UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

--X	Docket No.: 07-1107-cv
:	
In re: ZYPREXA LITIGATION :	MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE
:	
--X	

Respondent-Appellant James Gottstein filed Respondent-Appellant's Appendix concurrently with his opening merits brief, Joint Appendix, and Special Appendix. Gottstein properly moved the Court to take judicial notice of Appellant's Appendix at that time. The motion judge granted the motion as to "materials already in the record before the district court," otherwise denied it "without prejudice" to a further motion to take judicial notice of the balance of Appellant's Appendix, and ordered that any such motion "shall be referred to the merits panel." Order dated August 17, 2009. Gottstein filed such a motion on judicial notice, which has been fully briefed and referred to the merits panel in accordance with the Court's order. Lilly has now filed a further motion seeking to strike the same materials addressed in the fully briefed motion to take judicial notice already before the merits panel.

ARGUMENT

Carefully parsed, Lilly's motion to strike simply asks the Court to disregard any documents in Appellant's Appendix and references in the briefs to the extent

that the Court ultimately decides they are not subject to judicial notice or otherwise properly before the Court. Gottstein of course agrees that the Court should disregard any materials that it finds should not be considered in its ruling on the merits. The Court's ruling on the motion for judicial notice will fully address these issues and provide Lilly any relief to which it might be entitled. Thus, Lilly's motion to strike is unnecessary and duplicative and should be denied.

Some brief additional response is appropriate to Lilly's repeated suggestion that it was "improper" for Gottstein to submit the "vast majority" of Appellant's Appendix and discuss the documents in his briefs because Gottstein's motion seeking judicial notice had not yet been granted. Motion to Strike at 2. There is no support for Lilly's position in the Court's precedents or rules or practice, which if adopted would significantly prolong the appellate process.

If Lilly's novel theory were correct, appellate courts would presumably need to rule on motions for judicial notice or other analogous motions to supplement the district court record early on. Merits briefing would often be delayed. Moreover, such motions are generally better understood and decided in the context of full briefing on the merits, as the Court recognized in its August 17 Order.

Lilly's claim that it was "improper" for Gottstein to address the materials in Appellant's Appendix in his opening brief before a ruling on judicial notice is essentially an effort to overturn the Court's August 17 Order, which explicitly

refused to decide the judicial notice issues early on and indicated that they should be decided by the merits panel. Lilly had the opportunity to move the Court to extend the time for filing of its opposition brief until after the Court ruled on the pending motion for judicial notice—but did not do so. It had the opportunity to respond to the briefing and material in Appellant's Appendix (conditional on the Court's later ruling on judicial notice) but elected largely to ignore the material in its opposition.

The cases Lilly itself cites do not support its position.[1] In *United States v. Burke,* counsel for a criminal defendant included in the reply brief on appeal an account of his conversation with a juror unsupported by any affidavit, motion, or legal justification. In *Johnson v. United States*, the en banc court simply approved a prior panel's striking of unspecified "offended material" in a criminal appeal involving rape charges. The prior panel's opinion is not available on Westlaw. In *Cioffi,* the court simply refused to consider sections of a reply brief raising new issues in the appeal. In *Felzenberg,* the court granted a motion to strike references to new exhibits submitted by a pro se party along with her reply brief on appeal, but vacated and remanded to the district court for further proceedings. And in *Eng,*

[1] *United States v. Burke,* 781 F.2d 1234 (7th Cir. 1985); *Johnson v. United States,* 426 F.2d 651 (D.C. Cir. 1970) (en banc, per curium); *Cioffi* v. *Averill Park Central School Dist. Board of Ed.,* 444 F.3d 158 (2d Cir. 2006); *In re Felzenberg,* No. 99-5059, 2001 WL 10387 (2d Cir. 2000); *Eng v. New York Hosp.,* No. 98-9646, 1999 WL 980963 (2d Cir. 1999).

the court granted a motion to strike portions of depositions taken during district court proceedings which were not filed in the district court in opposition to a motion for summary judgment.

None of these cases remotely suggests that it is improper to submit material outside the district court record on a motion for judicial notice on appeal or to refer to such material in briefing pending a ruling on that motion. Nor is there any authority whatsoever for "striking" such material—if by that Lilly means to imply "expunging"—should judicial notice not ultimately be granted. Such material is simply disregarded by the appellate court. As will be discussed in Gottstein's reply brief on the merits, none of his legal arguments rest solely on documents in Appellant's Appendix, and all are thus properly before the Court.

Lilly's attempted invocation of Local Rule 28(1) pursuant to the Federal Rules of Appellate Procedure (and Rule 28 generally) has no merit. Local Rule 28(1) provides: "Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter." Noncompliant briefs "may be disregarded and stricken." In quoting the rule, Lilly edited it by deleting the reference to "scandalous" matter, which clarifies that the focus is on material intended purely to harass or embarrass. Motion to Strike at 3. The material offered for judicial notice here consists almost entirely of documents from public court dockets in related litigation, articles in national publications, and

highly publicized government reports. There is nothing of a personally harassing or scandalous sort to support Lilly's reliance on Rule 28(1).

Furthermore, Rule 28 simply does not address material which, though outside the record, is the subject of a proper motion for consideration under doctrines such as of judicial notice, changed circumstances, and mootness. As Appellant's Appendix constitutes the record on which the Court will decide the motion to take judicial notice, it is perforce part of the record on appeal—though of course any documents not found properly subject to judicial notice would be disregarded in the Court's separate ruling on the merits. The situation is analogous to a legal argument or evidence that is ultimately found irrelevant but which is not thereby expunged from the appellate docket.

In sum, the Court should address Gottstein's motion for judicial notice in the context of full briefing and oral argument by the parties in accordance with the August 17 Order, decide which materials may properly be considered on appeal under the Court's precedents and which, if any, may not, and render a judgment on the merits considering those materials properly subject to judicial notice.

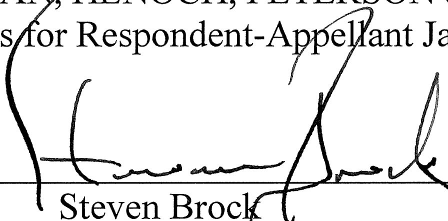
CONCLUSION

Accordingly, Lilly's motion to strike should be denied.

Dated: November 9, 2009

Respectfully submitted,

BERKMAN, HENOCH, PETERSON & PEDDY, P.C.
Attorneys for Respondent-Appellant James B. Gottstein



By:____________________________

Steven Brock
Leslie R. Bennett
100 Garden City Plaza
Garden City, New York 11530
(516) 222-6200

LAW OFFICES OF D. JOHN McKAY
D. John McKay
117 East Cook Avenue
Anchorage, Alaska 99501