07-1107-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELI LILLY AND COMPANY,

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

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO TAKE JUDICIAL NOTICE

SAMUEL J. ABATE JR.
PEPPER HAMILTON, LLP
The New York Times Building
620 Eight 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 & Arch Sts.
Philadelphia, PA 19103
(215) 981-4000

Counsel for Petitioner Eli Lilly and Company

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 "renew[ed]" his prior motion for this Court to take the highly unusual step of expanding the record on appeal, this time under the rubric of judicial notice. [Mot. to take Judicial Notice at 1.] In its Order of August 17, 2009, this Court denied Mr. Gottstein's first attempt to expand the record, stating that:

> 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 admits that the material he now seeks to add to the record was, with few exceptions, never presented below and post-dates the decision of the United States District Court for the Eastern District of New York (Weinstein, *J.*) now on appeal. [Mot. to take Judicial Notice at 2-9.] 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; Gottstein Mot. to Take Judicial Notice at 1-10.] This Court should again 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. [Gottstein Br. at 9-11, 15-17, 23-30, 54-58.] 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,

[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.]

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 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 motions to expand the record and for judicial notice in support of his appeal, followed.

Argument

Although Mr. Gottstein casts his motion in the language of "judicial notice," under Federal Rule of Evidence 201(f), his new motion seeks the very same relief as his first motion, supplementation of the record on appeal in violation

[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.]

of Federal Rule of Appellate Procedure 10. Whether analyzed under Rule 10 or Rule 201, Mr. Gottstein's attempt to expand the record on appeal should be denied.

"[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.").[3]

Judicial notice is not a means by which to bypass the restraints on expanding the record on appeal. This Court has, as has its sister Circuits, recognized the ability to take judicial notice for the first time on appeal, but has also expressed reluctance to do so because such a practice undermines the district court's fact-finding authority and the well-founded policies that prohibit expansion of the record on appeal. This Court put it most succinctly in *United States v. Campbell*, 351 F.2d 336, 341 (2d Cir. 1965): "[J]udicial notice should not be used as a device to correct on appeal an almost complete failure to present adequate evidence to the trial court." Similarly, in *Sprague & Rhodes Commodity Corp. v.*

[3] 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").

Instituto Mexicano Del Café, 566 F.2d 861 (2d Cir. 1977), this Court recognized that Rule 201 "permits this court to take judicial notice of judgments of courts of record even though the fact is presented for the first time on appeal." *Id.* at 862. Nevertheless, this Court remanded to the district court because "determination of the effect of the . . . judgment depends upon disputed issues of fact and law." *Id.* at 863. In *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910, 919 n.3 (9th Cir. 2006), the Ninth Circuit denied a request for judicial notice of certain government documents

> because these documents were not before the district court and their significance, if any, is not factored into the record on appeal. Consideration of these documents and after-enacted changes is best left to the district court, not to the court of appeals for initial analysis. There is good reason why we generally do not consider issues for the first time on appeal – the record has not been developed, the district court has not had an opportunity to consider the issue, and the parties' arguments are not developed against the district court decision.

And the Third and Seventh Circuits have also refused to take judicial notice of facts and documents in order to protect the district court's fact-finding authority and to prevent expansion of the record. *In re Color Tile Inc.*, 475 F.3d 508, 510 n.1 (3d Cir. 2007) ("'The appellate stage of the litigation process is not the place to introduce new evidentiary materials.'" (quoting *Berwick Grain Co., Inc. v. Ill. Dept. of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997).); *In re Indian Palms Associates, Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995) ("Judicial notice may be taken at any stage of

the proceeding," . . . including on appeal, . . . as long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority." (internal citations and quotation marks omitted)).

Whether employing Rule 10 or Rule 201, Mr. Gottstein's motion to expand the record here is inappropriate. The few instances in which this Court has permitted enlargement of the record on appeal under Rule 10 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 *United States v. Aulet*, 618 F.2d 182, 185-87 (2d Cir. 1980), this Court permitted "3500 material,"[4] 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

[4] *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 "clarif[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.

