IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

In re: VIOXX PRODUCTS LIABILITY LITIGATION	**MDL NO. 1657**
THIS DOCUMENT RELATES TO ALL CASES	**SECTION: L**
	JUDGE FALLON

MERCK'S MOTION FOR SANCTIONS AGAINST DR. DAVID EGILMAN

Defendant Merck Sharp & Dohme Corp. ("Merck") respectfully moves the Court to impose sanctions against Dr. David Egilman for violating Pretrial Order No. 13 ("Protective Order").

As set forth in the attached memorandum, Dr. Egilman recently made several statements to a reporter from the *Wall Street Journal*, purporting to summarize the content of documents covered by this Court's Protective Order. Dr. Egilman's conduct in this and other proceedings makes clear that nothing short of sanctions will deter his improper disclosures.

WHEREFORE, Merck respectfully requests that its motion be granted, that the Court order Dr. Egilman to return any and all materials that have been designated as confidential in this proceeding, and that the Court impose monetary sanctions to compensate Merck for its efforts in bringing this motion.

Dated: April 4, 2014

Respectfully submitted,

/s/ Dorothy H. Wimberly

Phillip A. Wittmann, 13625
Dorothy H. Wimberly, 18509
STONE PIGMAN WALTHER
WITTMANN L.L.C.
546 Carondelet Street
New Orleans, LA 70130

Douglas R. Marvin
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005

John H. Beisner
Jessica Davidson Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005

ATTORNEYS FOR MERCK SHARP & DOHME CORP.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Motion has been served on Liaison Counsel, Russ Herman, Ann B. Oldfather, and Phillip Wittmann, by U.S. Mail and e-mail or by hand delivery and e-mail, on Dr. Egilman via e-mail, and upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with Pre-Trial Order No. 8(C), and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system which will send a Notice of Electronic Filing in accord with the procedures established in MDL 1657 on this 4th day of April, 2014.

/s/ Dorothy H. Wimberly

Dorothy H. Wimberly, 18509
STONE PIGMAN WALTHER
WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Phone: 504-581-3200
Fax: 504-581-3361
dwimberly@stonepigman.com

Defendants' Liaison Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

In re: VIOXX PRODUCTS LIABILITY LITIGATION	**MDL NO. 1657**
	SECTION: L
THIS DOCUMENT RELATES TO ALL CASES	**JUDGE FALLON**

MEMORANDUM IN SUPPORT OF MERCK'S MOTION FOR SANCTIONS AGAINST DR. DAVID EGILMAN

Defendant Merck Sharp & Dohme Corp. ("Merck") respectfully moves the Court to impose sanctions against Dr. David Egilman for violating Pretrial Order No. 13 ("PTO 13" or the "Protective Order"). Dr. Egilman, an expert witness retained by the states with actions pending against Merck in this multidistrict litigation ("MDL") proceeding, recently made several statements to a reporter from the *Wall Street Journal*, purporting to summarize the content of documents covered by this Court's Protective Order. These statements were made public in a blog on the *Wall Street Journal*'s website, resulting in a clear breach of the terms of this Court's Order, which binds Dr. Egilman and the other retained experts who have received confidential information by virtue of their participation in the Vioxx MDL proceeding. Dr. Egilman's brazen conduct undermines the purpose of protective orders, which "serve essential functions in civil adjudications, including the protection of the parties' privacy and property rights." *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 414 (E.D.N.Y. 2007), *aff'd sub nom.*, *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 192 (2d Cir. 2010).

Dr. Egilman should be sanctioned for his improper disclosure. His conduct has made it clear that he does not respect this Court's authority to make the conclusive determination as to what can and cannot be made public under the terms of its Protective Order. And his latest disclosure continues a pattern of similar conduct for which he has previously been sanctioned by

two different courts. In order to stop this pattern of behavior and protect Merck's confidential documents, the Court should order Dr. Egilman to return all confidential information that he has received under this Court's Protective Order and enter monetary sanctions against him.

FACTUAL BACKGROUND

Over the course of this MDL proceeding, which has now been pending for nine years, Merck has produced millions of pages of documents to plaintiffs. *See generally, e.g.*, *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719, 721 (E.D. La. 2012). Many of these documents have contained sensitive information that Merck has sought to keep confidential. On May 24, 2005, the Court issued a protective order (the "Protective Order") to "facilitate a timely and efficient discovery process" in the Vioxx MDL proceeding while addressing the confidentiality concerns of all parties. (PTO 13 (attached as Ex. 1).) PTO 13 "govern[s] all documents, the information contained therein, and all other information produced or disclosed during th[e] [MDL] Action whether revealed in a document, deposition, other testimony, discovery response or otherwise, by any party in this Action[.]" (*Id.* ¶ 1.) Under PTO 13, "[a] party . . . may designate as Confidential Information any document or information produced by or testimony given by any other person or entity that the party reasonably believes qualifies as such party's Confidential Information pursuant to th[e] Protective Order." (*Id.* ¶ 9.) The order further provides that a party to the Vioxx litigation who receives confidential information "may show and deliver Confidential Information" to "any outside consultant or expert whether formally retained or not" – as long as the expert reads and agrees to be bound by the Protective Order's terms. (*Id.* ¶¶ 10, 12.) Under the order, confidential information must be used "only in connection with this Action or an action in which the Receiving Party is permitted by this Order to use Confidential Information," and any Receiving Party who "learns of any unauthorized disclosure" must "immediately . . . inform the Supplying Party of all pertinent facts relating to such disclosure and

[ ] make all reasonable efforts to prevent disclosure by each unauthorized person who received such information." (*Id.* ¶¶ 14, 19.)

