory Injunction .) Indeed, although Eli Lilly has threatened for more than a month to file charges of contempt against Dr. Egilman, no such charges have been forthcoming. Instead, Eli Lilly has mounted yet another attempt to erode Dr. Egilman's due process rights by asking this Court to prematurely decide issues of fact central to its anticipated contempt motion and irrelevant to its request for an injunction.[1] Specifically, in its papers currently before the Court, Eli Lilly requests that this Court make certain factual findings and legal conclusions which will inevitably prejudice Dr. Egilman's defense against the threatened contempt motion. For several reasons, petitioner's request should be denied.

There are four areas implicated by Eli Lilly's brief which, if decided in petitioner's favor, will have the effect of seriously prejudicing Dr. Egilman's ability to defend against a future contempt motion: (1) the request that the Court find that Dr. Egilman violated CMO-3 when he produced documents to Jim Gottstein in response to Mr. Gottstein's subpoena dated December 6, 2006; (2) Eli Lilly's contention that it acted in good faith when it designated every single one of the millions of documents produced in this matter as "confidential" and subject to the protective order at issue in this case, CMO-3; (3) petitioner request that the Court make certain findings of

[1] We have previously detailed Eli Lilly's prior attempts to use proceedings to which Dr. Egilman was not a party to bootstrap a finding of contempt against our client. (See January 16, 2007, Letter from Alexander A. Reinert to the Court, at 3-4; December 28, 2006, Letter from Alexander A. Reinert to the Court, at 3-4.)

fact regarding Dr. Egilman's actions and intentions which are not supported by admissible evidence and which have no bearing on petitioner's request for an injunction; and (4) Eli Lilly's request that the Court draw adverse factual inferences based on Dr. Egilman's invocation of his right to silence. Because neither the relevant law nor the admissible evidence supports Eli Lilly's premature requests, Dr. Egilman respectfully requests that the Court make no legal or factual findings which relate to Eli Lilly's anticipated motion for contempt against Dr. Egilman.

ARGUMENT

I. ELI LILLY HAS FAILED TO ESTABLISH THAT DR. EGILMAN ACTED IN CONTEMPT OF CMO-3

Eli Lilly asks this Court to adopt several factual findings to the effect that Dr. Egilman violated CMO-3 "in [c]oncert with [o]thers." (Eli Lilly And Co.'s Mem. Of Points And Authorities Concerning Its Request To Modify And Extend The Court's January 3, 2007 Temporary Mandatory Injunction ("Lilly Br.") at 4.) Indeed, Eli Lilly asks this court to find, without factual support, that Dr. Egilman "selectively leaked" documents to affect settlement discussions and "prejudice Lilly's right to a fair trial," (Proposed Revised Findings of Fact ("Proposed Findings") ¶¶ 18, 19), that Dr. Egilman agreed with Alex Berenson "on a scheme to bypass CMO-3 and get the protected documents to the *New York Times*," (id. ¶ 24), and that "Dr. Egilman had violated CMO-3 by sending Mr. Gottstein documents that he had received pursuant to the confidentiality provisions of CMO-3" (id. ¶ 42).[2] While petitioner does not explicitly ask this Court to find that Dr. Egilman acted in contempt of CMO-3, if the Court adopts Eli Lilly's

[2] One of the principal grounds for Eli Lilly's factual findings with regard to Dr. Egilman is his assertion of his Fifth Amendment right to silence. (See Proposed Findings ¶¶ 16-22, 27-28, 37 & n.1; Lilly Br. 4 n.3.) Unfortunately for petitioner, as detailed below, Dr. Egilman's assertion of his right to silence in this context does not

factual findings, it is hard to imagine what additional facts petitioner would present in support of its anticipated contempt motion. For several reasons, petitioner's request should be denied.

A. Eli Lilly Fails to Address the Standard of Proof for Establishing Contempt, and Accompanying Procedural Protections

As this Court is aware, any party seeking to establish contempt bears a "heavy" burden. See Air-Products and Chemicals, Inc. v. Inter-Chemicals, Ltd., No. 03 Civ. 6140, 2005 WL 196543, *3 (E.D. Pa. Jan. 27, 2005); cf. Perez v. Danbury Hosp., 347 F.3d 419, 423 (2d Cir. 2003) (district court's contempt power is "narrowly circumscribed," necessitating a more "exacting" appellate review than other discretionary decisions); see also Jan. 17, 2007 Tr., at 246 (noting that contempt is a "quagmire"). To establish civil contempt, petitioner bears the burden of presenting "clear and convincing" evidence that Dr. Egilman has violated a "clear and unambiguous" judicial order. Fonar Corp. v. Deccaid Servs., Inc., 983 F.2d 427, 429 (2d Cir. 1993); Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114, 115 (2d Cir.1988) (explaining that "[n]o one may be held in contempt for violating a court order unless the order is clear and specific and leaves no uncertainty in the minds of those to whom it is addressed"); Littlejohn v. BIC Corp., 851 F.2d 673, 683-84 (3d Cir. 1988); Lesco v. Masone, No. 05 Civ. 3207, 2006 WL 2166862, *5 (E.D.N.Y. July 27, 2006). To establish criminal contempt, which results in the imposition of punitive sanctions,[3] Eli Lilly must establish beyond a reasonable doubt that Dr. Egilman violated a similarly specific judicial order. Mackler Productions, Inc. v. Cohen, 225 F.3d 136, 142 (2d Cir. 2000); United States v. NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993) (requiring willful violation of specific order).

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give Lilly free rein to imagine a set of facts which are "not inconsistent," (Lilly Br. 4 n.3) with evidence which has been submitted in this proceeding. See infra Part III.B.

