

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 07-1107-cv

In re: Zyprexa Litigation

Motion for: Strike Portions of Respondent-Appellant's Brief

Set forth below precise, complete statement of relief sought:

Movant-Appellee Eli Lilly and Company moves this Court to disregard and strike those

portions of Respondent-Appellant James Gottstein's brief that rely on materials that are

not a part of the record on appeal.

MOVING PARTY: Movant-Appellee Eli Lilly and Comapny

- Plaintiff  Defendant  
 Appellant/Petitioner  Appellee/Respondent

OPPOSING PARTY: Respondent-Appellant James Gottstein

MOVING ATTORNEY: Sean Fahey; Paul Avelar

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Court-Judge/Agency appealed from: United States District Court for the Eastern District of New York, Honorable Jack B. Weinstein

Please check appropriate boxes:

Has consent of opposing counsel:  
A. been sought?  Yes  No  
B. been obtained?  Yes  No

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

Has argument date of appeal been set?  Yes  No  
If yes, enter date \_\_\_\_\_

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?  Yes  No

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

Requested return date and explanation of emergency:  
\_\_\_\_\_  
\_\_\_\_\_

Signature of Moving Attorney:

*Paul Avelar*

Date: 10/23/09

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

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: \_\_\_\_\_

By: \_\_\_\_\_

## **Corporate Disclosure Statement**

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Movant-Appellee Eli Lilly and Company hereby states that it does not have a parent corporation and that there are no publicly held corporations that own 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 28 and Second Circuit Local Rule 28(1), Movant-Appellee Eli Lilly and Company moves this Court to disregard and strike those portions of Respondent-Appellee James Gottstein's brief that rely on materials not a part of the record on appeal.

### **Argument**

In its Order of August 17, 2009, this Court denied Mr. Gottstein's first attempt to expand the record on appeal to include materials in the Supplemental Appendix that were never presented below:

The Appellant's motion seeking to include certain materials in a Supplemental Appendix is GRANTED only to the extent that materials already in the record before the district court may be presented in that Supplemental Appendix; to the extent that Appellant seeks permission to include materials in the Supplemental Appendix that were not in the record before the district court, that request is DENIED without prejudice to Appellant further moving to have the panel assigned to hear the merits of the appeal take judicial notice of matters not presented in the record before the district court; any such motion and any opposition thereto shall be referred to the merits panel when it is assigned to the appeal.

Mr. Gottstein has since moved this Court to expand the record on appeal through the procedure of judicial notice. For the reasons set forth in Lilly's opposition to that motion (filed October 14, 2009), that attempt to expand the record should also be denied. Denial of these motions to expand the record means that the vast

majority of the material in the Respondent-Appellant's Appendix would continue to be outside the record on appeal.<sup>1</sup>

Although the vast majority of the material in the Respondent-Appellant's Appendix was, continues to be, and should remain outside of the record appeal, Mr. Gottstein's brief extensively relies on the Respondent-Appellant's Appendix. The portions of Mr. Gottstein's brief that rely on and explicitly cite materials outside of the record on appeal include:

- Statement of Facts Sections I.A-C, in part
- Statement of Facts Sections I.D-G
- Statement of Facts Section II.A, in part
- Statement of Facts Section II.G-L
- Argument I.A, in part
- Argument II.A, in part
- Argument II.B-D

It is improper to include in an appellate brief matter which is outside the record. *United States v. Burke*, 781 F.2d 1234, 1246 (7th Cir. 1985) ("counsel may not refer to case-specific matter outside the record"); *Johnson v. United States*, 426 F.2d 651, 656 n.8 (D.C. Cir. 1970) (en banc, per curium) ("The panel which heard this case in the first instance commented adversely upon the inclusion

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<sup>1</sup> Lilly has agreed that the materials at RA 133-43 and RA 387-92 were cited or considered by the district court and are, therefore, a part of the record on appeal. The remainder of the Respondent-Appellant's Appendix should be stricken.

in appellant's brief on appeal of matter outside the record, and granted appellee's motion to strike the offending matter. We adhere to that disposition for the reasons advanced by the panel in its opinion.”). Rule 28 of the Federal Rules of Appellate Procedure dictates that the parties' briefs are to be confined to the record on appeal. *See* Fed. R. App. P. 28(a)(7, 9) (statement of facts must refer to the record, argument must include citations to the parts of the record on which the party's brief relies).

Briefs that contain “burdensome, irrelevant, [and] immaterial . . . matter . . . may be disregarded and stricken by the court.” 2d Cir. Local R. 28(1). Accordingly, this Court has previously stricken materials that were not a part of the record on appeal, and portions of briefs that relied on such materials or did not otherwise conform to Appellate Rule 28. *E.g., Cioffi v. Averill Park Central School Dist. Board of Ed.*, 444 F.3d 158, 169 (2d Cir. 2006) (striking portions of reply brief raising new issues for appeal); *In re Felzenberg*, No. 99-5059, 2001 WL 10387, \*1 (2d Cir. 2000) (“We grant the Trustee's motion to strike those portions of the reply brief that reference exhibits or information not before the district court.”); *Eng v. New York Hosp.*, No. 98-9646, 1999 WL 980963, \*1 (2d Cir. 1999) (denying motion to supplement record and striking materials from record that were not submitted to the district court).

Because substantial portions of Mr. Gottstein's brief explicitly cite to or otherwise rely on materials that are not a part of the record on appeal, those portions of his brief should be disregarded and stricken, pursuant to Rule 28 of the Federal Rules of Appellate Procedure, Second Circuit Local Rule 28(1), and the case law of this Circuit.

### **Conclusion**

For the foregoing reasons, this Court should disregard and strike those portions of the Brief for Respondent-Appellant James Gottstein that rely on materials not a part of the record on appeal.

Respectfully submitted,



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Dated: October 23, 2009

Counsel for Movant-Appellee, Eli Lilly  
and Company