Those cases cited by Mr. Gottstein that permitted judicial notice on appeal are also immaterial because they involved changed circumstances following a district court ruling where there was "no conceivable dispute as to the change itself or its effect on the case." *Capital Ventures Intern. v. Republic of Argentina*, 443 F.3d 214, 223 n.8. (2d Cir. 2006); *cf* Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute . . . ."). Thus, in *Capital Ventures*, this Court noted the expiration of a debt exchange offer, the existence of which the district court based its decision on. *Id.* at 223. In *Korn v. Franchard Corp.*, 456 F.2d 1206, (2d Cir. 1971), this Court considered the withdrawal of the plaintiff class's attorney where the district court had decertified the class represented by the attorney because the attorney had acted improperly in connection with the suit and was not capable of fairly and adequately protecting

the class's interest. *Id.* at 1208.[5] The remainder of the cases cited by Mr. Gottstein are not relevant here because they involve situations in which the lower courts had originally taken judicial 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).

Here, there are numerous disputes as whether any relevant fact has changed since the time of the district court's injunction, or the effect of any of those supposed changes on the district court's findings. Moreover, Mr. Gottstein is not arguing that certain facts be noticed, but rather argues that certain documents

[5] This Court has also considered materials not a part of the record on appeal under the rubric of judicial notice where both one party asked the Court to take judicial notice of that material, the other party did not object, and both parties cited the materials in their briefing. *See Young v. Selsky*, 41 F.3d 47, 50-51 (2d Cir. 1994). This Court admitted, however, that the case was already in an "unusual procedural posture," noted that with the new material it "could simply remand to the district court," but that under the unusual circumstances of that case it would "accept [the material] as part of the record on appeal." *Id.* Here, however, Lilly has objected to this material and under the circumstance of this case the materials should not be accepted as part of the record on appeal.

be noticed and thereafter argues factual inferences from those documents. [*See* Gottstein Mot. to Take Judicial Notice at 2-10.] For example, Mr. Gottstein wants the district court's findings of fact to be overturned. To this effect he argues, and requests this court expand the record on this point through judicial notice, that facts unknown to him at the time that he took the actions that led to the injunction would have made his actions more reasonable. [*See, e.g.* Gottstein Mot. to Take Judicial Notice at 2-4.] But these facts (if they are true) are irrelevant because Mr. Gottstein admitted he did not know them at the time he took his actions. [A 260-61.] Moreover, the relevant inquiry in this case, involving the aiding and abetting the violation of a court order, is properly "directed to the actuality of concert or participation [in the violation], without regard to the motives that prompt the concert or participation." *N.Y. State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2d Cir. 1992), *vacated on other grounds,* 41 F.3d 794 (2d Cir. 1994). Therefore, even if there were undisputed new facts here (and Lilly disputes the factual inferences drawn by Mr. Gottstein from Respondent-Appellant's Appendix), there are still disputes as to the effect of those facts (or no dispute that such a fact has no effect), and this Court has said that it will not take judicial notice under such circumstances. *Capital Ventures*, 443 F.3d at 223 n.8.

Ultimately, Mr. Gottstein's arguments on appeal, dependent as they are on his motion for judicial notice 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.][6] 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.] This Court is not the proper venue to hear such a request in the first instance.[7]

[6] 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.

[7] At most, on those rare occasions that this Court is presented with potential adjudicative facts that are outside the record on appeal, but which this Court finds to be very compelling, this Court has remanded where justice demands it. *See, e.g., Lin v. U.S. Dep't of Justice*, 473 F.3d 48, 51, 54 (2d Cir. 2007) (remanding in asylum case where both parties requested remand in light of new, compelling, evidence of home country's policy of forcible sterilization).

Conclusion

For the foregoing reasons, and for the same reasons this Court denied the prior motion to expand the record on appeal, this Court should deny Respondent-Appellant James Gottstein's Motion to Take Judicial Notice of the documents in Respondent-Appellant's Appendix.

Respectfully submitted,

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: October 14, 2009