

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 07-1107-CV

Caption [use short title]

Motion to: Supplement the Record and Take Judicial Notice

In re Zyprexa Litigation

Set forth below precise, complete statement of relief sought:

Appellant James Gottstein seeks to supplement the record and to take judicial notice of the documents in the Respondent-Appellant's Appendix

Three horizontal lines for additional text.

MOVING PARTY: Appellant James Gottstein
[] Plaintiff x Defendant
[] Appellant/Petitioner [] Appellee/Respondent

OPPOSING PARTY: Appellee Eli Lilly & Co.

MOVING ATTORNEY: Steven Brock, Esq.
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Court-Judge/Agency appealed from: United States District Court, EDNY, Honorable Jack B. Weinstein

Please check appropriate boxes:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has consent of opposing counsel:

Has request for relief been made below? [] Yes [] No

A. been sought? Yes x No
B. been obtained? Yes x [] No

Has this relief been previously sought in this Court? [] Yes [] No

Has service been effected? x Yes [] No
[Attach proof of service]

Is oral argument requested? [] Yes x No
(requests for oral argument will not necessarily be granted)

Requested return date and explanation of emergency:

Has argument date of appeal been set? [] Yes x No
If yes, enter date:

Two horizontal lines for return date and explanation.

Signature of Moving Attorney: Date: July 22, 2009

ORDER

IT IS HEREBY ORDERED that the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

07-1107-CV

United States Court of Appeals
for the
Second Circuit

ELI LILLY & CO.,

Movant-Appellee,

- v -

JAMES B. GOTTSTEIN,

Respondent-Appellant,

Vera Sharav, Alliance For Human Research Protection, John Doe,
David S. Egilman, Laura Ziegler, Mindfreedom International, Judi
Chamberlin, Robert Whitaker, Terri Gottstein, Jerry Winchester,
Dr. Peter Breggin, Dr. Grace Jackson, Dr. David Cohen, Bruce Whittington,
Dr. Stephen Kruszewski, Will Hall, David Oaks and Eric Whalen,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**RESPONDENT-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO SUPPLEMENT THE RECORD AND TO TAKE JUDICIAL NOTICE OF THE
DOCUMENTS IN THE RESPONDENT-APPELLANT'S APPENDIX**

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Preliminary Statement

This memorandum is respectfully submitted on behalf of Respondent-Appellant James B. Gottstein (Gottstein) in support of his motion to (a) supplement the record and (b) take judicial notice of documents that are not part of the record below and are contained in the Respondents-Appellant's Appendix (RA), a copy of which is attached hereto as Exhibit "A".

Factual Background

As discussed in Gottstein's brief on appeal, a central premise of the District Court's decision in issuing an injunction against Gottstein was the alleged sham nature of the subpoena to Dr. David Egilman (Egilman) in connection with litigation pending in Alaska. *See, e.g., In re Zyprexa Injunction*, 474 F.Supp.2d 385, 391, 400-01 (E.D.N.Y. 2007) ("pretense", "wholly unrelated to Zyprexa", "bore no relevance to the Alaska litigation"). However, as further set forth in Gottstein's brief on appeal, Zyprexa was indeed an issue in the Alaska litigation as established by information that was developed following the entry of the District Court's injunction, and thus the subpoena issued to Egilman for Eli Lilly and Company (Lilly) documents pertaining to Zyprexa was legitimate. Evidence of such linkage is contained in records of court proceedings in Alaska and/or records

maintained by medical facilities at which Gottstein's Alaska client, William Bigley, was treated.

As also discussed at length in Gottstein's brief on appeal, much of the information that Lilly sought to maintain as confidential pursuant to the injunction was previously in the public domain and apparently all of that information has since been declassified. Indeed, as reflected by the documents in the RA, much of the information that Lilly sought to protect formed the basis of a guilty plea by Lilly in the Eastern District of Pennsylvania and payment by Lilly of \$1.415 billion, including the largest criminal fine for an individual company ever imposed in a United States criminal prosecution of any kind.