[3] To be considered a "criminal" contempt proceeding, it is not necessary that a Court impose restrictions on the contemnor's liberty, such as jail or prison time. Indeed, fines as little as $1000 have been considered sufficient

Because of the serious nature of contempt charges, certain procedural protections must be satisfied prior to issuing a judgment of contempt. In civil contempt proceedings, the alleged contemnor is entitled to notice of the grounds for the contempt and an opportunity to be heard, but is not obliged to present any evidence should the movant fail in establishing any of the three elements of contempt. Perez, 347 F.3d at 423 (movant has burden of proof); Electrical Workers Pension Trust Fund v. Gary, 340 F.3d 373, 379 (6th Cir. 2003) (burden of proof and production rests with movant); see generally International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-34 (1994) (discussing difference in protections provided for criminal versus civil contempt). In the criminal contempt context, even more protections apply, including "the right to a public trial, the assistance of counsel, the presumption of innocence, the privilege against self-incrimination, and the requirement of proof beyond a reasonable doubt." Mackler Productions, Inc. v. Cohen, 225 F.3d 136, 142 (2d Cir. 2000); see also Bloom v. Illinois, 391 U.S. 194 (1968) (criminal procedural protections apply to criminal contempt proceedings). In no event may the movant rely on unsworn assertions to establish the critical elements of civil or criminal contempt. Mackler Productions, 225 F.3d at 146 (it is error to rely on unsworn assertions to establish sanctions in contempt). And to support claims for damages, the movant must provide concrete evidence of harm. Mingoia v. Crescent Wall Sys., No. 03 Civ. 7143, 2005 WL 991773, *5 (S.D.N.Y. April 26, 2005).

For these reasons, courts have emphasized the importance early on of indicating whether the contempt proceedings are criminal or civil in nature, so that the appropriate procedural and substantive protections may be provided to the alleged contemnor. In re Jessen, 738 F. Supp. 960, 962 (W.D.N.C. 1990); cf. Ashcraft v. Conoco, Inc., 1998 WL 404491, *2 n.2 (E.D.N.C.,

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to trigger the due process protections associated with criminal prosecution. Hess v. New Jersey Transit Rail

Jan. 21, 1998), rev'd on other grounds, 218 F.3d 288 (4th Cir. 2000). This is because if the civil/criminal determination affects both the remedy that a court may impose and the procedural protections that must be followed throughout the proceeding. Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114, 115 (2d Cir. 1988) (sanction of as little as $1000 considered exercise of criminal contempt power because purpose was to punish for past violations).

B. Eli Lilly's Request that the Court Find that Dr. Egilman Violated CMO-3 Disregards Its Burden and Dr. Egilman's Due Process Rights

Eli Lilly ignores each of these basic principles in asking the Court to find that Dr. Egilman willfully violated CMO-3. For instance, although petitioner has consistently indicated that it seeks to obtain punitive sanctions for Dr. Egilman's alleged violation of CMO-3, (see, e.g., December 26, 2006, Letter from Nina M. Gussack to the Court, at 1), Eli Lilly seeks here to use Dr. Egilman's invocation of his right to silence to establish certain facts which will inevitably prejudice any future criminal contempt proceeding. (See Proposed Findings ¶¶ 16-22, 27-28, 37 & n.1; Lilly Br. 4 n.3.) In its haste to prematurely convince this Court that Dr. Egilman acted in contempt of CMO-3, Eli Lilly makes no effort to square its desire to pursue criminal sanctions against Dr. Egilman, which triggers the protections of the Fifth Amendment, Mackler Productions, 225 F.3d at 142, with its request that the Court hold Dr. Egilman's silence against him.[4]

Moreover, Eli Lilly has asked this Court to find that Dr. Egilman violated CMO-3 without even attempting to satisfy its burden of establishing that Dr. Egilman violated a "clear and specific" order. Hess, 846 F.2d at 115. After all, Eli Lilly concedes that Dr. Egilman complied with that part of CMO-3 which required him to notify petitioner that he had been

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Operations, Inc., 846 F.2d 114, 115 (2d Cir. 1988).

served with a subpoena requesting disclosure of "confidential" documents. (Proposed Findings ¶ 38; Lilly Br. 5.) Therefore, Eli Lilly must establish that CMO-3 clearly and specifically communicated what constituted a "reasonable opportunity" for Eli Lilly to object to production of the documents. (Proposed Findings, Ex. 2, at ¶ 14.)

Eli Lilly cannot claim that it did not have notice of the anticipated disclosure. Nor can petitioner claim that Dr. Egilman's failure to notify Pepper Hamilton directly – a failing not of Dr. Egilman's making but of the protective order that had been drafted by Eli Lilly – prejudiced its rights, because it asserts that it "promptly" provided notice of the subpoena to its outside counsel, and that these counsel "took immediate steps to determine who had retained" Dr. Egilman.[5] (Lilly Br. 5.) Although Eli Lilly does not detail the steps it took, given the stated importance of the documents, one would expect that petitioner had a reasonable opportunity to make its objection known to Dr. Egilman before he disclosed the documents to Mr. Gottstein.[6] In any event, the factual record is simply insufficient at this time to make that determination, although we note in passing that in litigating the issues currently before the Court, Eli Lilly has adopted the position that one or two days' notice to address complex legal issues – such as the propriety of Orders to Show Cause or mandatory injunctions – is sufficient for other parties. (See, e.g., Eli Lilly's Proposed Order to Show Cause Issued to Dr. David Egilman (submitted on

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[4] The significance of Dr. Egilman's Fifth Amendment rights in this proceeding is addressed more fully in Part III.B of this brief.

[5] Eli Lilly makes the bald assertion that it could not contact Dr. Egilman directly, because of his status as an expert, but it is far from clear that any ethical rule prohibited Mr. Armitage from contacting Dr. Egilman about a matter that had no connection to Dr. Egilman's consultation with The Lanier Law Firm. In any event, there was no arguable prohibition on contacting Mr. Gottstein, whose contact information was provided in the material sent to Mr. Armitage. (Jan. 17, 2007, Tr. 129.)