For most of the litigation, the parties have been able to resolve confidentiality disputes without enlisting the Court's aid. Recently, however, Dr. Egilman has sought to challenge the confidential status of vast swaths of documents. Dr. Egilman first took his crusade to the state court in Franklin County, Kentucky, even though the only Vioxx matter pending in that court had already settled. Over the last few months, Dr. Egilman has sought de-designation of an ever-shifting range of documents in that proceeding, many of which Dr. Egilman has refused to identify with specificity. Merck requested and was granted more time to respond to Dr. Egilman's challenges after it advised the Kentucky court that it could not ascertain the documents Dr. Egilman has targeted in light of his refusal to clarify the scope of his requests. (*See* Order, *Commonwealth of Ky. v. Merck & Co.*, No. 09-CI-1671, Mar. 20, 2014 (attached as Ex. 2).)

Because many of the documents for which Dr. Egilman seeks de-designation are covered not only by the protective order in Kentucky but also by this Court's PTO 13, Merck previously brought Dr. Egilman's efforts to the Court's attention, leading to the hearing before the Court on February 28, 2014. At that hearing, the Court made clear that, while it would not interfere with Dr. Egilman's efforts in Kentucky, any information designated as confidential in this MDL proceeding cannot be disclosed unless and until this Court determines that such information is not confidential. (MDL Hr'g Tr. 18:3-20:10 (attached as Ex. 3).) The Kentucky court has similarly recognized that both courts need to make their own determinations, and that one court's determination would not be binding on the other. (Ky. Mar. 5, 2014 Hr'g Tr. 37:2-38:6 (attached as Ex. 4).)

In the past month, Dr. Egilman has become increasingly aggressive in his position with respect to confidential information. As Merck recently detailed in a letter to the Court, Dr. Egilman recently threatened to unilaterally disclose confidential depositions without waiting for a court order, arguing in an e-mail to Merck's counsel, Andrew Goldman, that his deposition in the AG cases is not confidential because "I think thirty days have passed since my deposition was provided to you," and "you have not followed up with a letter designating portions of the deposition or attached exhibits confidential." (E-mail from David Egilman to Andrew Goldman, Mar. 14, 2014 (attached as Ex. 5).) Dr. Egilman concluded that he "consider[s] the material to be public." (*Id.*) After further exchanges between Dr. Egilman and Mr. Goldman, Dr. Egilman flatly asserted that "none of my deposition testimony is confidential and no exhibits are confidential," and "[i]f you think otherwise, I suggest that you seek guidance from the Court." (E-mail from David Egilman to Andrew Goldman, Mar. 20, 2014 (attached as Ex. 6); *see also* Letter from John Beisner to Hon. Eldon Fallon, Mar. 25, 2014 (attached as Ex. 7).)

Merck also recently learned of an article posted on the *Wall Street Journal* website featuring direct quotes from Dr. Egilman purporting to describe confidential Vioxx documents, including the following:

- "In general, there's information on the toxicity of [Vioxx] that's not been previously published by Merck and there is information that Merck published that misrepresents the health effects of the drug."
- The Vioxx documents "provide new information on the health hazards of the drug and evidence of fraud in the conduct of the studies."
- "I've been able to see documents few others have."

See Ed Silverman, *More Disclosure Coming in Merck's Decade-Long Vioxx Nightmare*, Mar. 26, 2014, http://blogs.wsj.com/corporate-intelligence/2014/03/26/more-disclosure-coming-in-mercks-decade-long-vioxx-nightmare (attached as Ex. 8).

Notably, this is not Dr. Egilman's first foray into unauthorized disclosure of confidential information. As the recent *Wall Street Journal* article highlights, Dr. Egilman agreed to pay Eli Lilly $100,000 after leaking to the press confidential documents regarding Zyprexa back in 2007. *See* Silverman, *supra*. In that case, Judge Weinstein, who was presiding over the *Zyprexa* MDL proceeding, ordered Dr. Egilman to return all confidential documents to Eli Lilly after finding that Dr. Egilman had "deliberately thwarted a federal court's power to effectively conduct civil litigation." *Zyprexa*, 474 F. Supp. 2d at 395; *Eli Lilly*, 617 F.3d at 192 ("[T]he record is unequivocal that Gottstein schemed with Egilman to bypass the protective order and, in fact, aided and abetted the latter's violation of the same."); *see also Kuiper v. Givaudan, Inc.*, No. C06-4009-MWB, 2009 U.S. Dist. LEXIS 9157, at *26 (N.D. Iowa Feb. 6, 2009) (noting that Dr. Egilman had been sanctioned in a state court proceeding, where "the trial court found Dr. Egilman 'knowingly, deliberately, intentionally and willfully' violated a previous order of that court prohibiting certain extrajudicial statements") (quoting *Ballinger v. Brush Wellman*, No. 96-CV-2532 (Colo. Dist. Ct. Jefferson Cnty., June 21, 2001)).[1]

