

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 Take Judicial Notice

Set forth below precise, complete statement of relief sought:

In re: Zyprexa Litigation

Respondent-Appellant Gottstein requests the Court to take judicial notice of those documents in the Respondent-Appellant's Appendix not in the record before the district court

MOVING PARTY: Respondent-Appellant James Gottstein

- Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: Movant-Appellee Eli Lilly & Co.

MOVING ATTORNEY:

[name of attorney, with firm, address, phone number and e-mail]

Steven Brock

Berkman Henoch Peterson & Peddy, P.C.

100 Garden City Plaza, Garden City, NY 11530

516-780-0325

s.brock@bhpp.com

OPPOSING ATTORNEY [Name]:

[name of attorney, with firm, address, phone number and e-mail]

Sean P. Fahey

Pepper Hamilton, L.L.P.

3000 Logan Square, Philadelphia, PA 19103

215-981-4296

faheys@pepperlaw.com

Court-Judge/Agency appealed from: U.S. 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

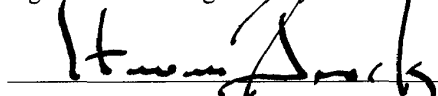
Has service been effected? Yes No
[Attach proof of service]

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: _____

Signature of Moving Attorney:



Date: September 28, 2009

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: _____

ORDER

IT IS HEREBY ORDERED that the motion is **GRANTED** **DENIED.**

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____
Form T-1080 (Revised 10/31/02)

By: _____

Preliminary Statement

On July 23, 2009, Respondent-Appellant James B. Gottstein (“Gottstein”) submitted Respondents-Appellant’s Appendix¹ (“RA”) together with a supporting motion to supplement the record and take judicial notice of its contents. Gottstein filed his brief on appeal, Joint Appendix, and Special Appendix on the same date. Movant-Appellee Eli Lilly & Company (“Lilly”) opposed Gottstein’s motion for filing of the RA. By order filed August 17, 2009 (“August 17 Order”), the Court granted the motion as to “materials already in the record before the district court”² and otherwise denied the motion “without prejudice” to refiling. The court ordered any such refiled motion be referred to the merits panel.

By this motion, Gottstein renews his motion that the RA be accepted for filing in its entirety. In the interest of avoiding repetition, Gottstein respectfully refers the Court to his brief on appeal for the background relevant to this motion, including specific discussions of the tensions and conflicts between the various documents in the RA and the district court’s ruling. This memorandum focuses on the propriety of judicial notice and general significance of the documents in the RA for the issues on appeal.

¹ The original and nine copies of the RA have been lodged with the clerk pending a ruling on the present motion, and Lilly was previously served. Gottstein respectfully refers the Court to those papers and has not submitted duplicative additional copies of the RA with the present motion. Should the Court require additional copies, Gottstein will provide them.

² The documents properly considered as part of the record under the August 17 letter are discussed below at p. 5 n.3.

The Documents in the RA

Alaska Court Documents (RA1-132). The permanent injunction against Gottstein rests on the district court's conclusion that Gottstein's subpoena of Zyprexa and other documents in an Alaska state court case on behalf of an anonymous client "BB" was a "pretense" because Zyprexa had "no relevance"; the case was "wholly unrelated to Zyprexa." *In re Zyprexa Injunction*, 474 F.Supp.2d 385, 391, 400-01 (E.D.N.Y. 2007). It is now a matter of public record that William (Bill) Bigley was the anonymous "BB," and some of his legal and psychiatric records filed in Alaska court proceedings have been unsealed and made public.

The RA includes documents from the record on appeal before the Alaska Supreme Court in *Bigley v. Alaska Psychiatric Inst.*, No. S-13116, stating that Bigley was in fact being involuntarily medicated with Zyprexa at about the time of the subpoena and on several occasions thereafter. RA8, 9; Gottstein Br. at 15, 32. These records contradict the District Court's conclusion that Zyprexa was irrelevant and confirm that Gottstein had reasonable grounds for seeking discovery regarding Zyprexa. *See* Gottstein Br. at 14-15. Thus, the subpoena was proper—not a "pretense," not even a violation of CMO-3 in MDL-1596, much less an intentional violation as the District Court erroneously concluded. The Alaska Psychiatric Institute, custodian of the records at R8 and R9, and Bigley's adversary

in No. S-13116, did not dispute the authenticity or accuracy of the records, nor did Lilly in its opposition to Gottstein's prior motion for judicial notice.

