

ASSURANCE OF VOLUNTARY COMPLIANCE AND DISCONTINUANCE

1.1 This Assurance of Voluntary Compliance and Discontinuance (“Assurance”) is entered into by the Attorneys General of California, Connecticut, Idaho, Iowa, Massachusetts, New Jersey, New York, and Vermont (referred to collectively as the “States”), acting pursuant to their respective consumer protection statutes¹, and Eli Lilly and Company², an Indiana corporation (hereafter “Lilly”).

1.2 Lilly is a pharmaceutical company and the maker of Prozac, an anti-depressant medication. Lilly has advertised and promoted Prozac nationwide through its Web sites www.prozac.com and www.lilly.com. From at least March 15, 2000 until June 22, 2001, Lilly offered and provided an e-mail reminder service known as “Medi-messenger” through those Web sites.

1.3 Consumers who utilized the service could specify the content of an e-mail concerning their medication or other matters, including reminders regarding such medication. Once a consumer registered, the e-mails were sent automatically from Prozac.com to the consumer at the e-mail address s/he had provided, according to a schedule designated by the consumer. After providing the information to register for Medi-messenger, the consumer was invited to view the Prozac.com “Privacy Statement” by means of a hyperlink situated just above the “Submit” and “Reset” buttons on the screen.

¹ CALIFORNIA - Bus. & Prof Code §§ 17200 *et seq.* and 17500 *et seq.*; CONNECTICUT- Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.*; IDAHO - Consumer Protection Act, Idaho Code §§ 48-601 *et seq.*; IOWA - Consumer Fraud Act, Iowa Code § 714.16; NEW JERSEY - Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*; MASSACHUSETTS - Mass. Gen. Laws c. 93A, §§ 2 and 4; NEW YORK - N.Y. Gen. Bus. Law §§ 349 & 350 and Executive Law § 63(12); VERMONT - Consumer Fraud Act, 9 V.S.A. §§ 2451 *et seq.*

² “Eli Lilly and Company” includes its successors and assigns and its officers, agents, representatives, and employees acting within the scope of their authority on behalf of, or in active concert or participation with, Eli Lilly and Company.

1.4 The Privacy Statement contained, among others, the following statements:

“Eli Lilly and Company respects the privacy of visitors to its Web sites, and we feel it is important to maintain our guests’ privacy as they take advantage of this resource.”

“We will use Your Information to respond to requests you may make of us, and from time to time, we may refer to Your Information to better understand your needs and how we can improve our Web sites, products and services. Any and all uses would comply with all applicable laws. We may also use Your Information to contact you. However, the provision of Your Information will only be necessary if you choose to use or receive certain tools or services, such as a newsletter or our medical reminder service.”

“Our Web sites have security measures in place, including the use of industry standard secure socket layer encryption (SSL), to protect the confidentiality of any of Your Information that you volunteer; . . . These security measures also help us to honor your choices for the use of Your Information.”

STATES’ POSITION

2.1 The statements contained in this section represent the position of the States. Lilly does not admit the truth of any of the statements contained in this section.

2.2 Consumers who provide personally identifiable information to a Web site reasonably expect that such information will be kept private and will be secure from disclosure or

unauthorized access. Such expectations are particularly acute where the information includes data relating to health or medical status or condition, whether such data is provided directly or inferred from other information. Consumers reasonably expect that such sensitive data will be accorded the same degree of care that a prudent business applies to its other valuable, confidential data, such as corporate financial records, proprietary business-to-business transaction data, or intellectual property assets.

2.3 A Web site that collects or obtains consumers' personally identifiable data has a duty to disclose all material practices relating to such data and to ensure the use and handling of such data complies in all respects with representations, both explicit and implicit, regarding the Web site's information practices, and conforms to consumers' expectations.

2.4 On June 27, 2001, at Lilly's direction, an e-mail was sent to Medi-messenger subscribers announcing the termination of the Medi-messenger service. To do this, an employee created a new computer program to access subscribers' e-mail addresses and send them the e-mail. The June 27th e-mail disclosed the e-mail addresses of all 669 Medi-messenger subscribers to each individual subscriber by including all of the recipients' e-mail addresses within the "To:" line of the message. Personally identifiable information provided to it by consumers in connection with use of Lilly's Prozac.com Web site was thus disclosed.

2.5 The June 27th disclosure of consumers' personally identifiable information resulted from Lilly's failure to maintain or implement internal measures appropriate under the circumstances to protect such sensitive information. For example, Lilly failed to adopt and implement appropriate barriers in its databases to ensure that only those applications that had been tested and pre-authorized by designated personnel could gain access to personally

identifiable information; failed to provide appropriate training for its employees regarding consumer privacy and information security; failed to provide appropriate oversight and assistance to employees with access to personally identifiable information or responsibility for creating, testing or implementing applications with access to such information; and failed to implement appropriate checks and controls on the process that resulted in the transmission of the June 27th e-mail, such as reviewing the computer program with experienced personnel and pretesting the program internally before sending out the e-mail.