ARGUMENT

The Court should impose sanctions on Dr. Egilman because Dr. Egilman's remarks to the *Wall Street Journal* constitute a clear breach of PTO 13 and because Dr. Egilman's prior statements and conduct in this and other proceedings make clear that nothing short of sanctions will deter his conduct. Such sanctions should include the return of all confidential documents to

[1] On appeal, the Colorado Court of Appeals vacated the ruling. *See Egilman v. District Court*, First Judicial District, No. 01CA1982 (Colo. App. Sept. 5, 2002) (attached as Ex. 9). However, it did so ***only*** because the trial court issued the sanctions order without providing Dr. Egilman with sufficient notice prior to entering the sanction. *Id.* at 3-5. The appellate court did not question the trial court's conclusion that Dr. Egilman had violated its order; nor did it vacate the portion of the trial court's order striking Dr. Egilman's testimony on the same grounds. *See id.* at 5; *see also generally* Findings, Conclusions, & Orders Concerning Sanctions, *Ballinger v. Brush Wellman Inc.*, No. 96-CV-2532 (Colo. Dist. Ct. Jefferson Cnty., June 22, 2001) (attached as Ex. 10). Counsel for Merck obtained the *Ballinger* rulings from the Northern District of Iowa's docket in *Kuiper v. Givaudan*, cited above.

Merck and the payment of reasonable costs necessary to compensate Merck for the preparation of its motion.

I. DR. EGILMAN VIOLATED THE PROTECTIVE ORDER IN THIS CASE.

There can be no doubt that Dr. Egilman's recent behavior violated the Court's PTO 13. A disclosure violates a protective order even if it is indirect – i.e., where it purports to summarize or be based on a confidential document rather than revealing the document itself. *See, e.g.*, *Nevil v. Ford Motor Co.*, No. CV 294-015, 1999 U.S. Dist. LEXIS 23222, at *10-11 (S.D. Ga. Dec. 23, 1999) (finding that general references to confidential documents in a deposition violated protective order); *Pyramid Real Estate Servs., LLC v. United States*, 95 Fed. Cl. 613, 621-22 (Fed. Cl. 2010) ("The court . . . takes . . . [c]ounsel at his word" that "'[he] did not disclose specific source selection information with [his] client.'" "However, the use by . . . [c]ounsel of the protected information to advise his client to bring a separate civil action outside of this litigation was improper, regardless of whether Counsel revealed the protected information he used to arrive at his conclusion.") (citation omitted). Indeed, even the act of disclosing that one's opinions are based on protected documents suffices to establish a violation. *See Nevil*, 1999 U.S. Dist. LEXIS 23222, at *10 ("Assertions that this evidence came from specific General Tire documents violate[d] the terms of the Protective Order.").

In *Nevil*, for example, the court sanctioned a plaintiff's expert in a product-liability suit against General Tire, a tire manufacturer, for improperly disclosing confidential information after the case settled. *Id.* at *2. Prior to settlement, the *Nevil* court had approved a protective order that "restricted the use and dissemination of confidential and proprietary information." *Id.* The expert signed an acknowledgment of that order. *Id.* After settlement, however, General Tire learned that the expert disclosed confidential information obtained in the *Nevil* suit in depositions in two other lawsuits. *Id.* at *4-5. Although the expert had not actually revealed the documents

containing the confidential information or quoted them verbatim, he did make clear that his opinions in the two other lawsuits had been informed by that information. In the first suit, he acknowledged that he had relied on "manufacturing and design documents" that had been "deemed confidential or protected" in other cases, including in the *Nevil* case, as "background information." *Id.* The expert explained that the protected materials were helpful in that they "show[ed] some of the design processes" that companies like General Tire "have gone through," noting that General Tire designed a "series of tires" featuring a "zero-degree belt" that were used to "control separation problems" in its plants. *Id.* at *5-6. He also stated that the confidential information "support[ed]" his opinions that "there was a contamination issue" and "design issue" plaguing zero-degree belt tires generally. *Id.* at *7. In the second deposition identified by General Tire, the expert was asked to describe studies comparing certain types of tires. *Id.* at *9. The expert answered by stating that he had "seen the results of that in some of the papers that [he had] seen under protective order," including the General Tire documents. *Id.*

Based on this testimony, General Tire moved for sanctions, arguing that the expert had violated the protective order. The expert disagreed that he had violated the order, arguing that he "merely disclosed the existence of General Tire documents without disclosing their substance," and that, in any event, much of the information was already within the public domain. *Id.* at *10. The court rejected the expert's arguments, explaining that in both of the depositions, the expert "disclose[d] specific information contained in General Tire studies." *Id.* According to the court, the fact that some of the information was part of the public record did not matter because the expert testified that he learned the information from confidential General Tire documents. *Id.* "Assertions that this evidence came from specific General Tire documents violate[d] the terms of the Protective Order." *Id.*

