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

REPLY 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

The Respondent-Appellant Appendix (RA) which Lilly seeks to exclude contains documentation of Lilly's guilty plea to a federal crime based on information which Gottstein provided to *The New York Times* and evidence that Lilly designated documents confidential to conceal evidence of crime. Such evidence of Lilly's admitted criminal conduct and abuse of the confidentiality and injunction proceedings below should be considered now by this Court in this appeal. *See Hirsch v. Arthur Anderson & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995) (taking judicial notice of guilty plea and barring assertion of claim inconsistent with such plea).

We are mindful that changed circumstances are ordinarily addressed by the District Court. *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972). However, this is discretionary, and *Korn* proceeded to decide the appeal before it rather than remand because the correct result was clear. *Id.* The evidence in the RA—Lilly's guilty plea, improper claims of confidentiality to conceal evidence of crime, court records in Alaska and related MDL-1596 dockets in conflict with the opinion below—involves precisely the kind of drastically changed circumstances which should be considered by this Court in ruling on the propriety of the injunction Lilly obtained in the District Court.

That conclusion is reinforced here by the fact that the District Court has taken the unprecedented step of enforcing against a non-party a protective order negotiated by the parties in MDL-1596 under F.R.C.P. Rule 26(c) as if it were a nationwide injunction under F.R.C.P. Rule 65 issued after full hearing and notice. This appeal presents multiple issues of first impression as to whether the District Court had the power to rule that an Alaska state court subpoena was a sham punishable in the Eastern District of New York, and, if so, what standards and limits control the exercise of such power, and what facts must be proved, with what quantum of proof. *See* Gottstein App. Br. at 35-50, 60-62.

The District Court's conclusion that proceedings in Alaska were a pretense was based on fundamental legal errors which should be decided in this appeal. *See* Gottstein App. Br. at 35-50. The Court may not adopt all the District Court's novel rulings unchanged. Further factual findings without resolution of applicable legal principles would be inefficient at best and may well prove unnecessary. With legal errors corrected, the record will show unequivocally that Mr. Gottstein acted properly as a lawyer representing his client vigorously within the bounds of the law. *See* Gottstein App. Br. at 31-35. Lilly's unseemly, disparaging remarks paint a false picture of Mr. Gottstein, a dedicated lawyer with a distinguished career of public service.

See Gottstein App. Br. at 8-11. Lilly's remarks are particularly inappropriate given that Lilly has now pled guilty to a federal crime relating to supposedly confidential information in the documents at issue in this appeal.

In light of the foregoing, the Court should proceed to decide this appeal on the merits. The panel addressing the merits will be in the better position to address the present motion to accept the RA, as the relevant factors and considerations are closely intertwined with merits issues. Accordingly, we respectfully suggest that the present motion be referred to the merits panel for determination. Should the Court proceed to rule, the motion should be granted for the reasons set forth below.

ARGUMENT

In its opposition, Lilly asks the Court to refuse to take judicial notice of any document in Respondent-Appellant's Appendix (RA) on grounds that it is "new material," Opp. at 1, and "[o]rdinarily, material not included in the record on appeal will not be considered." Opp. at 3, *quoting Lori v. Gorman,* 306 F.3d 1271, 1280 n.2 (2d Cir. 2002). Lilly's argument consists solely of case summaries and quotations elaborating that general proposition, which of course we do not dispute.

However, as "ordinarily" indicates, there are exceptions: changed circumstances which affect the propriety of injunctive relief or render a case moot, changes in the law, facts subject to judicial notice, among others. *See, e.g., Korn*, 456 F.2d at 1208 & n.3; *Goland v. Central Intelligence Agency,* 607 F.2d 339, 369 n.7 (D.C. Cir. 1978). Every document in the RA falls well within one of the well-recognized exceptions. Lilly did not point to a single example of objectionable "new evidence" in the RA because it could not find one.

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).

This appeal, like other appeals from permanent injunctions, is "forward looking." Changed circumstances since the entry of the injunction are taken into account in deciding whether the injunction should be continued now, even assuming that it had been properly entered by the District Court in different circumstances. *Meccano, Ltd. v. Wanamaker,* 253 U.S. 136 (1920); *Korn,* 456 F.2d at 1208 n.3.

The RA contains evidence of drastically changed circumstances of the sort that must be taken into account under *Korn*. The documents Gottstein provided to the *Times* contained evidence of criminal conduct by Lilly, including marketing Zyprexa for elderly patients with dementia, a treatment not approved by the Food and Drug Administration. RA–137. An ongoing investigation by the Justice Department "gained momentum" with the publication of the *Times* articles. RA–242. 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, "the largest criminal fine for an individual corporation ever imposed in a United

States criminal prosecution of any kind." RA–249. Only a few months before, the District Court had encouraged parties to settle, stating:

> In the enormous cache of discovery documents it has reviewed, *no sign of potential criminal liability* has been observed by this court. . . .