2.6 Consumers reasonably expect Lilly will, and Lilly has represented, expressly or by implication, that it does, employ appropriate measures to (a) maintain and protect the privacy and confidentiality of personally identifiable information obtained from or about consumers through its Prozac.com and Lilly.com Web sites and (b) safeguard that information from unauthorized access or disclosure. In fact, however, Lilly has not employed measures appropriate under the circumstances to protect and safeguard such information.

2.7 The States' position is that Lilly's conduct as set forth above violates the States' respective consumer protection statutes.

LILLY'S POSITION

3.1 The statements contained in this section represent the position of Lilly only and the States do not admit the truth of any of the statements contained in this section.

3.2 For two years, Lilly offered the Medi-messenger service to individuals visiting the Prozac.com website. Visitors who wanted to use the reminder service simply subscribed to it online, provided their e-mail address, wrote the desired content of the reminder, and designated the frequency with which they wanted to receive the reminders. The Medi-messenger service

was not well-subscribed, and in June 2001, Lilly decided to terminate it.

3.3 A Lilly employee drafted the text for an e-mail to be sent to each of the 669 current Medi-messenger subscribers notifying them that Lilly was terminating the service. Notwithstanding the substantial security measures in place at Lilly, and the use of a trained programmer in designing the code to send the message, the programmer made an error in writing the code (she placed a “}” in the wrong place). Despite her internal test of the program before it was executed (she sent it to herself first, a single user, so the embedded error in the code was not revealed in the test), her error was such that instead of sending 669 individual e-mails to each subscriber, the program sent one e-mail to all 669 subscribers. The message, miscoded, was sent on June 27, 2001 and was received by 649 subscribers all at once (twenty messages were “bounced back” undelivered due to failures in the e-mail address).

3.4 The e-mail sent on June 27, 2001 revealed the e-mail addresses of all the subscribers to each of the other subscribers, though no other information was disclosed. Moreover, Lilly did not ask subscribers when they signed up for the service where they lived. Accordingly, Lilly does not know, and with the data available to it cannot find out to any reasonable level of accuracy and completeness, whether any particular subscriber resides in any particular state.

3.5 All Lilly employees are instructed in Lilly’s policy to maintain and protect confidential information. The programmer, who understood the importance of the privacy of personal information at Lilly, discovered the inadvertent disclosure immediately, as she herself was one of the Medi-messenger service subscribers. Lilly immediately acknowledged the mistake to each of its subscribers directly, accepted responsibility for it, and voluntarily took

immediate steps internally to prevent it from recurring. Only six subscribers (about one percent) registered any complaint, and none of those who complained asserted that the inadvertent disclosure violated Lilly's Privacy Statement. Neither Lilly nor Lilly's employee intended the disclosure, which was admittedly the product of human error. Lilly had and has security measures in place to protect private information, and Lilly has never before improperly disclosed other e-mail addresses or other confidential subscriber or customer information.

3.6 Lilly's position is that it did not violate any state or federal laws with respect to the use or disclosure of consumers' personally identifiable information.

GENERAL PROVISIONS

4.1 This Assurance does not constitute an admission by Lilly of any fact or violation of any state or federal law, rule or regulation. Lilly enters into this Assurance without admitting any wrongdoing and for settlement purposes only. This Assurance is made without trial or adjudication of any issue of fact or law. This Assurance does not constitute evidence or admission of any issues of fact or law.

4.2 This Assurance shall be governed by the laws of each of the respective States.

4.3 This Assurance does not constitute an approval by the States of any of Lilly's standards, procedures or practices, and neither Lilly nor any of its agents, employees, contractors or representatives shall make any representation to the contrary.

4.4 Lilly's obligations under this Assurance shall be in addition to those imposed by the law of the respective States, including but not limited to statutes, regulations and court decisions; and nothing herein shall be deemed to excuse compliance with such law.

4.5 Nothing in this Assurance shall be construed as a waiver of any private rights of

any person. Nothing in this Assurance shall permit any person or entity not a signatory hereto to enforce any provision of this Assurance.

4.6 Nothing in this Assurance shall be construed to authorize or require any action by Lilly in violation of applicable federal, state or other laws. Lilly agrees that this Assurance constitutes a legally enforceable obligation of Lilly in accordance with its terms.

4.7 This Assurance may be executed in counterparts.

4.8 The respective States, without further notice, may make *ex parte* application to any appropriate state court for an order approving this Assurance, which shall be considered an Assurance of Voluntary Compliance or an Assurance of Discontinuance as provided by the States' respective laws, or otherwise file this Assurance with any appropriate state court or state agency.

ASSURANCES

5.1 This Assurance shall not apply to information from or about individual U.S. consumers collected in the course of and used in Lilly's activities related to pharmaceutical research and development, medical or regulatory activities.

