07-1107-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELI LILLY & CO.,

Movant-Appellee,

—against—

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,

Repondents.

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

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO SUPPPLEMENT THE RECORD AND TAKE JUDICIAL NOTICE OF THE DOCUMENTS IN THE RESPONDENT-APPELLANT'S APPENDIX

SAMUEL J. ABATE, JR.
PEPPER HAMILTON LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
(212) 808-2700

NINA M. GUSSACK
SEAN P. FAHEY
PAUL V. AVELAR
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, Pennsylvania 19103
(215) 981-4000

Attorneys for Movant-Appellee

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.

Preliminary Statement

Respondent-Appellant James Gottstein has moved for this Court to take the highly unusual step of expanding the record on appeal. The new material he seeks to add to the record was never presented below and largely post-dates the decision of the United States District Court for the Eastern District of New York (Weinstein, *J.*) now on appeal. He seeks to add this material in an attempt to challenge the factual findings of the district court, which he admits can only be reviewed for plain error. *See* Gottstein Br. at 4; Gottstein Mem. of Law in Supp. of Mot. to Supplement R. at 5. This Court should deny the motion.

Statement of Facts

The factual background of this appeal is set forth at length in the district court's decision. [SPA 3-80.] *In re Zyprexa Injunction*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007). Respondent-Appellant James Gottstein's brief takes little notice of this background, however, and instead focuses on "facts" not in the record on appeal. Recognizing this, Mr. Gottstein has moved this Court to expand the record on appeal to include material in support of the "facts" on which he bases his appeal.

The findings of the district court, based largely on Mr. Gottstein's own admissions, could not be more plain. Put most succinctly, Mr. Gottstein

admitted to his active involvement in a plot – along with Dr. David Egilman,[1] a consulting expert witness in litigation against Movant-Appellee Eli Lilly and Company ("Lilly") involving its prescription medication Zyprexa®, and Alex Berenson, a reporter for *The New York Times* – to violate the district court's litigation protective order by leaking confidential discovery materials to Mr. Berenson and others. [SPA 23-31; A 63-69, 96-98, 245-46, 251-59, 323, 426, 525-27.] Mr. Gottstein was the lynchpin of the plot. He first arranged to obtain, through a secret subpoena, the confidential discovery materials from Dr. Egilman, ostensibly for a case that he had hastily taken on to justify a subpoena, though he later admitted that he did not know if the case involved Zyprexa. Then, rather than use the confidential discovery material for his new case, he set out to disseminate it in an attempt to "make it impossible" for Lilly to get its confidential discovery material back. [SPA 9, 25, 30; A 258-61, 274-75, 319-20.]

Upon Lilly's discovery of the plot, it initiated the below proceedings to obtain the return of the stolen documents.[2] [SPA 32-35.] After several hearings, including a two day evidentiary hearing [A 228-482], the injunction at issue in this appeal was entered to undo, as much as possible, the acts of the conspirators who

[1] Dr. Egilman, Mr. Gottstein's co-conspirator, refused to testify below and invoked his fifth amendment rights against self incrimination. [SPA 36, A 541.]

[2] In the interim, Mr. Berenson began publishing articles based on the documents provided to him by Dr. Egilman and Mr. Gottstein. [*See* SPA 33, *see also* RA 133-143.]

wrongfully obtained and disseminated confidential discovery materials in violation of the district court's protective order. [SPA 67-68.] Mr. Gottstein's appeal from that injunction, and his motion to expand the record in support of his appeal, followed.

Argument

"[A]bsent extraordinary circumstances, federal appellate courts will not consider rulings or evidence which are not part of the trial record." *IBM Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975); *accord Loria v. Gorman*, 306 F.3d 1271, 1280 n.2 (2d Cir. 2002) ("Ordinarily, material not included in the record on appeal will not be considered."). Although Rule 10 of the Federal Rules of Appellate Procedure permits the "correction or modification" of the record on appeal if "material evidence" has been "omitted from or misstated in the record by error or accident," the Rule says nothing about the enlargement of the record on appeal. Fed. R. App. P. 10(e). "[T]he purpose of amendment under [Rule 10(e)(2)] is to ensure that the appellate record accurately reflects the record before the District Court, *not* to provide this Court with new evidence not before the District Court, even if the new evidence is substantial." *Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003) (emphasis in original), *cert. denied*, 541 U.S. 956 (2004); *accord Schreier v. Weight Watchers Northeast Region, Inc.*, 872 F. Supp. 1, 3 (E.D.N.Y. 1994) ("purpose of this rule [Rule 10] is to correct omissions from

– or misstatements in – the record on appeal, not to introduce new evidence in the court of appeals").