[6] Eli Lilly has refused to make its General Counsel available for a deposition to determine what steps were taken to make petitioner's objections known to Dr. Egilman. Eli Lilly appears to base its argument in favor of contempt on the ground that Richard Meadow testified that he contacted Dr. Egilman and informed him "not to do anything." (Proposed Findings, Ex. 3, ¶ 9.) Notwithstanding the fact that there is no evidence that Mr. Meadow told Dr. Egilman that Eli Lilly intended to move to prevent disclosure, or had moved to prevent disclosure, because

December 26, 2006, and calling for a response within 24 hours).)

Moreover, Dr. Egilman's actions with respect to the subpoena were consistent with the language of CMO-3, which only contained one defined time limit where an individual intends to disclose confidential documents. Specifically, CMO-3, drafted by Eli Lilly, provides only three days' notice to petitioner where disclosure of confidential information is to be made to a customer or competitor of Eli Lilly. (Proposed Findings, Ex. 2, at ¶ 6.). If, after three days has passed, no motion is filed objecting to the proposed disclosure, then CMO-3 is not violated. Given that Eli Lilly asserts that the principal purpose of the confidentiality designations in this case is to protect its competitive advantage, it defies reason for Eli Lilly to simultaneously argue that the notice provided in the instant case did not afford it sufficient opportunity to raise an objection to disclosure.

Even if the Court determines now that Eli Lilly did not have a reasonable opportunity to object to Dr. Egilman's disclosure, this does not end the inquiry, because petitioner must still show that CMO-3 specifically defines what is meant by "a reasonable opportunity to object." In contempt proceedings, whether criminal or civil, ambiguities must be resolved in "favor of the party charged with contempt." Air-Products and Chemicals, Inc. v. Inter-Chemicals, Ltd., No. 03 Civ. 6140, 2005 WL 196543, *3 (E.D. Pa. Jan. 27, 2005). For instance, where a protective order fails to spell out specific steps to be taken with protected documents, it is error to find even an attorney, judged to be better able to decipher ambiguous court orders, see United States v. Cutler, 58 F.3d 825, 835 (2d Cir. 1995), in contempt for revealing confidential information, Littlejohn v. BIC Corp., 851 F.2d 673, 686 (3d Cir. 1988). And where it is not apparent from the Order what kind of conduct is prohibited, then the Order will not be considered sufficiently

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Mr. Meadow's telephone call occurred after a Eli Lilly had had a reasonable opportunity to object to disclosure, it

clear and specific to support a contempt finding. NYNEX Corp., 8 F.3d at 55-57.

Notably, court orders which were more clear and specific than CMO-3 have been found insufficiently clear to justify contempt in other contexts. For instance, where a district court ordered a litigant to "stay out of the facilities up here on this floor unless you get prior permission. That's the jury room, also," this was not considered sufficiently clear and unambiguous to support contempt for a defendant who was found in the jury room after the Order was issued. United States v. O'Quinn, 913 F.2d 221, 222 (5th Cir. 1990) (per curiam). And the Second Circuit has held that the phrase "bonafide offer of settlement" is "vague and imprecise" and therefore will not support a conviction for contempt. Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114, 115 (2d Cir.1988). Just as in Hess, in which the Court could not decipher what kind of settlement offer would be a "bonafide" one, here it is impossible to state precisely what is meant by "reasonable opportunity to object" as used in CMO-3. Similarly, the Second Circuit has held that an order that prohibited a party from using certain software was insufficient to support contempt where the order "never defined precisely what constituted 'Maintenance Software.'" Fonar Corp. v. Deccaid Servs., Inc., 983 F.2d 427, 429 (2d Cir. 1993); see also John Paul Mitchell Sys. v. Quality King Distributors, Inc., No. 99 Civ. 9905, 2001 WL 910405, *7 (S.D.N.Y. Aug. 13, 2001) (order, which prevented Quality King from "movement, transfer, or other distribution" of a product, did not clearly prohibit company from purchasing and receiving products (and thereby "moving" the products to its own warehouse), nor did it prohibit company from aiding the sale of product by another company, because Order simply forbid the company "from itself distributing the products"). The Court noted that even if the defendant could be charged with actual knowledge of what the term

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has no bearing on the issue of Dr. Egilman's alleged contempt.

"Maintenance Software" meant, it would not matter, because the Order must be "clear and unambiguous" in a more objective sense. Fonar Corp., 983 F. 2d at 429. And this Circuit has seen numerous incidents in which even attorneys, expected to "comply with less specific orders than laymen," see Cutler, 58 F.3d at 835, have not been sanctioned for violating confidentiality, say, of settlement discussions, despite a clear prohibition of such disclosures. Calka v. Kucker Kraus & Bruh, 167 F.3d 144, 145 (2d Cir. 1999) (per curiam) (declining to impose sanction for attorney who violated confidentiality of CAMP proceedings); E-Z Bowz, L.L.C. v. Professional Prod. Res. Co., No. 00 Civ. 8670, 2003 WL 22416174, *3 (S.D.N.Y. Oct. 23, 2003) (declining to impose sanctions on attorney which violated court's confidentiality order regarding settlement discussions); Concerned Citizens of Bell Haven v. The Belle Haven Club, No. 99 Civ. 1467, 2002 WL 32124959, *5-6 (D. Conn. Oct. 25, 2002) (declining to impose sanction on party which publicly disclosed confidential settlement discussions).

