



Vol. 22 No. 13

April 27, 2007

WHEN CONSPIRATORS DEFY PROTECTIVE ORDERS: LESSONS FROM *IN RE ZYPREXA INJUNCTION*

by

Martin C. Calhoun and Rebecca A. Womeldorf

A recent opinion by Judge Jack B. Weinstein details a brazen conspiracy by a plaintiffs' expert, a reporter for *The New York Times*, and an attorney not involved in the Zyprexa multidistrict litigation, to publicize Eli Lilly documents in violation of a confidentiality order. See *In re Zyprexa Injunction*, --- F. Supp. 2d ---, No. 07-CV-0504, 2007 WL 460838 (E.D.N.Y. Feb. 13, 2007). Although it addresses an unusual fact pattern, Judge Weinstein's forceful opinion should serve both to deter future violations of protective orders and to assist attorneys seeking to maintain the confidentiality of client documents, at least during the discovery phase of litigation.

The Conspiracy to Obtain and Publish Documents. The Zyprexa multidistrict litigation encompasses approximately 30,000 claims that the anti-psychotic drug Zyprexa causes various adverse events about which Lilly allegedly provided inadequate warnings. *Id.* at *3. To facilitate discovery during the multidistrict litigation proceedings, Judge Weinstein issued an umbrella confidentiality order. Lilly produced numerous documents designated as confidential pursuant to Judge Weinstein's order. Subsequently and in direct violation of the order, various individuals schemed to obtain and disseminate Lilly's protected documents. *Id.* Judge Weinstein described the scheme this way:

In November and December of 2006, a conspiracy was entered into among a plaintiffs' expert, a New York Times reporter, and an attorney in Alaska to subpoena confidential documents under false pretenses and widely disseminate them. Documents subpoenaed by Alaska attorney James Gottstein were provided to plaintiffs' expert Dr. David [Egilman] on December 11, 2006; Lilly was not given an adequate opportunity to object to the subpoena. Those confidential documents were disseminated widely through the New York Times and otherwise in the following weeks.

In re Zyprexa Prods. Liab. Litig., --- F.R.D. ---, Nos. 04-MD-1596, 05-CV-4115, 05-CV-2948, 2007 WL 959031, at *2 (Mar. 30, 2007) (citations omitted).

Martin C. Calhoun and Rebecca A. Womeldorf have litigated confidentiality issues as partners in the Washington, D.C. law firm of Spriggs & Hollingsworth.

The Response by Lilly and Judge Weinstein. When *The New York Times* published high-profile articles about the Lilly documents, Lilly and Judge Weinstein could have decided that efforts to remedy the problem would be futile. The cat was out of the bag. Information in the leaked documents appeared as front-page news, and the documents themselves spread like wildfire on Internet websites (some posted deliberately on websites outside the jurisdictional reach of the court). In this Internet age, the power of a federal court and the litigation resources of a major pharmaceutical company could not prevent determined individuals from irreparably stripping away confidentiality protections granted by an umbrella protective order. See *Zyprexa Injunction*, 2007 WL 460838, at *41 (declining to enjoin certain websites because “[p]rohibiting five of the internet’s millions of websites from posting the documents will not substantially lower the risk of harm posed to Lilly”).

Nevertheless, Lilly and Judge Weinstein took strong action in response to these developments. Judge Weinstein granted Lilly’s motion for injunctive relief as to certain individuals, issuing permanent injunctions against “two of the conspirators – Egilman and Gottstein – and others who have not returned the documents they obtained from Gottstein.” *Id.* at *4.¹ These two “conspirators” also face the prospect of contempt proceedings before Judge Weinstein. See *id.* at *21 (“On January 12, 2007, Lilly indicated to the court its intent to initiate contempt proceedings against both Egilman and Gottstein.”).

The Need for Confidentiality Orders. Although some attorneys and judges dispute the need for confidentiality orders, Judge Weinstein’s opinion shows that these kinds of orders are proper and necessary – particularly in the context of discovery documents. Confidential documents produced for discovery under the relatively low threshold of relevance of Federal Rule of Civil Procedure 26(b)(1) are “not generally appropriate for public consumption.” *Id.* at *35. Confidentiality orders “serve *essential* functions in civil adjudications.” *Id.* at *27 (emphasis added). “In complicated mass cases, the use of umbrella protective orders is recommended by the Manual for Complex Litigation.” *Id.* at *29.