Rule 10 "allows a party to supplement the record on appeal. However, it does not grant a license to build a new record." *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981). "[G]ranting a motion to expand the record" is "an action that is only taken in unusual circumstances." *Moretto v. G & W Elec. Co.*, 20 F.3d 1214, 1221 n.3 (2d Cir. 1994); *see also* 16A Charles Alan Wright, Arthur R. Miller, et al., Federal Practice and Procedure, § 3956.4 at 677 (4th ed. 2008) ("In special circumstances, a court of appeals may supplement the record to add material not presented to the district court, though this is rare enough that many of the decisions noting the court's power to do so go on to say that the power will not be exercised under the circumstances of the case.").

Mr. Gottstein has the burden of demonstrating why the record on appeal should be expanded. *See Leibowitz v. Cornell Univ.*, 445 F.3d 586, 592 n.4 (2d Cir. 2006) (Rule 10 requires party moving to supplement record " to provide evidence of an erroneous or accidental omission of material evidence"). This burden is only heightened because he has failed to first direct this request to the district court. *See United States v. Zichettello*, 208 F.3d 72, 93 (2d Cir. 2000) ("parties should generally seek relief [under Rule 10] initially from the district court").

The few instances in which this Court has permitted enlargement of the record on appeal demonstrates the inappropriateness of doing so here. Those cases dealt with materials that had been at issue in the district court, but not necessarily made a part of the record, and were added to the record to clarify or explain the events below, not to impermissibly build a new record. For example, in *Salinger v. Random House, Inc.*, 818 F.2d 252, 253 (2d Cir. 1987) (per curium) ("*Salinger II*"), this Court permitted the record on appeal to be supplemented with a version of an admitted exhibit that had been used by the district court judge. *Salinger* involved a preliminary injunction which barred publication of a biography containing plaintiff's allegedly copyrighted, unpublished letters. *See Salinger v. Random House, Inc.*, 811 F.2d 90, 92-93 (2d Cir. 1987). The new document was a "color-coded" copy of a plaintiff's exhibit on which the district court had "meticulously mark[ed] the passages in five colors to reflect his view as to whether the passage contained an infringing quotation, an infringing paraphrase, a non-infringing quotation . . . , a non-infringing report of historical facts, or a non-infringing report of ideas." *Salinger II*, 818 F.2d at 253. This Court concluded it would allow supplementation of the record in that instance because "[t]he marked exhibit clarifies our understanding of the process by which the District Judge reached the decision challenged on appeal," and permitted the Court to "eliminate

the uncertainty we previously expressed as to whether [the district court judge] had considered those passages." *Id.*

Similarly, in *Unites States v. Aulet*, 618 F.2d 182, 185-87 (2d Cir. 1980), this Court permitted "3500 material,"[3] which had been provided to Aulet's trial counsel but not introduced in court, to be added to the record when Aulet raised on appeal, for the first time, a claim of ineffective assistance of counsel. Aulet claimed that her trial counsel was ineffective because he failed to move for suppression of physical evidence and statements made by her during and subsequent to an allegedly illegal search. *Id.* at 186. In response, the government moved to supplement the record with the 3500 material that it had provided to Aulet's trial counsel before trial began, but which it never had occasion to introduce into trial, to support its contention that trial counsel was not ineffective. *Id.* This Court determined that the record could be supplemented with this material because: (1) it was *clearly in the possession of trial counsel below*, (2) it bore "heavily on the merits" of Aulet's claim and failure to consider it would put Aulet "in a stronger position" than if she had followed proper procedure "and thus facilitated the creation of a proper factual record for . . . review," and (3) no

[3] *See* 18 U.S.C.§ 3500.

"principle of law or equity would be served by shielding [this Court] from the *knowledge of what transpired below*." *Id.* at 187 (emphasis added).