The imprecision of CMO-3 is reinforced by those courts, in other legal contexts, that have noted the difficulty of interpreting the term "reasonable opportunity." Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (in copyright protection case, noting that "reasonable opportunity" is something more than "bare possibility," but distinguishing the two will sometimes "present a close question") (internal quotation marks omitted); Morgan v. Account Collection Technology, LLC, No. 05 Civ. 2131, 2006 WL 2597865, *4 (S.D.N.Y. Sept. 6, 2006) (noting that courts have not agreed on what constitutes a "reasonable opportunity" to file for class certification prior to a Rule 68 offer of judgment). To be sufficiently clear for purposes of contempt, there must have been "nothing ambiguous about [Dr. Egilman's] obligations" under CMO-3. JSC Foreign Economic Ass'n v. International Development & Trade Servs., Inc., No. 03 Civ. 5562, 2006 WL 1148110, *5 (S.D.N.Y. April 28, 2006). Eli Lilly has

made no argument here that the CMO-3 unambiguously defined what constituted a "reasonably opportunity to object" to Dr. Egilman's disclosure of documents to Mr. Gottstein.[7] Instead, petitioner attempts to tar Dr. Egilman with testimony from Mr. Gottstein that he thought that Dr. Egilman thought that the documents should be publicly disseminated. (Jan. 16, 2007, Tr. at 26.) Putting aside the question of whether Mr. Gottstein's speculation amounts to clear and convincing evidence, or evidence beyond a reasonable doubt, of Dr. Egilman's motives, the CMO-3 does not prohibit individuals subject to the protective order from having a particular state of mind with respect to the disclosure of "confidential" documents; it prohibits disclosure of such documents without following the procedures laid out by CMO-3. If anything, however, Mr. Gottstein's testimony establishes that Dr. Egilman considered himself to be bound by the terms of the protective order, and sought to meet its terms as he interpreted them. (Id. at 27-30, 49-51; Jan. 17, 2007, Tr. at 75, 121-22, 133.) Whether Dr. Egilman simultaneously hoped that the documents would be publicly disseminated is irrelevant here, where Dr. Egilman did not violate a clear and specific court order upon disclosure of the documents to Mr. Gottstein. See United States v. NYNEX Corp., 8 F.3d 52, 55 (D.C. Cir. 1993) (in criminal contempt case, criticizing failure to distinguish between the need for violation to be willful and for the order to be clear and reasonably specific).

II. ELI LILLY HAS FAILED TO ESTABLISH ITS OWN COMPLIANCE WITH CMO-3

Aside from Eli Lilly's failure to establish that Dr. Egilman acted in contempt of CMO-3,

[7] Similarly, Eli Lilly's apparent contention that the CMO-3 "clearly and unambiguously," Fonar Corp., 983 F.2d at 429, called for Dr. Egilman to notify the Pepper Hamilton law firm rather than Eli Lilly itself is questionable. The CMO-3 refers nowhere to the Pepper Hamilton law firm and instead simply directs subpoena recipients to

petitioner also has failed to abide by this Court's direction that it provide an explanation for why the documents disclosed by Dr. Egilman should be considered "confidential." Paragraph 3 of CMO-3 defines confidential material as "any information that the producing party in good faith believes is properly protected under [Fed. R. Civ. P.] 26(c)(7)." (See Proposed Findings, Ex. 2.) Rule 26(c)(7), in turn, allows for the issuance of orders when necessary to protect "a trade secret or other confidential research, development, or commercial information." Fed. R. Civ. P. 26(c)(7). The Federal Rules recognize a "presumptive right of public access to discovery in all civil cases," absent a showing of good cause for a protective order pursuant to Rule 26(c). Loussier v. Universal Music Group, Inc., 214 F.R.D. 174, 176-177 (S.D.N.Y. 2003); see also In re "Agent Orange" Product Liability Litigation, 821 F.2d 139, 145-46 (2d Cir. 1989).[8] As the Supreme Court has recognized when drawing analogies between FOIA disclosures and the Federal Rules, "'there is no absolute privilege for trade secrets and similar confidential information.'" Federal Open Market Committee of Federal Reserve System v. Merrill, 443 U.S. 340, 362 (1979) (quoting 8 C. Wright & A. Miller, Federal Practice and Procedure § 2043, p. 300 (1970).) Accordingly, the proponent of a protective order under Rule 26(c)(7) must show both that the confidentiality of trade secrets or commercial information is threatened, and that good cause exists to shield it from the public. Eli Lilly fails to satisfy either of these standards, despite the Court's direction at the January 17, 2007, proceedings to "be very specific" about "which of the documents that were exposed are documents, one, that constitute trade secrets or embarrassment of the other language under the rules and how their release has harmed you."

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contact the party responsible for the confidentiality designation, which Eli Lilly has conceded was done immediately by Dr. Egilman.

[8] In endorsing the protective order, in fact, the Court explicitly recognized that the public "has a right to know" about the subject documents, except to the extent that disclosure would undermine petitioner's ability to market Zyprexa in a competitive environment. (See Proposed Findings, Ex. 1, at 10-11.) The Court's concern was

(Jan. 17, 2007, Tr. at 242; see also id. at 243 ("[Y]ou are going to as quickly as possible tell them . . . which of the documents released you are going to specifically rely on, because I cannot, I believe, deal with the case on the ground that I know that in the millions of pages that we now have in our depository, there are some documents that should not have been released.").)

In New York, "[t]he subject of the trade secret must be secret" and "known only in the particular business in which it is used." DDS, Inc. v. Lucas Aerospace Power Transmission Corp., 182 F.R.D. 1, 4 (N.D.N.Y. 1998) (internal quotation marks and citation omitted). Federal courts in the Second Circuit look to six non-exclusive factors to determine whether information satisfies this test: "(1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the measures taken to guard the information's secrecy; (4) the value of the information to the business or to its competitors; (5) the amount of time, money, and effort expended in development of the information; and (6) the ease or difficulty of duplicating or properly acquiring the information." Chembio Diagnostic Systems, Inc. v. Saliva Diagnostic Systems, Inc., 236 F.R.D. 129, 136 (E.D.N.Y. 2006). In satisfying this test, "there must be a specific demonstration of the facts as they relate to all of the factors, a specific articulation of the harm, and no reliance upon stereotypical and conclusory statements that the information is confidential." Sherwin-Williams Co. v. Spitzer, No. 04 Civ. 185, 2005 WL 2128938, *12 (N.D.N.Y. Aug. 24, 2005); Traveler's Ins. Co. v. Allied-Signal Inc. Master Pension Trust, 145 F.R.D. 17 (D. Conn. 1992) (denying motion for protective order for failure to "identify with particularity any serious harm that would result from public disclosure of the documents"). Moreover, as this Court has noted, "[a]n important factor in determining whether disclosure will cause competitive harm is whether the

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not, as Eli Lilly seeks to imply, that psychiatric patients would somehow be harmed by disclosure. (See id.) If

information that the party seeks to protect is current or stale." In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 575 (E.D.N.Y. 1985) (collecting cases indicating that information from one to 15 years old is entitled to less protection).