The same logic applies here. As set forth above, Dr. Egilman offered his characterization of confidential Vioxx information to the *Wall Street Journal*, resulting in an article titled *More Disclosure Coming in Merck's Decade-Long Vioxx Nightmare*. The article quotes Dr. Egilman as stating that "[i]n general, there's information on the toxicity of the drug that's not been previously published by Merck and there is information that Merck published that misrepresents the health effects of the drug." Silverman, *supra*. According to Dr. Egilman, confidential Vioxx documents "provide new information on the health hazards of the drug and evidence of fraud in the conduct of the studies." *Id.* The article also features a boast by Dr. Egilman that he has "been able to see documents few others have." *Id.*

Dr. Egilman's conduct here is far more egregious than the expert's behavior in *Nevil*. After all, in *Nevil*, the expert divulged confidential information in response to direct deposition questions, whereas here, Dr. Egilman sought out media coverage to bring attention to his access to confidential Merck documents. In so doing, Dr. Egilman "disclose[d] ***specific*** information contained in" Merck documents that are protected by PTO 13. *Nevil*, 1999 U.S. Dist. LEXIS 23222, at *10 (emphasis added). Moreover, Dr. Egilman claimed that the Vioxx documents that "few others have" seen "provide ***new*** information on the health hazards of the drug and evidence of fraud in the conduct of the studies." Silverman, *supra* (emphasis added). These statements are particularly prejudicial to Merck because the Company lacks any effective means of rebutting Dr. Egilman's statements in the public forum without discussing the very documents it seeks to keep confidential. *See Zyprexa*, 474 F. Supp. 2d at 425 ("The harm faced by Lilly is amplified by the fact that the protected documents which respondents seek to disseminate are segments of a large body of information, whose selective and out-of-context disclosure may lead

to . . . undeserved reputational harm . . . ."). In short, Dr. Egilman's disclosure of confidential Vioxx documents plainly violated the Protective Order in this case.

II. THE COURT SHOULD IMPOSE SANCTIONS ON DR. EGILMAN.

Sanctions are necessary and appropriate in this case because Dr. Egilman's conduct in disseminating confidential Vioxx information was particularly egregious and because he is a repeat violator of court orders, making it all the more likely that future violations will occur absent robust sanctions. Specifically, the Court should: (1) require Dr. Egilman to return all confidential documents to which he has been given access in this litigation; and (2) compensate Merck for the expense of filing this motion.

The Supreme Court has recognized that "'[t]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order.'" *United States v. Barnett*, 376 U.S. 681, 697 (1964) (quoting *In re Debs*, 158 U.S. 564, 594 (1895)); *see also In re Lafayette Radio Elecs. Corp.*, 761 F.2d 84, 93 (2d Cir. 1985) ("ancillary jurisdiction is recognized as part of a court's inherent power to prevent its judgments and orders from being ignored or avoided with impunity"); Fed. R. Civ. P. 37(b) (authorizing entry of any "just" order, including an order of contempt, for failure to obey the Court's discovery orders). The power to sanction "is a necessary prerequisite to the administration of justice; without it, courts would be ill-equipped to ensure the rule of law in a democratic society." *Zyprexa*, 474 F. Supp. 2d at 417-18. Notably, "[a] person who is not a party to a proceeding may be held in contempt if he or she has actual knowledge of a court's order and either abets the [party] or is legally identified with him." *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 972 (3d Cir. 1982). Thus, courts routinely enforce protective orders that are violated by experts and other non-parties through the imposition of sanctions. *Zyprexa*, 474 F. Supp. 2d at 414.

The circumstances here strongly support sanctioning Dr. Egilman by requiring him to return all confidential information to which he has obtained access in this litigation. Dr. Egilman's conduct was not an innocent, inadvertent disclosure of confidential information. To the contrary, he purposely leaked his views of information that he acknowledged was confidential to a journalist in order to garner publicity for his views regarding Merck. Lest there be any doubt that this was an isolated incident, Dr. Egilman's prior skirmishes in other cases regarding court orders make clear that it was not. As noted above, Dr. Egilman has previously leaked confidential information to the press, resulting in sanctions by Judge Weinstein. *See Zyprexa*, 474 F. Supp. 2d at 395-97. Dr. Egilman's status as a repeat violator of protective orders only underscores the need for substantial sanctions in this case. *See Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 488-90 (5th Cir. 2012) (affirming award of sanctions where attorney had willfully violated a protective order in another case involving the same defendant). And Dr. Egilman's relentless effort to obtain de-designation of Merck's documents in multiple courts simply highlights his overarching goal: to attack Merck in the media using confidential documents to which he obtained access for the limited purpose of providing expert opinions. The simplest way to prevent him from doing so is to require the return of all confidential documents in this litigation. *See Zyprexa*, 474 F. Supp. 2d at 422-27 (ordering Dr. Egilman and others to return confidential documents and enjoining further dissemination of documents after finding that Dr. Egilman violated protective order); *Nevil*, 1999 U.S. Dist. LEXIS 23222, at *11 (imposing a series of "minimal" sanctions, including an order requiring the expert to return all confidential materials subject to the protective order and barring him from "showing, discussing, or divulging" any confidential materials obtained from General Tire that would violate the protective order).