Unlike in *Salinger II* and *Aulet*, Mr. Gottstein seeks to add to the record materials that are completely extraneous to the proceedings below. These materials do nothing to provide this Court "knowledge of what transpired below," *Aulet*, 618 F.2d at 187, or otherwise "clarify[y] [its] understanding of the process by which the District Judge reached the decision challenged on appeal." *Salinger II*, 818 F.2d at 253. Indeed, Mr. Gottstein seeks to use these materials to obfuscate the lower court's proceedings and findings.

Mr. Gottstein has not cited a single case that supports his attempt to expand the record on appeal in contravention of this Court's well-founded aversion to doing so. Those few cases that considered post-judgment facts did so in, essentially, finding that certain of the district court's considerations were mooted. *See Capital Ventures International v. Republic of Argentina*, 443 F.3d 214, 217-18, 223 (2d Cir. 2006) (expiration of a debt exchange offer, the existence of which the district court based its decision on); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1971) (withdrawal of plaintiff's attorney, who the district court thought had acted improperly in connection with the suit and would therefore not fairly and adequately protect the class interest). The remainder of the cases cited by Mr. Gottstein stand for the unremarkable propositions that a court may take

notice of documents incorporated in a complaint, *e.g. Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (considering an Offer to Purchase and Joint Proxy Statement filed with the SEC in a securities action based on allegations of material misrepresentations or omissions), of financial articles when faced with "storm warnings" statute of limitations arguments in securities cases, *e.g. Shah v. Meeker*, 435 F.3d 244 (2d Cir. 2006); *LC Capital Partners, LP v. Frontier Ins. Group*, 318 F.3d 148 (2d Cir. 2003), or of events in other litigation, *e.g. Liberty Mutual Ins. Co. v. Roches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1991).

Ultimately, Mr. Gottstein's arguments on appeal, dependant as they are on his motion to expand the record, are more proof of his inability to follow the procedures established by the district court. His "appeal" is little more than a request that this Court modify or abolish the district court's protective order and this motion comes in furtherance of that request. *See* Gottstein Br. at 31-59.[4] But the district court has, even after enjoining Mr. Gottstein from retaining the documents he played such a central role in stealing, permitted him to engage in the proper procedure for challenging the confidentiality of documents. [SPA 71.]

[4] Only Mr. Gottstein's baseless assertion that he was not subject to the district court's personal jurisdiction is premised on the actual record on appeal. *See* Gottstein Br. at 60-62.

This Court is not the proper venue to hear such a request in the first instance. Mr. Gottstein's motion to expand the record should be denied.

Conclusion

For the foregoing reasons, this Court should deny Movant-Appellant James Gottstein's Motion to Supplement the Record and Take Judicial Notice of the Documents in Respondent-Appellant's Appendix.

Respectfully submitted,

/s/ Paul V. Avelar
Nina M. Gussack
Sean P. Fahey
Paul V. Avelar
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Samuel J. Abate, Jr.
PEPPER HAMILTON LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
(212) 808-2700

Counsel for Movant-Appellee, Eli Lilly and Company

Dated: August 7, 2009

CERTIFICATE OF SERVICE

07-1107-cv Eli Lilly & Co. v. Gottstein

I hereby certify that one copy of this Memorandum of Law in Opposition to Motion to Supplement the Record and Take Judicial Notice of the Documents in the Respondent-Appellant's Appendix was sent by Federal Express Next Business Day Delivery to:

D. John McKay
Law Office of D. John McKay
117 E. Cook Avenue
Anchorage, Alaska 99501
(907) 274-3154

Steven Brock
Leslie R. Bennett
Berkman, Henoch, Peterson
& Peddy, P.C.
100 Garden City Plaza
Garden City, New York 11530
(516) 222-6200

Attorneys for Respondent-Appellant

I also certify that the original and four copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 7th day of August 2009.

Notary Public:

/s/ Nadia R. Oswald-Hamid

Sworn to me this

August 7, 2009

NADIA R. OSWALD HAMID
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings County
Commission Expires November 10, 2011

/s/ Samantha Collins

SAMANTHA COLLINS
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949

ANTI-VIRUS CERTIFICATION

Case Name: Eli Lilly & Co. v. Gottstein

Docket Number: 07-1107-cv

I, Samantha Collins, hereby certify that the Opposition to Motion submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/7/2009) and found to be VIRUS FREE.

/s/ Samantha Collins
Samantha Collins
Record Press, Inc.

Dated: August 7, 2009