Eli Lilly has not sought to address these standards, or the Court's direction that it be "very specific" about which documents that were released are protected, because it simply cannot do so. The entirety of Eli Lilly's argument for the nondisclosure of the materials that were disclosed to Mr. Gottstein is based on a declaration from Gerald Hoffman, who reviewed an unspecified subset of documents more than one year ago. (Ex. A to Lilly Br. at 6.) Eli Lilly relies on Mr. Hoffman's stale declaration, arguing that there is "substantial overlap" between the documents reviewed by Mr. Hoffman and the documents disclosed by Dr. Egilman. (Lilly Br. 10 n.8.) This is not the specific identification or argument required by the Court, nor does it purport even to meet the Court's requirement that Eli Lilly be specific about how it has been harmed by the disclosure. Instead, Eli Lilly states without elaboration that the documents protect "confidential, and often draft or preliminary research and development information; strategic planning documents; employee training techniques; regulatory strategy; product development; competitor analyses; market research; potential marketing plans and strategies, or otherwise confidential material." (Lilly Br. 10.) And Mr. Hoffman, in turn, states that each of the documents "contains information related to: confidential research and development information; strategic plans; marketing plans, strategies; competitive analyses; market research; clinical trials and non-clinical trials; or interactions with key regulators or publishers" and "reveals something about Lilly's internal organization and structure, qualifies as intelligence data, and if disseminated would be useful to Lilly's competitors in the atypical antipsychotic marketplace."

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anything, the continued suppression of the subject documents will harm psychiatric patients and their doctors.

(Ex. A to Lilly Br. ¶ 9.)

Notwithstanding Mr. Hoffman's broad brush strokes, however, even Eli Lilly appears to concede that disclosure of some of the documents he reviewed do not, as Mr. Hoffman previously swore under oath, constitute trade secrets or otherwise confidential business information. (Lilly Br. at 12 n. 10 (abandoning claim of confidentiality as to specific documents).) Thus, it is hard to take at face value Eli Lilly's attempt to rely upon his declaration now, when there is no evidence that he reviewed the documents disclosed by Dr. Egilman to Mr. Gottstein, or that his initial determination of confidentiality is reliable. Similarly, Eli Lilly can hardly argue that certain of the documents which have been identified – e.g., press releases and published newspaper articles – cannot be disclosed without disclosing confidential information. (See Proposed Findings, Ex. 11.)

Not only does Mr. Hoffman's declaration fail to meet this Court's direction from the Jauary 17, 2007, hearing, but it also fails to meet the burden of any movant seeking to establish that particular documents are eligible for protection under Rule 26(c)(7). For instance, that a party treats particular documents as confidential "does not mean they are automatically entitled to be subject to a protective order." Houbigant, Inc. v. Development Specialists, Inc., No. 01 Civ. 7388, 2003 WL 21688243, *2 (S.D.N.Y. Jul 21, 2003) (finding that documents relating to audit methodology are privileged, but requiring party to review documents to determine which are properly considered protected material). And reliance on conclusory assertions of confidentiality will doom an application for protective order under Rule 26(c)(7). See Salter v. I.C. System, Inc., No. 04 Civ. 1566, 2005 WL 3941662, *1 (D. Conn. May 3, 2005) (citing Cuno Inc. v. Pall Corp., 117 F.R.D. 506, 508 (E.D.N.Y.1987) (denying defendant's motion for protective order where "motion simply alleges that 'the documents have at all times been

maintained as internal proprietary documents and contain valuable confidential technical information'")).

Moreover, the standard for businesses seeking a protective order is high. While natural persons may seek a protective order to protect against embarrassment, "protective orders are not available . . . to protect businesses from annoyance or embarrassment," unless the harm can be shown to have a specific monetizable value. Wilcock v. Equidev Capital L.L.C., No. 99 Civ. 10781, 2001 WL 913957, *1 (S.D.N.Y. Aug. 14, 2001) (names of businesses' clients are not confidential, based solely on speculation that "contacts with clients would be embarrassing or would result in the loss of those clients"). Conclusory allegations of harm, "unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Application of Akron Beacon Journal, No. 94 Civ. 1402, 1995 WL 234710, *10 (S.D.N.Y. April 20, 1995) (internal quotation marks omitted). Businesses must make a "specified showing of significant harm" to the business' competitive position; otherwise the good cause requirement would be "effectively undermine[d] . . ., as businesses would be able to claim good cause for any internal documents that portrayed the business in an unflattering light." Id. at *11. Even if certain documents "might injure [Eli Lilly's] commercial standing, that does not mean the are entitled to protection under a Rule 26(c) protective order. Littlejohn v. BIC Corp., 851 F.2d 673, 685 (3d Cir. 1988). As the Third Circuit has noted, "because release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). Therefore, to the extent that Mr. Hoffman seeks to protect against "damaging Lilly's reputation and bolstering competitors' market shares," (Ex. A to Lilly Br. ¶

22), this is not a legitimate grounds for finding a document confidential.[9]