In addition, the Court should impose monetary sanctions on Dr. Egilman for the trouble he has caused Merck by virtue of his conduct, as other courts have done in similar circumstances. *See, e.g.*, *Quinter*, 676 F.2d at 974-75 (remanding to determine appropriate fine to impose for civil contempt as sanction for expert's violation of protective order); *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223-24 (7th Cir. 1992) (affirming dismissal of case and award of legal fees and costs to defendant as sanctions where "conduct of [plaintiff's] experts and attorneys clearly transgressed the court's protective order" when expert engaged in *ex parte* inspection of evidence and plaintiff actively concealed this fact from the court). Monetary sanctions are appropriate because they will help to "deter future violations of protective orders" by Dr. Egilman "and to reflect the seriousness of such orders." *Smith & Fuller*, 685 F.3d at 487-90 (affirming imposition of monetary sanctions against plaintiff's counsel for inadvertent disclosure of confidential documents in violation of protective order). As set forth above, Dr. Egilman has violated confidentiality orders in other litigation and did so here with full knowledge that the information he was describing was confidential. He has also forced Merck to defend its confidential documents in multiple courts at the same time, while barraging the Company with multiple, inconsistent and ambiguous requests that have made it virtually impossible to respond to or address his purported concerns. At the very least, Dr. Egilman should be forced to pay for Merck's efforts in protecting its confidential information in this proceeding.

CONCLUSION

For the foregoing reasons, the Court should find that Dr. Egilman violated PTO 13, order Dr. Egilman to return any and all materials governed by the Protective Order and impose monetary sanctions to compensate Merck for its efforts in bringing this motion.

Dated: April 4, 2014

Respectfully submitted,

/s/ Dorothy H. Wimberly

Phillip A. Wittmann, 13625
Dorothy H. Wimberly, 18509
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, LA 70130

Douglas R. Marvin
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005

John H. Beisner
Jessica Davidson Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005

ATTORNEYS FOR MERCK SHARP & DOHME CORP.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Brief in Support of Motion for Sanctions has been served on Liaison Counsel, Russ Herman, Ann B. Oldfather, and Phillip Wittmann, by U.S. Mail and e-mail or by hand delivery and e-mail, on Dr. Egilman via e-mail, and upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with Pre-Trial Order No. 8(C), and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system which will send a Notice of Electronic Filing in accord with the procedures established in MDL 1657 on this 4th day of April, 2014.

/s/ Dorothy H. Wimberly
Dorothy H. Wimberly, 18509
STONE PIGMAN WALTHER
WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Phone: 504-581-3200
Fax: 504-581-3361
dwimberly@stonepigman.com

Defendants' Liaison Counsel

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION	:	MDL NO. 1657 SECTION: L JUDGE FALLON MAG. JUDGE KNOWLES

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER #13
(Stipulation and Protective Order Regarding Confidential Information)

WHEREAS, certain documents and information have been and may be sought, produced, or exhibited by and among the parties to the above-styled proceeding (the "Action") which relate to the parties' confidential and proprietary information that may be subject to protection pursuant to Fed. R. Civ. P. 26(c); and

WHEREAS, the parties have provided and will provide a significant amount of discovery materials in this Action and the parties agree that a protective order will facilitate a timely and efficient discovery process;

IT IS HEREBY STIPULATED AND AGREED, AND FOR GOOD CAUSE SHOWN, ORDERED THAT:

Scope

1. This Protective Order shall govern all documents, the information contained therein, and all other information produced or disclosed during this Action whether revealed in a

document, deposition, other testimony, discovery response or otherwise, by any party in this Action (the "Supplying Party") to any other party or parties (the "Receiving Party").

2. Third parties who so elect may avail themselves of, and agree to be bound by, the terms and conditions of this Protective Order and thereby become a Supplying Party for purposes of this Protective Order.

3. The entry of this Protective Order does not prevent any party from seeking a further order of this Court pursuant to Fed. R. Civ. P. 26(c).

4. Nothing herein shall be construed to affect in any manner the admissibility at trial or any other court proceeding of any document, testimony, or other evidence.

Confidential Information

5. "Confidential Information" as used herein means any information that the Supplying Party believes in good faith constitutes, reflects, discloses, or contains information subject to protection under Fed. R. Civ. P. 26(c)(7), whether it is a document, information contained in a document, information revealed during a deposition or other testimony, information revealed in an interrogatory response, or information otherwise revealed.

6. Specific documents and discovery responses produced by a Supplying Party shall, if appropriate, be designated as Confidential Information by marking the pages of the document that contain Confidential Information as follows: "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER". Except as provided in paragraphs 8 and 21, documents that do not bear the foregoing designation are not Confidential Information as that term is used in this Order.