The RA also includes court records from the guardianship proceeding in which the subpoena was issued documenting that Gottstein sought from the outset to terminate the guardian's power to consent to psychiatric drugs over Bigley's objection; Gottstein ultimately negotiated a favorable settlement ending the power to consent to psychiatric medication. RA113; Gottstein Br. at 16. As Zyprexa was one of a class of psychiatric drugs (with Risperdal, Seroquel, and others), RA19, commonly prescribed to persons such as Bigley, a subpoena for evidence of Zyprexa hazards and benefits to test the guardian's competence to consent to such drug treatment was plainly proper, not a "pretense." Gottstein Br. at 33.

The Alaska Supreme Court has also found evidence on hazards of Zyprexa (olanzapine) relevant in litigation seeking forced treatment of Bigley with other drugs in its class. *See* RA19-22, RA24-34; Gottstein Br. at 17. Additional court records in the RA —petitions, verdict forms, appearances, elections, orders, notices, briefs and affidavits—document extensive and often successful litigation by Mr. Gottstein to protect Mr. Bigley's right to decline psychiatric drugs. These documents were formerly sealed but are now publicly available from the Alaska court dockets, and further demonstrate that Gottstein's representation of Bigley was not a "pretense."

RA1-65 are taken from the record on appeal before the Alaska Supreme Court in *Bigley v. Alaska Psychiatric Inst.*, No. S-13116, one of the numerous cases in which Gottstein has represented Bigley. RA43 is an order by the Alaska Supreme Court in that appeal taking judicial notice of RA44-65 without objection from the Alaska Psychiatric Institute, which was familiar with the documents because Mr. Bigley had been committed to that facility repeatedly for decades and it was typically the petitioner or otherwise a party to the cases involving Bigley.

RA66-102 are opinions of the Alaska Superior Court in *In re Bigley*, No. 3AN 08-1252PR dated November 25, 2008 and January 23, 2009 making public the proceedings and docket in that case based on Bigley's request. RA103-132 are documents from an appendix filed in that case by Gottstein on Bigley's treatment history, including court papers documenting Gottstein's extensive litigation of the Bigley guardianship proceeding and two medication orders for Zyprexa. The Alaska Psychiatric Institute was again the petitioner against Bigley and did not argue that the records were not authentic or their contents false.

The New York Times Articles dated December 17-21, 2006 (RA133-143).

The District Court cited these four crucial articles (the "*Times* articles") in its opinion, SPA-33, stated that they contained the "gist" of the documents which Gottstein provided to the *Times*, SPA-11, and relied on the *Times* articles as evidence that the documents provided were confidential, SPA-64. The *Times*

articles appear frequently in other MDL-1596 rulings and dockets. However, only one was entered in the docket specifically created for the injunction proceedings, Dkt. No. 07-cv-504. *See* A-4, #8. The District Court did not order this separate docket number until February 5, 2007, only shortly before its February 13, 2007 ruling. Lilly now concedes that the *Times* articles are part of the record on appeal pursuant to the Court's August 17 order.³

Government Response to the *Times* Articles (RA144-214). The District Court rejected Gottstein's claims of justifiable disclosure of misconduct and disclosure in the public interest. SPA15. RA154-188 and RA192-197 are letters from the Food and Drug Administration to Lilly regarding additional data submissions on matters raised in the *Times* articles and strong additional warnings on Zyprexa labeling of Zyprexa. *See* Gottstein Br. at 25. Lilly produced these documents under seal in *Alaska v. Eli Lilly*, No. 3AN-06-5630CI, claiming confidentiality, but as the stamped text on the documents indicates the Alaska court ordered them unsealed. RA198-212 is Lilly's October 5, 2007 "Dear Doctor" letter to health professionals publicizing the new warnings. RA189-191 and

³ Lilly takes the position that the only documents from the RA already in the record before the District Court were RA133-143 and RA387-392. Given the District Court's awareness of the full MDL-1596 record, the frequent errors of docketing and the late designation of a separate docket for the injunction proceedings, Gottstein submits that all MDL-1596 documents prior to the final judgment below and some later MDL-1596 documents which fill in gaps and reconstruct relevant MDL-1596 proceedings should be considered part of the record on appeal pursuant to the August 17 order. Those documents would include RA215-240, 252-259, 281-282, 286-298, 300-305, 345-352, and 359-375.

RA213-214 are *Times* articles reporting on the FDA investigation following the December 2006 *Times* articles and the warnings issued as a result.