III. MANY OF THE FACTUAL FINDINGS PROPOSED BY ELI LILLY SHOULD BE REJECTED

A. Eli Lilly Asks This Court to Make Factual Findings Regarding Dr. Egilman Which Are Unsupported By The Record

Many of the factual findings that Eli Lilly asks this Court to make are based exclusively on Dr. Egilman's invocation of his Fifth Amendmen rights. (Proposed Findings ¶¶ 16-21.) We explain below, infra Part III.B, why petitioner's reliance upon Dr. Egilman's silence is misplaced. Even as to those factual findings which petitioner claims are supported by other evidence, however, they reflect faulty reasoning. Eli Lilly asks this Court to find, for instance, that Dr. Egilman executed an endorsement of CMO-3 prior to receiving Zyprexa documents from The Lanier Law Firm, (Proposed Findings ¶ 9) although no documentary evidence has been introduced to support this assertion. Similarly, there is no evidence that Dr. Egilman was informed of the multiple protective orders entered in this case prior to receiving the Zyprexa documents. (Id. ¶ 8.) Instead, the evidence presented by petitioner establishes only that Dr. Egilman executed a modified endorsement of CMO-3 after he received the Zyprexa documents. (Compare Proposed Findings, Exs. B & C to Ex. 3 with Proposed Findings ¶ 10.)

In addition, many of petitioner's proposed factual findings can only be supported by inadmissible hearsay. Petitioner's proposal that Dr. Egilman "needed to find a way" to transfer

[9] Nor do the published newspaper articles in which the contents of Eli Lilly's documents have been revealed offer a compelling argument for why Eli Lilly designated as confidential the released documents. These articles have focused principally on two aspects of the documents released by Dr. Egilman to Mr. Gottstein: (1) Eli Lilly's awareness, and suppression, of information linking weight gain and diabetes to Zyprexa; and (2) Eli Lilly's illegal off-label marketing of Zyprexa for non-FDA-approved uses. Documents which reveal these facts ought not be protected by a Rule 26(c) Order. See Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & Pol'y 53, 61 (2000) (secrecy order which protects "those who engage in misconduct, conceal the cause of injury

documents to the New York Times, for instance, appears to be loosely based upon vague hearsay statements attributed by Mr. Gottstein to Alex Berenson. (Proposed Findings ¶ 22, citing Jan. 17, 2007, Tr. 96.) Similarly, Eli Lilly's proposal that Dr. Egilman and Mr. Berenson "agreed on a scheme to bypass CMO-3" either because Dr. Egilman understood that the documents were properly protected or because of concerns about timing of the release is remarkable, given that it is not supported by the portion of the transcript to which petitioner refers, which contains only inadmissible hearsay testimony. (Id. ¶ 24, citing Jan. 17, 2007, Tr. 96-98.) And petitioner's assertion that "Mr. Berenson told Dr. Egilman to contact Mr. Gottstein . . . and use him as the conduit for getting the protected documents to The New York Times" is similarly based on inadmissible hearsay. (Id. ¶ 25.)

Moreover, many of petitioner's proposed findings of fact are not supported by anything but rabid conjecture. For instance, there is no support in the material referenced in Proposed Revised Findings of Fact ¶ 30 for the proposition that Dr. Egilman played a role in determining what case Mr. Gottstein initiated prior to issuing the subpoena. Similarly, nothing in Mr. Gottstein's December 17, 2006, letter supports the inference that "he and Dr. Egilman worked in concert to issue a secret 'amended' subpoena," (Proposed Findings ¶ 47), nor did Eli Lilly elicit any testimony from Mr. Gottstein that he colluded with Dr. Egilman to issue the second subpoena. And accepting arguendo the dubious admissibility of Mr. Gottstein's testimony as to Dr. Egilman's understanding and intentions, Mr. Gottstein never testified that Dr. Egilman "understood and intended" that Mr. Gottstein would distribute the documents "as quickly as possible." (Proposed Findings ¶ 60.) Similarly, the excerpts of testimony relied upon for Proposed Revised Factual Finding ¶ 63 refer only to Mr. Gottstein's understanding, not Dr.

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from the victims, or render potential victims vulnerable . . . defeats a function of the justice system - to reveal

Egilman's.

B. Eli Lilly Improperly Seeks to Use Dr. Egilman's Invocation of His Fifth Amendment Right to Silence

Perhaps more troubling than petitioner's treatment of the record in this case is Eli Lilly's attempt to rely in this proceeding on Dr. Egilman's invocation of his right to silence. The Fifth Amendment permits adverse inferences against (1) parties when (2) "they refuse to testify in response to probative evidence offered against them." Mitchell v. United States, 526 U.S. 314, 327 (1999). Eli Lilly, on the other hand, seeks to use Dr. Egilman's invocation of his right to silence against other parties, and not based on Dr. Egilman's refusal to answer specific questions supported by probative evidence, but as a freewheeling opportunity for Eli Lilly to paint whatever picture it deems to be "not inconsistent" with the facts that have been presented. (See Proposed Findings ¶¶ 16-22, 27-28, 37 & n.1; Lilly Br. 4 n.3.). This poses several problems which are not acknowledged by petitioner.

1. Dr. Egilman's Silence Cannot Be Held Against the Respondents in This Proceeding

First, because Eli Lilly seeks to use Dr. Egilman's invocation of his right to silence against others, it must demonstrate a sufficiently close relationship between Dr. Egilman and the parties to be enjoined. The Second Circuit has held that, in determining whether a non-party's invocation of a Fifth Amendment privilege may be used to draw an adverse inference against a party to a proceeding, four non-exclusive factors should be considered: (1) the nature of the relationships between the party and non-party; (2) the "degree of control which the party has vested in the non-party witness in regard to the key facts" at issue in the litigation; (3)

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important legal factual issues to the public").

convergence of interests between party and non-party; and (4) whether non-party was a "key figure in the litigation and played a controlling role in respect to any of its underlying aspects." LiButti v. United States, 107 F.3d 110, 123-24 (2d Cir. 1997). The fundamental question in undertaking this inquiry is "whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." Id. at 124.