7. Any material produced or provided in this Action for inspection is to be treated by the Receiving Party as Confidential Information pending the copying and delivery of any copies of the same by the Supplying Party to the Receiving Party.

8. Information disclosed at a deposition taken in connection with this Action may be designated as Confidential Information by:

(a) stating on the record during the taking of the deposition that the deposition, or some part of it, may constitute Confidential Information; and

(b) designating the portions of the transcript in a letter to be served on the court reporter and opposing counsel within thirty (30) calendar days of the Supplying Party's receipt of the transcript of a deposition. The Court reporter will indicate the portions designated as confidential and segregate them as appropriate. Designations of transcripts will apply to audio, video, or other recordings of the testimony. The court reporter shall clearly mark any transcript released prior to the expiration of the 30-day period as "Confidential-Subject to Further Confidentiality Review." Such transcripts will be treated as Confidential Information until the expiration of the 30-day period. If the Supplying Party does not serve a designation letter within the 30-day period, then the entire transcript will be deemed not to contain Confidential Information.

9. A party in this Action may designate as Confidential Information any document or information produced by or testimony given by any other person or entity that the party reasonably believes qualifies as such party's Confidential Information pursuant to this Protective Order.

Permissible Disclosure of Confidential Information

10. Subject to Paragraph 13, the Receiving Party may show and deliver Confidential Information to the following people:

(a) counsel for the Receiving Party and Merck in-house counsel, and the attorneys, paralegals, stenographic, and clerical staff employed by such counsel;

(b) with respect to any Confidential Information produced by any plaintiff or third party with respect to plaintiff, any employee of the Receiving Party to whom it is necessary to disclose such information for the purpose of assisting in, or consulting with respect to, the preparation of this Action;

(c) stenographic employees and court reporters recording or transcribing testimony in this Action;

(d) the Court, any Special Master appointed by the Court, and any members of their staffs to whom it is necessary to disclose the information;

(e) any outside consultant or expert whether formally retained or not if the Receiving Party signs the certification described in paragraph 12;

(f) any attorney for claimants in other pending U.S. litigation alleging personal injury or economic loss arising from the alleged use, purchase, or payment of VIOXX (or attorneys for claimants in any other pending litigation as the parties may mutually agree or the Court directs) for use in this or such other action, provided that the proposed recipient is: (i) already operating under a stipulated Protective Order or (ii) agrees to be bound by this Order and signs the certification described in paragraph 12;

(g) any third party for whom there is a litigation need to disclose the information if the Receiving Party signs the certification described in paragraph 12; and

(h) any physician who treated a plaintiff for whom there is a litigation need to show Confidential Information that declines to sign the certification described in paragraph 12, provided that the physician is advised that, pursuant to this Order, such physician (1) may not make copies of any of the documents, (2) may not disclose the information beyond the parties involved in the litigation, and (3) must return the documents to counsel for the Receiving Party

after the litigation need for the documents has past.

11. The Receiving Party may show Confidential Information to any witness during a deposition, hearing, or trial. Confidential Information shown to any witness during a deposition shall not lose its Confidential status through such use, and counsel shall exercise their best efforts and take all steps reasonably required to protect its confidentiality during such use. If, after a deposition is noticed or a hearing or trial is set, the Supplying Party objects to Confidential Information being shown to that witness, the Supplying Party shall attempt to confer with counsel to resolve the issue. If counsel are unable to resolve the issue themselves, counsel may seek an order from the Court prohibiting or limiting such use or for other relief.

12. Where indicated in this Order, each putative recipient of Confidential Information shall be provided with a copy of this Protective Order, which he or she shall read. Upon reading this Protective Order, such person shall sign a Certification, in the form annexed hereto as Exhibit A, acknowledging that he or she has read this Protective Order and shall abide by its terms. These certifications are strictly confidential. Counsel for each party shall maintain the certifications without giving copies to the other side. The parties expressly agree, and it is hereby ordered that, except in the event of a violation of this order, they will make no attempt to seek copies of the certifications or to determine the identities of persons signing them. If the Court finds that any disclosure is necessary to investigate a violation of this Order, the disclosure will be limited to outside counsel only and outside counsel shall not disclose any information to their clients that could tend to identify any certification signatory unless and until there is specific evidence that a particular signatory may have violated the Order, in which case limited disclosure may be made with respect to that signatory. Persons who come into contact with Confidential Information for clerical or administrative purposes, and who do not retain copies or

extracts thereof, are not required to execute Certifications.