RA144-153 are Congressional documents relating to requests by Senator Chuck Grassley and Representative Henry Waxman to Lilly for documents relating to the 2006 *Times* articles based on documents provided by Gottstein.

Lilly Criminal Plea and Fines (RA241-251, 398-462).

The December 18, 2006 *Times* article, RA137-140, which Lilly now admits is part of the record before the Court, reported apparent criminal conduct by Lilly involving the marketing of Zyprexa for elderly patients with dementia, a treatment not approved by the Food and Drug Administration. That article was based on the documents provided by Gottstein. On January 15, 2009, Lilly pled guilty to the criminal charge of “promoting Zyprexa in elderly populations as treatment for dementia, including Alzheimer’s dementia.” RA-450. Lilly agreed to pay \$1.4 billion, including a criminal fine of \$515 million, which the Department of Justice news release described at the time as “the largest criminal fine for an individual corporation ever imposed in a United States criminal prosecution of any kind.” RA-249.

RA398-452 are the Memorandum and exhibits filed by the United States Department of Justice in the Eastern District of Pennsylvania supporting the entry of the Lilly guilty plea and sentencing. RA 249-251 is the contemporaneous news

release by the Department of Justice. RA241-243, 244-248 are *Times* articles from about a year earlier, January 30 and January 31, 2008, reporting that Lilly was considering payment of \$1 billion to settle with the Department of Justice. The *Times* further reported that persons involved in the Justice Department investigation of Lilly said that it “gained momentum” with the publication of the *Times* articles in December 2006 based on documents provided by Gottstein and that the Justice Department later pressed for criminal as well as civil charges against Lilly. RA242-243. *See* Gottstein Br. at 27-28; 57-58.

Rulings that Lilly Zyprexa Documents Are Not Confidential (RA215-240, 252-397). The District Court’s injunction against Gottstein was based on findings that the documents Gottstein disclosed to the *Times* were properly classified as confidential and that disclosure threatened Lilly with irreparable harm. SPA61-63, 68-69. The District Court and an Alaska state court have subsequently ruled that many of these same and other similar Lilly Zyprexa documents were not confidential. *See* Gottstein Br. at 50-58.

In Case Management Order No. 9 (Unsealing of Documents Produced by Lilly), *In re Zyprexa Products Liability Litigation*, MDL-1596 (E.D.N.Y. March 20, 2009) (CMO-9), Special Discovery Master Woodin unsealed all but 11 of hundreds of documents Lilly had claimed confidential. Judge Weinstein affirmed that ruling on May 1, 2009. RA374-375. These documents are among the Third

Party Payor documents which Lilly and the District Court acknowledge “overlap” with the documents at issue in this appeal. *See* Gottstein App. Br. at 18, 23, 25, 28. RA258-259 is a letter from Special Discovery Master Woodin to Judge Weinstein dated February 7, 2007, shortly before the ruling on appeal, regarding the “overlap” between the documents provided by Gottstein to the *Times* and the documents eventually reviewed and declassified in CMO-9. RA252-257 is an excerpt from proceedings before Special Discovery Master Woodin on April 6, 2005 in which Lilly acknowledges overdesignation of documents as confidential.

While Lilly objects to the inclusion of the foregoing court opinions and transcripts, it agrees that the Declaration of Gerald Hoffman dated January 16, 2006, RA387-392, which Lilly submitted in support of the confidentiality of the challenged Third Party Payor documents, should be included in the record on appeal. While the District Court relied on the Hoffman Declaration in granting Lilly’s request for an injunction against Gottstein, its ruling in CMO-9 found many of the documents claimed confidential in the Hoffman Declaration to be nonconfidential. Lilly similarly designated large numbers of documents confidential in proceedings in Alaska state court, but almost every document was

declassified upon a document-by-document review of Lilly's confidentiality designations in Alaska state court. RA215.⁴

As the briefing and transcripts relating to the rulings on confidentiality in MDL-1596 generally remain under seal and inaccessible for Gottstein, some secondary documents from MDL-1596 and related published articles have been included in the RA to clarify the record in the District Court. RA260-358 is a memorandum and exhibits filed by counsel for Third Party Payors on August 4, 2008, which include a chronology, tables, and general descriptions of sealed documents, briefs, and hearings relating to the challenge to the confidentiality of the Third Party Payor documents. RA376-379 and RA 463-466 are Bloomberg News articles dated June 12, 2009, reporting on the contents of the Third Party Payor documents unsealed by CMO-9. RA380-386 is a May 2009 peer reviewed article analyzing the documents provided by Gottstein to the *Times*, which remain posted on the internet as they were when the District Court ordered Gottstein to return all such documents and related information in his possession and issued a permanent injunction which is the subject of this appeal.