In re Zyprexa Products Liability Litigation, 2008 WL 2783155 at *3 (E.D.N.Y.) (emphasis added).

Another drastic change in circumstances occurred in October 2007 when Lilly, faced with a securities fraud class action based on the disclosures in the *Times* articles, 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). However, in seeking an injunction against Gottstein, Lilly claimed on the contrary that the documents he 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.

The securities fraud class action was also before the District Court, which accepted Lilly's position in both cases thought they were inconsistent. While it had found the information Gottstein released to the *Times* was confidential and resulted in irreparable harm to Lilly in the injunction

proceedings below, SPA–63-64, 70, the District Court dismissed the securities fraud class action against Lilly on statute of limitation grounds because "[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.

There can be no question that such changed circumstances should be considered in determining the propriety of the permanent injunction before the Court. This Court ought not grant relief to a petitioner who uses an injunction to conceal evidence of crime or treats information as either confidential or not depending on its interests at the moment. These concerns support vacating the injunction, not just ending it. The Court should accept such evidence of changed circumstances in the RA and proceed to decide the legal issues raised in the present appeal. Given its prior rulings and statements, further proceedings in the District Court at this juncture would not be helpful. The materials in the RA are a matter of public record, properly subject to judicial notice. It is the legal consequences that need to be decided, a task appropriately undertaken by this Court in this appeal.

The other categories of documents in the RA involve similar considerations and raise no substantial concerns of inappropriate

consideration of "new evidence" as Lilly asserts.[1] All fall within settled case law allowing consideration of changed circumstances in "forward looking" situations such as cases involving injunctions or class certification and permitting judicial notice of court records, government records, media and scientific articles, at least as to the existence and contents of the records, and, in some circumstances, the truth of the matters stated. Motion at 3-5. Lilly concedes these principles of judicial notice in its opposition but makes no attempt to explain why they should not apply to the documents in the RA. Opp. at 8.

For example, the RA includes unpublished rulings and transcripts of the District Court and Special Master Woodin and filings in various MDL-1596 dockets relating to the declassification of a collection of documents that Lilly and the District Court acknowledge overlaps with the collection of documents at issue here. *See* RA–252-375, 387-92; Gottstein App. Br. at 56-57. These documents are from related MDL-1596 dockets and many were

[1] Many of the documents in the RA are corrections of the record of the sort Lilly acknowledges are appropriate. Opp. at 3. For example, only one of the four crucial *Times* articles was entered in the record below, (A–4, Dkt. 8), though the District Court cited them all in its opinion, SPA-33, stated they contained the "gist" of the documents which Gottstein provided Berenson, SPA–11, and relied on the *Times* articles as evidence that those documents were confidential, SPA–64. Gottstein has included the *Times* articles at RA–133-43 to correct the record. While Lilly opposes filing of the *Times* articles along with all the rest of the RA, it nevertheless cites the *Times* articles at "RA-133-143" in its statement of facts. Opp. at 2 n.2.

directly or indirectly considered below. *See, e.g.*, Response of Gottstein at 6-7, 23-25, (A–8, Dkt. 61). They are properly included in the RA as either corrections of the record or as judicially noticed court records.

The RA also includes court records from the Alaska proceeding which the District Court erroneously viewed as a sham and from related proceedings in the Alaska state courts. RA–1-132. These court records document the relevance of Zyprexa to the litigation the District Court considered a sham and provide additional examples of proceedings where evidence on Zyprexa's risks and benefits such as Gottstein subpoenaed was received in the Alaska courts. Gottstein App. Br. at 11-17. Judicial notice of the existence and contents of such court records is routine. This evidence that Gottstein's subpoena was legally and factually supported is plainly relevant to the Court's "forward looking" consideration of the propriety of continuing the permanent injunction and, moreover, supports vacating the injunction originally entered.

The Alaska Supreme Court has taken judicial notice of many of these documents without objection from Mr. Gottstein's adversary in these proceedings, the Alaska Psychiatric Institute, the custodian of many of the records involved. RA–43-45. The other Alaska court records are similar and equally subject to judicial notice.

CONCLUSION

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

Dated: Garden City, New York
August 12, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that:

(1) a true and correct copy of Respondent-Appellant Gottstein's Reply 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 were served this 12th day of August, 2009 upon Sean P. Fahey, Esq., Pepper Hamilton, LLP, 3000 Two Logan Square, Philadelphia, PA 19103, via Federal Express, and

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

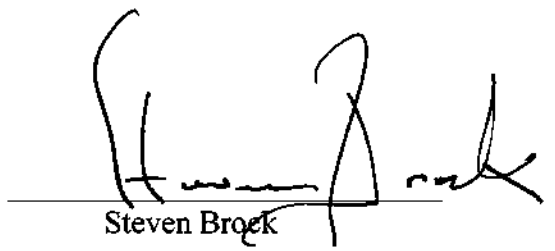
Dated: August 12, 2009

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: August 12, 2009



Steven Brock