13. Before disclosing Confidential Information to any person who is, independent of this litigation, a current director, officer, employee of, or counsel for a pharmaceutical company other than Merck that is marketing or has in development a selective COX-2 inhibitor, or a consultant, other than an occasional consultant, who is currently consulting about a selective COX-2 inhibitor, the party wishing to make such disclosure shall give at least ten (10) days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made. If, within the ten day period, a motion is filed objecting to the proposed disclosure, the designated document or item shall not be disclosed unless and until ten days have elapsed after the appeal period from a Court order denying the motion. Alternatively, the party wishing to make such disclosure may provide the counsel who designated such information as confidential with information concerning the proposed recipient that does not identify the proposed recipient but is sufficient to permit an informed decision to be made with respect to any potential objection. If there is no consent to the disclosure within ten (10) days, the party wishing to make the disclosure may submit the information to the Court for a determination of whether the disclosure may be made. The objecting party will have opportunities to (1) request that the Court direct the party wishing to make disclosure to produce additional information about the proposed recipient and (2) submit such papers and argument as it may feel necessary to allow the Court to make an informed decision. Because only the party seeking to make the disclosure may know who the proposed recipient is, it is the responsibility of the party seeking to make the disclosure to determine prior to making any disclosure whether the proposed recipient is a person described in this paragraph. The parties have agreed that plaintiffs do not have to give notice or invoke the Court with respect

to any person whom plaintiffs have retained to assist them in the prosecution of this Action as of September 17, 2004 who otherwise would be a consultant described in this paragraph as long as any such person signs the certification described in paragraph 12. This agreement does not cover any person who as of September 17, 2004 was not a consultant described in this paragraph, but who later becomes a person described in this paragraph.

Use of Confidential Information

14. The Receiving Party shall use confidential information only in connection with this Action or an action in which the Receiving Party is permitted by this Order to use Confidential Information.

15. Notwithstanding any other provisions hereof, nothing herein shall restrict any party's counsel from rendering advice to its clients with respect to this Action and, in the course thereof, relying upon Confidential Information, provided that in rendering such advice, counsel shall not disclose any other party's Confidential Information other than in a manner provided for in this Protective Order.

16. Nothing contained in this Protective Order shall preclude any party from using its own Confidential Information in any manner it sees fit, without prior consent of any party or the Court.

Protection of Confidential Information

17. Counsel shall take all reasonable and necessary steps to assure the security of any Confidential Information and will limit access to Confidential Information to those persons authorized by this Order.

18. Any party that is served with a subpoena or other notice compelling the

production of discovery materials produced by another party must immediately give written notice of such subpoena or other notice to the original Supplying Party. Upon receiving such notice, the original Supplying Party shall bear the burden of opposing, if it deems appropriate, the subpoena on grounds of confidentiality.

19. If a Receiving Party learns of any unauthorized disclosure of Confidential Information, the party shall immediately upon learning of such disclosure inform the Supplying Party of all pertinent facts relating to such disclosure and shall make all reasonable efforts to prevent disclosure by each unauthorized person who received such information.

20. Upon the conclusion of any attorney's last case in this proceeding (or such other case in which the Receiving Party is permitted by this order to use Confidential Information), including any appeals related thereto, at the written request and option of the Supplying Party, all discovery materials produced by the Supplying Party and any and all copies, summaries, notes, compilations (electronic or otherwise), and memoranda related thereto, shall be returned within thirty (30) calendar days to the Supplying Party, provided, however, that counsel may retain their privileged communications, work product, certifications pursuant to paragraph 12, and all court-filed documents even though they contain discovery materials produced by the Supplying Party, but such retained privileged communications and work product and court-filed documents shall remain subject to the terms of this Protective Order. At the written request of the Supplying Party, any person or entity having custody or control of recordings, notes, memoranda, summaries or other written materials, and all copies thereof, relating to or containing discovery materials produced by the Supplying Party shall deliver to the Supplying Party an affidavit certifying that reasonable efforts have been made to assure that all such discovery materials produced by the Supplying Party and any copies thereof, any and all records, notes, memoranda,

summaries, or other written material regarding the discovery materials produced by the Supplying Party (except for privileged communications, work product and court-filed documents as stated above) have been delivered to the Supplying Party in accordance with the terms of this Protective Order.

Changes in Designation of Information

21. Any Supplying Party may designate as Confidential Information or withdraw a Confidential Information designation from any material that it has produced; provided, however, that such redesignation shall be effective only as of the date of such redesignation. Such redesignation shall be accomplished by notifying counsel for each party in writing of such redesignation and simultaneously producing a re-designated copy of such material.

22. Any party may object to the propriety of the designation (or redesignation) of specific material as Confidential Information by serving a written objection upon the Supplying Party's counsel. The Supplying Party or its counsel shall thereafter, within ten (10) calendar days, respond (by hand delivery or facsimile transmission) to such objection in writing by either: (i) agreeing to remove the designation; or (ii) stating the reasons for such designation. If the Objecting Party and the Supplying Party are subsequently unable to agree upon the terms and conditions of disclosure for the material(s) in issue, the document will have its designation removed unless within thirty (30) days after written notice that the parties' negotiations are ended, the Supplying Party moves the Court for an order upholding the designation. On such a motion, the Supplying Party shall have the burden of proving that the material is Confidential Information. The material(s) in issue shall continue to be treated in the manner as designated by the Supplying Party until the Court orders otherwise.

23. To the extent that any material designated as Confidential Information herein

becomes publicly available other than through a violation of this or another protective order, or has its designation as Confidential Information withdrawn or judicially removed in any U.S. VIOXX action or MDL-1658, the Confidential Information designation shall be deemed withdrawn from such material and shall, on notice, be removed from the log.