The Proper Scope of Confidentiality Orders. Sometimes, judges or attorneys attempt to restrict the scope of confidentiality orders to documents containing “trade secrets,” but Judge Weinstein’s opinion can be used to rebut this unduly narrow perspective. Not only trade secret information in the strict sense of that term, but also “confidential commercial information” and “proprietary information,” qualify for protection from public disclosure under Rule 26(c). *Id.* at **35-36. “In large complex cases, courts often enter ‘umbrella’ protective orders to designate in advance a large volume of discovery material as confidential.” *Id.* at *29; see also *Zyprexa Prods. Liab. Litig.*, 2007 WL 959031, at *2 (“Millions of documents produced by Lilly in discovery were designated confidential pursuant to [the umbrella protective order].”).

The Interests Served by Confidentiality Orders. As Judge Weinstein explained, maintaining the confidentiality of discovery documents serves several distinct interests. For example, revealing a corporate defendant’s trade secrets and confidential commercial information “has the potential to impinge on the company’s privacy and property rights and inflict commercial harm.” *Zyprexa Injunction*, 2007 WL 460838, at *36; see also *id.* at *35 (“The [protective] order was essential to protecting litigants from the embarrassment and oppression that would result from unnecessary pretrial public disclosure of their private information.”). Confidentiality orders also protect the litigants’ reputations and the public’s interest in not being misled by the disclosure of inaccurate information. “[T]he protected documents which respondents seek to disseminate are segments of a large body of information, whose selective and out-of-context disclosure may lead to confusion in the patient community and undeserved reputational harm – what appears

¹Egilman and Gottstein have appealed this ruling. *The New York Times* and its reporter are not enjoined because Lilly did not seek an injunction against them. *Zyprexa Injunction*, 2007 WL 460838, at *43. Even so, Judge Weinstein stated that the reporter’s “conduct in assisting in the stealing of the protected documents was reprehensible.” *Id.*

damning may, in context after difficult proof, be shown to be neutral or even favorable to the defendant.” *Id.* at *40 (internal quotation marks omitted)). The integrity of the litigation process is also served by barring pre-trial disclosures of confidential discovery documents. *See id.* at *44 (public dissemination of Lilly’s protected documents has made “settlement of the remaining MDL and state cases and trials more difficult by creating probable prejudice largely irrelevant to the issues posed by the pending cases and by making impartial juror selection more difficult”); *id.* at *38 (issuing this injunction “allows the court to protect the privacy and property rights of litigants appearing before it, which is essential to a fair and efficient system of adjudication”). In addition, umbrella protective orders expedite the document production process, reduce costs, and ensure that courts are not burdened with document-by-document adjudication of confidentiality issues. *See id.* at *29; *see also id.* at *30 (“[t]he value of umbrella [protective] orders has been well-documented”).

No Valid First Amendment Objection. Although efforts to maintain the confidentiality of discovery documents may elicit a First Amendment objection, Judge Weinstein’s opinion (and Supreme Court cases cited therein) demonstrate that this argument has no merit. A “litigant has no First Amendment right of access to information made available only for purposes of trying his suit.” *Id.* at *31 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)). Moreover, “[n]onparties who are prohibited from accessing confidential documents by [an umbrella protective order] cannot claim an infringement on their freedom of speech [because] ‘[t]he right to speak and publish does not carry with it the unrestrained right to gather information.’” *Id.* at *38 (quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)).²

No Common Law Presumption of Public Access. Although a common law presumption of public access applies to judicial proceedings in certain circumstances, Judge Weinstein’s opinion can be used to ensure that this presumption is not applied too broadly. “The presumption of access varies according to the nature of the judicial document to which access is sought. ‘Unlimited access to every item turned up in the course of litigation would be unthinkable.’” *Id.* at *25 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)). The presumption does not apply to documents produced by parties during discovery that have not been “‘presented to the court to invoke its powers or affect its decisions.’” *Id.* In fact, as Judge Weinstein stated, there is an “assumption of *non-access*” that attaches to documents produced in discovery. *Id.* at *26 (emphasis added).