In sum, Lilly contends that only RA133-143 and RA387-392 (the four *Times* articles and the Hoffman Declaration, all cited and relied on in the District Court's

⁴ This and several other RA documents are simply courtesy copies of unpublished decisions which do not strictly require judicial notice to be considered by the Court. However, as Lilly has objected, Gottstein requests judicial notice of RA215-240; RA43; RA66-102; RA359-375.

ruling) are properly included in the record on appeal. Gottstein argues that the remaining documents in the RA—court rulings and records from public MDL-1596 and Alaska dockets, public government documents, and media and peer reviewed publications—are also proper for consideration by the Court under a variety of accepted principles of judicial notice.

ARGUMENT

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

The documents in the RA are standard types of documents found appropriate for judicial notice in the courts under the Federal Rules of Evidence and familiar legal and procedural principles. The variety of documents submitted in the RA demonstrates how unsound and inconsistent the opinion below has proved in comparison to other opinions in MDL-1596, various governmental investigations, and proceedings in Alaska and elsewhere relating to Zyprexa.

Judicial notice is appropriate for facts as to which there is no “reasonable dispute,” Fed.R.Evi. 201(b), and may be taken “at any stage of the proceeding.” Fed.R.Evi. 201(f); Notes of Advisory Committee on Rule 201(f) (“whether in the trial court or on appeal”); *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).

The documents in the RA consist of court records in related proceedings, other government reports and records, and articles in the media and peer-reviewed journals, all of which are well-established categories of documents which may properly be subject to judicial notice. *See, e.g., 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”); *Lyons v. Stovall*, 188 F.3d 327, 333 n.3 (6th Cir. 1999).

Where the facts stated in such documents are not subject to reasonable dispute, courts may take judicial notice of the truth of such facts. But judicial notice may also be proper to establish that certain matters were stated in a document, regardless of their truth, when the existence of particular statements in such records is relevant. *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) (court took judicial notice of the existence (but not the truth) of testimony that undermined a claim of qualified immunity). In securities fraud litigation, courts take judicial notice of media and government reports and public records on matters that plaintiffs allege were fraudulently concealed. *In re Zyprexa*, 549 F.Supp.2d 496, 501, 536 (E.D.N.Y. 2008). Such media reports may put

plaintiffs on inquiry notice for purposes of statutes of limitations whether or not the media reports are true.

Of course “[o]rdinarily, material not included in the record on appeal will not be considered.” *Lori v. Gorman*, 306 F.3d 1271, 1280 n.2 (2d Cir. 2002). However, as the qualifier “ordinarily” indicates, there are recognized exceptions. In addition to circumstances involving judicially noticeable facts, there are exceptions in a number of “forward-looking” circumstances, such as where changed circumstances affect the propriety of injunctive relief or statements or court rulings support an estoppel. *See Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 & n.3 (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”); *Doran v. Aus*, 308 Fed. Appx. 49 (9th Cir. 2009) (collateral estoppel based on judicially noticed state court proceedings); *Hirsch v. Arthur Anderson & Co.*, 72 F.3d 1085, 1094 (2d Cir. 1995) (taking judicial notice of guilty plea and barring assertion of claim inconsistent with such plea).

In this appeal, the exception for facts subject to judicial notice occurs in combination with dramatically changed circumstances warranting exercise of judicial notice: Lilly has pled guilty to a federal crime based on information in the documents at issue and has made legal and factual claims contrary to its assertions

of confidentiality and irreparable harm in support of its permanent injunction against Gottstein.

In *Korn, supra*, the district court had denied class certification, finding plaintiff's class action counsel unsuitable and the proposed class too small and diverse. On appeal, class action counsel had been replaced by suitable new counsel. This Court concluded that its ruling on class certification had to be "forward looking," evaluating class certification in light of the "new situation," "just as we would if we were considering an injunction for the future." *Korn*, 456 F.2d at 1208 & n.3 (citations omitted). Similar considerations warrant judicial notice of changed circumstances in other "forward looking" situations. *See, e.g., In re Michael B.*, 80 N.Y.2d 299, 317-18 (1992) (judicial notice of admitted neglect in determination of best interests of child in custody proceedings).