The documents in the RA include court records, hospital records, newspaper articles and other materials discussed in Gottstein's brief in support of (1) the legitimacy of the subpoena that was the subject of the District Court's injunction and (2) the nonconfidential nature of the information Lilly sought to protect pursuant to the injunction.

The RA also includes documents that (1) are part of the record below but do not appear in the Joint Appendix, (2) are not included in the record below but should be part of that record, e.g., some of *The New York Times* articles that were the subject of the District Court's injunction and are

pertinent to this appeal (*see In re Zyprexa Injunction*, 474 F.Supp.2d at 405), and (3) are from related proceedings in the District Court.

ARGUMENT

THE COURT SHOULD PERMIT SUPPLEMENTATION OF THE RECORD AND TAKE JUDICIAL NOTICE OF THE MATERIALS IN THE RESPONDENT-APPELLANT'S APPENDIX

This court may take judicial notice of the types of records contained in the RA in connection with the instant appeal.

A court may take judicial notice “at any stage of the proceeding.” Fed.R.Evi. 201(f). *See, e.g., Hotel Employees & Restaurant Employees Union v. City of New York Dep’t of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002); *Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001) (“appeals court may take judicial notice of filings or developments in related proceedings which take place after the judgment appealed from”). Many of the records in the RA were generated after the District Court’s decision. Under these circumstances, this Court may and should take judicial notice of these materials. *Capital Ventures International v. Republic of Argentina*, 443 F.3d 214, 223 n.8 (2d Cir. 2006); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972) (“Since our decision has to be forward-looking, determining the cast of the proceedings from now on, we must take account

of this new situation, just as we would if we were considering an injunction for the future.”)

Judicial notice may be taken of proceedings in other courts and news articles if they have a bearing on the matters at issue.¹ *Werner v. Werner, supra*; *Shah v. Meeker*, 435 F.3d 244, 249 (2d Cir. 2006); *LC Capital Partners, LP v. Frontier Insurance Group, Inc.*, 318 F.3d 148, 153 (2d Cir. 2003); *Lyons v. Stovall*, 188 F.3d 327, 333 n.3 (6th Cir. 1999); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) (“scope and reach of the doctrine of judicial notice has been enlarged over the years . . . [to] include[] those matters that are verifiable with certainty”). At a minimum, courts will take judicial notice of the existence of other court proceedings or publicly filed documents where the purpose is merely to establish that certain matters were stated in the documents, not for their truth. *See, e.g., Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773-74 (2d Cir. 1991); *Brown v. Lippard*, 472 F.3d 384, 387 (5th Cir. 2006)

¹ We note that the District Court has taken judicial notice of many court records and news articles regarding Zyprexa in connection with other rulings in this litigation. *In re: Zyprexa Products Liability Litigation*, 549 F.Supp.2d 496, 528-29, 536 (E.D.N.Y. 2008). The Supreme Court of Alaska also has taken judicial notice of many of the documents in the RA in connection with the landmark victory Gottstein recently obtained on behalf of his client, *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168 (2009). *See* RA-43-45.

(court took judicial notice of the existence (but not the truth) of testimony that undermined a claim of qualified immunity).

Here, the nonrecord documents are being offered for two principal purposes. First, nonrecord documents are included in the RA for the purpose of establishing that Zyprexa was indeed an issue in the Alaska proceedings, and that those proceedings, Gottstein's vigorous efforts in support of his client, and the subpoena for Zyprexa documents were not a sham. Second, nonrecord documents are also included in the RA to establish the nonconfidential nature of the information Lilly sought to protect by the injunction against Gottstein. Based on the authorities cited above, this Court may take judicial notice of all such nonrecord documents for these purposes.

CONCLUSION

For the reasons set forth herein, Respondent-Appellant James B. Gottstein respectfully requests that the Court permit supplementation of the record and take judicial notice of the documents contained in the Respondent-Appellant's Appendix.

Dated: Garden City, New York
July 22, 2009

Respectfully submitted,

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