5.2 Lilly shall institute supervisory procedures reasonably designed to achieve compliance with this Assurance.

5.3 Lilly shall not misrepresent in any manner, expressly or by implication, the extent to which it will maintain and protect the privacy or confidentiality of any personally identifiable information³ obtained from or about U.S. consumers.

³ As used in this Assurance, "personally identifiable information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address; (c) an e-mail address or other online contact information, such as an instant messaging user

5.4 Lilly shall establish and maintain an information security program for the protection of personally identifiable information obtained from or about U.S. consumers, which program shall include:

- a. Appropriate administrative, technical, and physical safeguards reasonably designed to protect the security and confidentiality of such information and to protect such information against any reasonably anticipated threats or hazards to its security or integrity, and against any unauthorized access, use, or disclosure; and
- b. Automated barriers in its databases to ensure that only those applications that have been tested and pre-authorized by designated personnel, and that are being executed by designated personnel, can gain access to personally identifiable information.

5.5 To develop, implement, and maintain the program required by Section 5.4 above, Lilly shall:

- a. Designate appropriate personnel to coordinate and oversee the program;
- b. Identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of personally identifiable information, and address these risks in each relevant area of Lilly's operations, whether performed by employees, contractors, or agents, including (i) management and training of personnel; (ii) information systems for the processing, storage, transmission, or disposal of personally identifiable information; and (iii) prevention and response to attacks, intrusions,

identifier or a screen name that reveals an individual's e-mail address; (d) a telephone number; (e) a social security number; (f) an Internet Protocol ("IP") address or host name that identifies an individual consumer; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; or (h) any information that is combined with (a) through (g) above. Provided that this definition shall not include personally identifiable information about physicians, nurses, or other healthcare professionals, or their staff, that is collected in connection with such persons' professional duties.

unauthorized access, or other information systems failures;

c. Train relevant employees, develop and keep updated relevant training materials and internal procedures for monitoring compliance with the privacy training program;

d. Document its means of implementing the program;

e. Conduct a written review by qualified persons within ninety (90) days after the date as of which this Assurance is executed and yearly thereafter, which review shall monitor and document compliance with the program, evaluate the program's effectiveness and recommend changes to it, and monitor and document the conformance of Lilly's practices to its representations regarding the privacy, confidentiality and security of personally identifiable information obtained from or about U.S. consumers;

f. Unless the written review required by paragraph 5.5.e. above is performed by a qualified independent third party, present each such written review to a qualified independent third party, which third party shall examine the written review for appropriateness of format, scope and content and verify the results or conclusions of said written review; the qualified independent third party shall report its results in writing; and

g. Adjust the program and any other standards, practices or procedures in light of (i) the findings or recommendations resulting from the review, the review by the qualified independent third party, or other ongoing monitoring, or (ii) material changes to Lilly's operations that affect its information security program.

5.6 Lilly shall provide the States, at the addresses specified by the States, with a copy of the review and audit reports required by Section 5.5. In addition, for a period of five (5) years

after the date this Assurance is executed, Lilly shall maintain and upon request make available to the States for inspection and copying a print or electronic copy capable of being printed of all documents relating to compliance with this Assurance, including:

a. A sample copy of each different print, broadcast, cable, or Internet advertisement, promotion, information collection form, Web page, screen, e-mail message, or other document containing any representation regarding Lilly's collection, use, and security of personally identifiable information from or about U.S. consumers that Lilly offers to the general public. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web. Provided, however, that after creation of any Web page or screen in compliance with this order, Lilly shall not be required to retain a print or electronic copy of any amended Web page or screen to the extent that the amendment does not affect Lilly's's compliance obligations under this order;

b. All reports, studies, reviews, audits, audit trails, policies, training materials, and plans, whether prepared by or on behalf of Lilly, relating to Lilly's compliance with the information security program required by Section 5.4; and

c. Any documents, whether prepared by or on behalf of Lilly, that contradict, qualify, or call into question Lilly's compliance with the information security program required by Section 5.4, maintained through reasonable efforts.

5.7 Lilly shall deliver a copy of this Assurance to all current and future principals, officers, directors, and managers and to all current and future employees, agents, representatives,

and contractors having any responsibility with respect to the subject matter of this Assurance.

Lilly shall deliver a copy of this Assurance to such current individuals and entities no later than thirty (30) days after the date as of which this Assurance is executed, and to such future individuals and entities no later than thirty (30) days after such individual or entity assumes such position or responsibility.

5.8 Lilly agrees to pay, within thirty (30) business days after the date as of which this Assurance is executed, the sum of \$160,000 to the States, in individual checks made payable to such accounts and addresses as the States shall direct. The States state that such sum shall be divided among the States as they may agree and may be designated for attorneys' fees and investigative costs or for consumer education, litigation, public protection or local consumer aid funds, or any other purpose authorized by state law at the discretion of each State.

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