This appeal involves "forward looking" consideration of continuation of a permanent injunction as well as the propriety of the injunction in the first instance, providing additional grounds for judicial notice of the changed circumstances documented in the RA. Even if the injunction had been proper on the record below—which it was not—the changed circumstances would warrant vacatur of the injunction in retrospect as improvidently granted or, at a minimum, dissolution of the permanent injunction going forward. *Meccano, Ltd. v. Wanamaker*, 253 U.S. 136 (1920); *Korn*, 456 F.2d at 1208 n.3. The overwhelming evidence that

Gottstein's subpoena of Zyprexa documents was proper removes any semblance of foundation for the District Court's clearly erroneous findings and unfortunate mischaracterizations of Gottstein's effective legal advocacy on behalf of his client.

The evidence in the RA of investigations triggered in Congress, the FDA, and the Justice Department culminating in historic fines, Lilly's guilty plea to a federal crime, and the numerous subsequent statements by the District Court and Lilly inconsistent with Lilly's claims of confidentiality and irreparable harm supports the conclusion that Lilly improperly designated documents confidential to suppress evidence of criminal conduct clearly should be judicially noticed.

The documents in the RA from Alaska state court dockets, RA1-132, are all court records subject to judicial notice. The bulk of the documents are court rulings, briefs, exhibits, and other standard court filings in litigation involving Mr. Bigley, on whose behalf Gottstein subpoenaed Lilly Zyprexa documents. These documents qualify for judicial notice because their existence and contents are not subject to reasonable dispute. Their contents in themselves establish that Zyprexa was at issue in the crucial Bigley guardianship case and that the Alaska courts consider evidence related to Zyprexa in cases involving involuntary medication with other psychiatric drugs. The Alaska Supreme Court has taken judicial notice of many of the documents without objection by the Alaska Psychiatric Institute, Bigley's adversary. While the Alaska Psychiatric Institute has disputed the legal

significance of these documents in a different context, it has not suggested that the court records documenting Zyprexa use are false. Lilly also has raised only legal arguments against judicial notice of these records and did not challenge the truthfulness of the records in its opposition to Gottstein's previous motion for judicial notice. These records may at a minimum be judicially noticed to establish the existence of documents stating that Zyprexa was used.

The documents regarding various Congressional, FDA, and Justice Department investigations resulting in new Zyprexa warnings, historic fines and Lilly's criminal guilty plea are also government records and reports, court filings, and related media articles which are routinely received in the courts by judicial notice if relevant. *See* RA144-214, 241-251, 398-462. As before, the contents of the documents are not reasonably disputable and support Gottstein's claims that Lilly improperly classified documents as confidential to hide its criminal conduct and that disclosure was in the public interest. Given the public nature of these matters and Lilly's direct involvement and admissions, Lilly will be unable to reasonably dispute the truth of many of these documents.

It is important to realize that Lilly did not simply plead guilty to a crime relating to Zyprexa with some limited, perhaps coincidental relation to Gottstein's actions. The evidence in the RA supports a conclusion that that Lilly improperly classified documents confidential to avoid disclosure of admitted criminal conduct

and improperly obtained a permanent injunction against Gottstein by continuing improper claims of confidentiality in an effort to avoid disclosure. The Court should take judicial notice of Lilly's admission of criminal conduct and bar Lilly from assertion of any claims inconsistent with its guilty plea. *See Hirsch v. Arthur Anderson & Co.*, 72 F.3d 1085, 1094 (2d Cir. 1995) (taking judicial notice of guilty plea and barring assertion of claim inconsistent with such plea). Lilly should be precluded from claiming documents establishing criminal conduct are confidential trade and business secrets.

In October 2007, Lilly took a position in related litigation in MDL-1596 that is inconsistent with its claims of confidentiality and irreparable harm and warrants reversal and vacatur of the District Court's injunction. RA393-397. Faced with a securities fraud class action based on the disclosures in the *Times* articles, Lilly sought dismissal on statute of limitations grounds by arguing that the *Times* articles "raised *no* new concern" and did not cause financial harm because such allegations had been reported in the media for many years. RA-394-95 (emphasis by Lilly). The District Court accepted Lilly's argument and dismissed the securities fraud class action, stating that "[t]hese allegations against Lilly had been current in the medical, legal and investment worlds since at least 2001." *In re Zyprexa*, 549 F.Supp.2d 496, 529 (E.D.N.Y. 2008). *See* Gottstein App. Br. at 24-25, 54-55. However, in seeking an injunction against Gottstein, Lilly claimed, and the District

Court found, that the documents provided to the *Times* contained confidential information of great value to Lilly's competitors, the release of which had caused Lilly irreparable harm. SPA-63-64, 70.