Provisions That Strengthen Confidentiality Orders. Counsel for all parties may agree on the need for an umbrella confidentiality order, yet disagree on what the order should say. The facts in *Zyprexa Injunction* support extending confidentiality orders to any person (including experts) who may receive confidential documents, preferably by requiring each person to sign a copy of the order to acknowledge that he has read it and that he submits to the jurisdiction of the court that issued the order. *See id.* at *9 (experts

²A confidentiality order does not necessarily forever bar access to covered documents by media organizations or other nonparties. Such orders often have provisions for removing confidentiality protections in certain circumstances. *See Zyprexa Injunction*, 2007 WL 460838, at *38 (“Those who can demonstrate a substantial need to know information contained in confidential documents must utilize [the confidentiality order’s] declassification provisions.”); *id.* at *4 (“None of the three conspirators . . . sought a lifting or modification of the protective order, despite the declassification procedures provided [therein] . . .”); *see also Zyprexa Prods. Liab. Litig.*, 2007 WL 959031, at **2-4 (addressing motions for declassification filed by plaintiffs and nonparties). The party seeking to maintain confidentiality bears the burden of showing that information at issue continues to warrant protection under the circumstances. *See Zyprexa Injunction*, 2007 WL 460838, at *29. To protect confidential documents beyond the discovery phase may require a showing that “good cause” continues to exist to preserve confidentiality, and what constitutes good cause during discovery may not suffice to maintain the confidentiality of the same documents as the litigation progresses, particularly if the documents are relied upon by the court to resolve a merits-based issue. As framed by Judge Weinstein in addressing motions for declassification of confidential documents filed by plaintiffs and nonparties, even documents “properly protected under Rule 26(c)(7) should nonetheless be declassified unless defendant demonstrates an *extraordinary reason* to keep them under seal.” *Zyprexa Prods. Liab. Litig.*, 2007 WL 959031, at **2-4 (emphasis added).

were required to sign “Endorsement of Protective Order” before receiving confidential documents). By doing so, courts may hold violators of protective orders accountable.

Protective orders should also require any person covered by the protective order to: (a) give the party who produced protected documents prompt notice if any third party issues a subpoena or other request for the protected documents; and (b) decline to turn the documents over to the third party until the party who initially produced the protected documents has had a reasonable opportunity to protect its interest by objecting to the third party’s subpoena or request. As shown by Lilly’s recent experience, this kind of provision cannot prevent unlawful action by individuals determined to disseminate confidential documents, but it may decrease the likelihood of such misconduct – and give the aggrieved party a basis for seeking relief if such misconduct does occur. *See id.* at *3 (“The subpoenaed documents were sent by [the plaintiffs’ expert] to [the attorney who subpoenaed the documents] pursuant to an expedited amended subpoena about which Lilly was deliberately kept in the dark so that it would be unable to make a timely objection.”); *id.* at *14 (“[The lawyer who issued the subpoenas] and [the expert witness to whom the subpoenas were issued] deliberately misled Lilly and violated the terms of the [the protective order] by not informing Lilly about the second subpoena [that contained an accelerated production date].”).

Permissible and Improper Conduct by Reporters. If an attorney representing a party protected by a confidentiality order has reason to suspect a reporter’s involvement in efforts to obtain confidential documents, the attorney could consider informing counsel for the media entity. Judge Weinstein stated that the reporter for *The New York Times* was “deeply involved in the effort to illegally obtain the documents” and that he “conspired to obtain and publish documents in knowing violation of a court order not to do so.” *Id.* at **7-8. Even if a reporter does not appreciate the legal consequences of his actions, the media entity’s attorney should understand the distinction that Judge Weinstein observed between “passively accepting stolen documents of public importance for dissemination” and “[a]ffirmatively inducing the stealing of documents.” *Id.* at *7; *see also id.* (stating that *The New York Times* appears to recognize this distinction and quoting *New York Times* handbook on “ethical journalism”).

Conclusion. Judge Weinstein’s *Zyprexa Injunction* opinion provides valuable instruction to anyone interested in maintaining the confidentiality of litigation information. One hopes that Judge Weinstein’s forceful response to the violation of his umbrella confidentiality order will discourage potential future wrongdoers from believing that they may disregard lawful court orders with impunity.