Using this analysis, courts have held that an ex-employees' claim of privilege could be held against an employer as "vicarious admissions," id. at 121 (internal quotation marks omitted), and that a father's invocation of his Fifth Amendment privilege is admissible against his daughter where the relationship was strong and where they had "precisely the same interest," id. at 124. But where there is no formal or informal relationship with a non-party who has asserted his Fifth Amendment privilege, courts have permitted no adverse inference to be drawn even if the non-party has played a central role in the case. Willingham v. County of Albany, 2006 WL 1979048, *5 (N.D.N.Y. July 12, 2006). And even if the relationship has been shown to be very strong, if one party has chosen to subject herself to deposition, but the non-party has not, courts have held that that in and of itself demonstrates a sufficient disparity of interest to refuse to hold the non-party's assertion of a Fifth Amendment privilege against the party which agreed to testify. Kontos v. Kontos, 968 F. Supp. 400, 408 (S.D. Ind. 1997) (one sister's invocation of Fifth Amendment privilege inadmissible against other sister).

Here, Eli Lilly has made no attempt to establish, with respect to any of the four LiButti factors, that Dr. Egilman is sufficiently entwined with the parties to this proceeding such that his silence should be used to draw adverse inferences here. The instant proceeding seeks the continuation of an injunction only against the natural persons Terri Gottstein, Dr. Peter Breggin, Dr. David Cohen, Bruce Whittington, Laura Ziegler, Judi Chamberlin, Vera Sharav, Robert

Whittaker, Will Hall, Eric Whalen, and David Oaks, and against the websites www.joysoup.net, www.mindfreedom.org, www.ahrp.org, www.ahrp.blogspot.com, and zyprexa.pbwiki.com. Whatever the role that Eli Lilly argues that Dr. Egilman has played in this litigation, petitioner has not shown that he communicated with any of the parties to this proceeding, nor has Dr. Egilman been shown to be have any formal or informal relationship with them. Therefore, it is simply inappropriate for Eli Lilly to attempt to use his invocation of his right to silence against the parties to this proceeding. Lorusso v. Borer, No. 03 Civ. 504, 2006 WL 473729, *11 n.9 (D. Conn. Feb 28, 2006) (finding that it was inappropriate to use invocation of Fifth Amendment privilege against third party where there was "neither an agency relationship between the party and non-party concerned, nor any other close or intimate association between them, nor even a congruence of interests").

2. The Court Should Exercise Its Discretion to Reject Eli Lilly's Request for an Adverse Inference

Even were the Court to conclude that Dr. Egilman's relationship with the third parties against whom Eli Lilly seeks an injunction was sufficiently close, the Court still should exercise its discretion not to find an adverse inference from his invocation of his Fifth Amendment rights. Here, because Eli Lilly has indicated that it will seek criminal sanctions against Dr. Egilman, the Court should exercise its discretion not to rely in any way on Dr. Egilman's invocation of his Fifth Amendment rights. In general, where a party is simultaneously forced to defend against criminal and civil liability, courts take pains to protect Fifth Amendment rights by staying the civil proceeding until the criminal proceeding is complete so that the party will not be forced to choose between asserting his Fifth Amendment rights and fully defending himself in the civil action. For instance, in Sampson v. City of Schenectady, 160 F.Supp.2d 336 (N.D.N.Y. 2001), the Court declined to draw an adverse inference from a defendant's invocation of the Fifth

Amendment in response to a question at a deposition. The Court first noted that the drawing of an adverse inference "is a harsh remedy that is normally employed to counter a defendant's desire to obstruct discovery or abuse the privilege against self-incrimination." Id. at 351.[10] The Court found that, because the defendant had stated that he would go forward with a deposition once his criminal trial concluded, it would be unduly harsh to use his invocation of his Fifth Amendment rights against him in the civil proceeding. Id.

Of course, here, because of the unique framework of contempt motions, which permits litigants to seek criminal and civil remedies in the same proceeding, Eli Lilly has put Dr. Egilman in an untenable situation. Clearly petitioner seeks to establish certain facts in this proceeding which will later be used against Dr. Egilman in a hybrid criminal/civil contempt proceeding. In such a circumstance, it would be manifestly unfair for the Court to rely on Dr. Egilman's invocation of his constitutional right to silence to find facts which later will be used by Eli Lilly to support both criminal and civil penalties. In any event, just like the defendant in Sampson, here Dr. Egilman would be in a different position if criminal contempt proceedings were initiated first, or not at all, so that he could freely defend himself in the civil contempt proceeding.

This case is emblematic of the problem where one party has the opportunity to "manipulat[e] simultaneous civil and criminal proceedings," thus exacerbating "the risk to individuals' constitutional rights." Sterling Nat. Bank v. A-1 Hotels Intern., Inc., 175 F. Supp. 2d 573, 578 (S.D.N.Y. 2001). The Second Circuit identified this "dilemma" for litigants who are accused in parallel civil and criminal proceedings, such as forfeiture proceedings, noting that

[10] The Court also relied on the fact that the defendant had answered the civil complaint and denied certain allegations. Id. at 351. Of course, here, where Eli Lilly has yet to file a motion seeking contempt, Dr. Egilman has not had an opportunity to file any responsive pleading.

district courts must make "special efforts" in such cases to preserve both the Fifth Amendment privilege and the interest of all parties in the "opportunity to litigate a civil case fully." United States v. Certain Real Property and Premises Known as: 4003-4005 5th Ave., 55 F.3d 78, 83-84 (2d Cir. 1995). The options available to district courts include "entry of a protective order prohibiting the use of the civil litigant's responses in any criminal proceeding in that district, a stay of discovery or the civil action until parallel criminal proceedings have run their course, and attempts to arrange for immunity to ensure that a civil litigant will not be prosecuted for his or her statements." Id. at 84 n.6 (citations omitted). Courts in this Circuit have even granted a parties' request to stay the deadline for filing a responsive pleading in a civil case, where a parallel criminal proceeding remained open. Philip Morris Inc. v. Heinrich, No. 95 Civ. 0328, 1998 WL 167333, *1 (S.D.N.Y. April 8, 1998) ("If the Court orders Siegel to answer the Complaint and he asserts his Fifth Amendment privilege in his answer, he would be forced to suffer the consequence that a trier of fact may draw an adverse inference from his assertion of the privilege.")