Given that the *Times* articles contained the "gist" of the documents which Gottstein provided to the *Times*, SPA-11, specifically including the sort of information found to be confidential, SPA-64, Lilly's denials of financial harm and its insistence that the information in the *Times* articles had been public and well-known for years before those articles appeared are flatly inconsistent with its position in this appeal. Lilly's brief in related litigation in MDL-1596 is a proper subject for judicial notice on appeal. Lilly should be estopped from persisting in assertions of confidentiality on these grounds, as well as based on its criminal guilty plea. Barred from improper assertions of confidentiality, Lilly cannot support its request for an injunction, and even if that were not the case, Lilly's unclean hands would bar equitable injunctive relief against Gottstein.

Additional evidence in the RA to similar effect is taken from court records in the MDL-1596 proceedings relating to Lilly's claim of confidentiality for a collection of Third Party Payor documents which "overlap" with the documents provided to the *Times*. RA215-240.252-317, 463-66. Lilly's claims of confidentiality and the eventual ruling against confidentiality after over three years of delay are recorded in the MDL-1596 docket and are relevant to the District

Court's rulings on the confidentiality of documents at issue in the present appeal. Judicial notice is again appropriate for what the documents state regarding Lilly's claims of confidentiality for overlapping documents. In addition, RA250-368 is needed to establish basic facts as to what is or is not on the MDL-1596 docket, which documents were involved in confidentiality disputes, and what factual representations were made by Lilly as to confidentiality. Media and journal articles reporting the recent public release of the documents and discussing their contents are also included at RA 376-386 and RA463-466 as proper subjects of judicial notice, similar to the *Times* articles.

In sum, judicial notice is proper because the existence and contents of the documents are not subject to reasonable dispute and provide strong, relevant evidence for the Court even if statements in particular documents were subject to dispute. Moreover, the truth of relevant aspects of the documents has not been contested in past proceedings in which judicial notice was granted or in Lilly's earlier opposition to judicial notice of the RA filed August 7, 2009.

While the number of documents in the RA is substantial, the individual documents do not present novel claims for judicial notice. The unusual aspect is the confluence of so many different developments after the District Court ruling conflicting with all its major findings relating to Gottstein. The evidence in the RA—Lilly's highly relevant guilty plea, improper claims of confidentiality to

conceal evidence of crime, government investigations and actions against Lilly, extensive court records in Alaska and related MDL-1596 dockets in conflict with the opinion below—together render judicial notice of the RA in its entirety particularly appropriate in the present appeal.

CONCLUSION

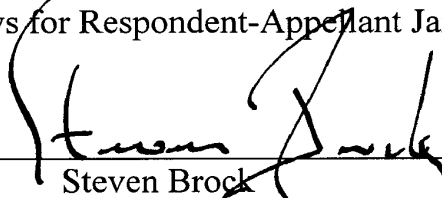
Accordingly, the Court should grant Gottstein's motion to accept Respondent-Appellant's Appendix for filing with the Court.

Dated: Garden City, New York
September 28, 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

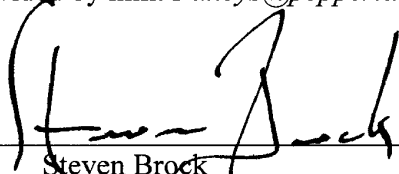
CERTIFICATE OF SERVICE

I hereby certify that:

(1) a true and correct copy of Respondent-Appellant Gottstein's Motion to Take Judicial Notice of the Documents in the Respondent-Appellant's Appendix was served this 28th day of September, 2009 upon Sean P. Fahey, Esq., Pepper Hamilton, LLP, 3000 Two Logan Square, Philadelphia, PA 19103, by mail, and

(2) an additional copy of the foregoing was emailed to Mr. Fahey on this 12th day of August, 2009, at the following email address provided by him: *Faheys@pepperlaw.com*.

Dated: September 28, 2009

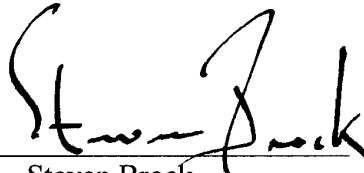


Steven Brock

VIRUS PROTECTION CERTIFICATE

Steven Brock certifies that the PDF version of the attached document that has been submitted via email to the Court of Appeals at civilcases@ca2.uscourts.gov has been scanned for viruses and no virus has been detected.

Dated: September 28, 2009



Steven Brock