Where, as with the anticipated contempt motion against Dr. Egilman, there are "overlapping issues in the criminal and civil cases, . . . the risk of impairing the party's Fifth Amendment rights presents a stronger case for staying discovery." American Express Business Finance Corp. v. RW Professional Leasing Servs. Corp., 225 F. Supp. 2d 263, 265 (E.D.N.Y. 2002); Savalle v. Kobyluck, Inc., No. 00 Civ. 675, 2001 WL 1571381, *2 (D. Conn. Aug. 15, 2001) ("Although requiring a defendant to choose between waiving his Fifth Amendment rights and suffering the adverse inference which results in the civil case from invoking his privilege does not violate due process, forcing the defendant to make this choice greatly increases the potential prejudice facing him in the absence of a stay."). This would prevent the party from

being in "the uncomfortable position between choosing to waive their Fifth Amendment privilege, risking self-incrimination, or to invoke it, not only preventing them from adequately defending their position but subjecting them to adverse inferences." American Express, 225 F. Supp. 2d at 265. However, here, where Eli Lilly has not even begun proceedings against Dr. Egilman, but is seeking to lay an established factual foundation for its anticipated contempt motion, the Court should exercise its discretion to refuse to draw any adverse inference from Dr. Egilman's invocation of his Fifth Amendment rights. When Eli Lilly finally brings its contempt motion, the Court should then address whether to consider petitioner's request for criminal sanctions first, thus eliminating the pressure on Dr. Egilman to choose between asserting his constitutional rights and fully defending himself in the civil proceeding. For instance, even where a court was convinced that a party's "dilatory tactics in resolving his criminal case for more than two years" cautioned against continuing a stay of a parallel civil proceeding, the court nonetheless protected the party's Fifth Amendment right by giving the party "the opportunity to revoke the privilege prior to trial [in the civil proceeding] in order to avoid the adverse inference." Savalle, 2001 WL 1571381, at *3. Dr. Egilman should have the opportunity to argue that similar measures be taken when Eli Lilly finally institutes its contempt proceedings.

3. Eli Lilly Seeks to Rely on an Adverse Inference to Establish Facts That Are Not Supported By Any Other Independent Evidence

Even were the Court to be satisfied that due process does not forbid an adverse inference to be drawn in this proceeding from Dr. Egilman's invocation of his Fifth Amendment rights, Eli Lilly goes beyond all reasonable bounds by suggesting that the inference may support completely new facts which are "not inconsistent" with other facts adduced through this proceeding. It is well-established that the adverse inference requested by Eli Lilly may only be relied upon to "confirm matters supported by other independent evidence" and that liability may

not be imposed "based solely upon the adverse inference." United States v. Incorporated Village of Island Park, 888 F. Supp. 419, 431-32 (E.D.N.Y. 1995). Here, no specific questions have been put to Dr. Egilman to which he has raised a Fifth Amendment objection; instead he has simply exercised his right to silence in the face of promises by Eli Lilly to seek criminal sanctions for his alleged violation of CMO-3.

Without relying on any other independent evidence, however, petitioner asks this Court to make certain factual findings based solely on Dr. Egilman's invocation of his Fifth Amendment rights. One must remember that the overriding purpose of reliance on the adverse inference in the Fifth Amendment context is the advancement of truth. LiButti, 107 F.3d at 123-24. Thus, an adverse inference is only appropriate where the Fifth Amendment is asserted in response to the presentation of "probative evidence." Mitchell, 526 U.S. at 327. Where a party seeks to draw adverse inferences with a sweeping scope, and with no support from corroborating admissible evidence, it cannot be said that relying on the adverse inference alone is likely to advance the search for truth. Emerson v. Wembley USA Inc., 433 F. Supp. 2d 1200, 1213 (D. Colo. 2006) (refusing adverse inference where plaintiff sought an inference based on all questions the witness refused to answer). This is especially the case where the inference has no foundation in any other evidence, and Eli Lilly is simply using a "fruitless deposition as a crutch to prop up [its] claims." Id. at 1214.

As this Court indicated when counsel first stated that Dr. Egilman intended to assert his Fifth Amendment right to silence at the deposition proposed by Eli Lilly, to the extent an adverse inference can be drawn, it should be limited to issues of credibility. (Jan. 17, 2007, Tr. 247); see also Orena v. United States, 956 F. Supp. 1071, 1094 (E.D.N.Y. 1997) ("Lack of credibility as a witness is not, in itself, affirmative proof of what the witness denies."). Dr. Egilman's

credibility, however, is not relevant to the instant proceeding – there is no dispute that he received the subpoena from Mr. Gottstein, that he communicated it to Eli Lilly, and that he disclosed documents to Mr. Gottstein in response to the subpoena. The question in this proceeding is whether the injunction prohibiting further dissemination of these documents should be continued against certain individuals, who have no connection to Dr. Egilman. In such a circumstance, there is no basis for relying on Dr. Egilman's invocation of his right to silence to support petitioner's request that the injunction continue.

CONCLUSION

For the foregoing reasons, Dr. Egilman respectfully requests that the Court make no legal or factual findings which relate to Eli Lilly's anticipated motion for contempt against Dr. Egilman.

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Respectfully submitted,

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