Filing Papers In Court Records

24. The parties will use the following procedure for submitting to the Court material consisting of, relating to, containing, incorporating, reflecting, describing, or attaching Confidential Information:

(a) Any such material shall be filed in a sealed envelope, labeled with the case name, case number, the motion to which the documents relate, and a listing of the titles of the documents in the envelope (such titles not to reveal Confidential Information).

(b) Within seven (7) business days of the submission of any material pursuant to the preceding sub-paragraph, the parties shall confer to determine if the Supplying Party objects to the filing of the subject Confidential Information in unsealed form. To the extent of the parties agreement concerning the treatment of the subject Confidential Information, the filing party may file the subject materials in unsealed form. To the extent the parties are unable to reach agreement, either party may file a motion to address the appropriate treatment of the subject materials. On such a motion, the Supplying Party shall have the burden of proving that the material is Confidential Information. The material shall remain sealed unless the Court orders otherwise.

25. When submitting deposition testimony pursuant to the previous paragraph that has been designated as Confidential Information, the submitting party shall submit, to the extent reasonably possible, only those pages of the deposition transcript that are cited, referred to, or

relied on by the submitting party.

Miscellaneous Provisions

26. Defendant shall produce within thirty days of this Order a confidentiality log in a searchable electronic format that can be used with commercially available database software (*e.g.*, Microsoft Access) identifying the following information for each document produced or made available in this litigation: the document's (a) beginning and ending Bates numbers; (b) date; (c) title, (d) document type; (e) author(s); (f) recipient(s); and (g) confidentiality status (*e.g.*, "Confidential" or "Non-Confidential"). Defendant shall update the confidentiality log on the first business day of each month. Each confidentiality log shall reflect all documents produced by defendant by the fifteenth day of the prior month. Documents designated "Confidential-Subject to Protective Order" that do not appear on the log are Confidential Information under this Order.

27. Within seven days of entry of this Order (or within seven days of entry or execution of any applicable order or stipulation), Defendant shall produce to Plaintiffs copies of any order from any U.S. VIOXX action or MDL-1658 or any stipulation allowing disclosure beyond the protective order in such action that concerns, in whole or in part, the treatment of Confidential Information concerning VIOXX. The parties shall meet and confer to discuss any issues raised by such orders or stipulations.

28. It is expressly understood by and between the parties that in producing Confidential Information in this litigation, the parties shall be relying upon the terms and conditions of this Protective Order.

29. By written agreement of the parties, or upon motion and order of the Court, the terms of this Protective Order may be amended or modified. This Protective Order shall continue in force until amended or superseded by express order of the Court, and shall survive any final judgment or settlement in this Action.

30. Notwithstanding any other provision in the order, nothing in this Order shall affect or modify Merck's ability to review plaintiffs' information and report information to regulatory agencies.

DONE this 24th day of May, 2005.

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 09-CI-1671

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

V. **ORDER**

MERCK & CO., INC. **DEFENDANT**

This matter came before the Court the Defendant's Motion for Extension of Time filed on March 19, 2014. Dr. Egilman noted his objection via electronic mail on March 19, 2014 as to the 450 documents he initially requested on October 29, 2013, but had no objection to an extension as to the new document requests made. The deadline for Merck to file its confidentiality reports was previously scheduled for today, March 20, 2014. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, the Court finds that good cause being shown, **HEREBY** extends the Defendant's time to file until the Court can rule on Merck's Motion.

SO ORDERED this 20th day of March, 2014.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division

DISTRIBUTION:

SUSAN J. POPE
Frost Brown Todd LLC
250 West Main Street, Suite 2800
Lexington, KY 40507-1749

JOHN H. BEISNER
Skadden, Arps, Slate Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005-2111

TAREK ISMAIL
Goldman Ismail Tomaselli Brennan & Baum LLP
1 North Franklin Street, Suite 625
Chicago, IL 60606

DR. DAVID EGILMAN
8 North Main Street, Suite 404
Attleboro, MA 02703

WILLIAM R. GARMER
Garmer & Prather LLC
141 North Broadway
Lexington, KY 40507
RICHARD L. JOSEPHSON
Baker Botts, LLP
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995

SCOTT A. POWELL
DON P. MCKENNA
MATTHEW C. MINNER
BRIAN M. VINES
Hare, Wynn, Newell & Newton
2025 Third Avenue North, Suite 800
Birmingham, AL 35203

TODD LEATHERMAN
MARYELLEN MYNEAR
ELIZABETH UNGAR NATTER
Office of Consumer Protection
Office of the Attorney General
1024 Capitol Center Drive, Suite 200
Frankfort, KY 40601

ANN B. OLDFATHER
R. SEAN DESKINS
Oldfather Law Firm
1330 South Third Street
Louisville, KY 40208

EXHIBIT 3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION	*	MDL No. 1657
	*	Section L
	*	February 28, 2014

* * * * * * * * * * * * * * * * * *

STATUS CONFERENCE BEFORE
THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

Appearances: Dawn Barrios, Esq.
Leonard Davis, Esq.
John Beisner, Esq
David Egilman, M.D.
William Garmer, Esq.
Ben Barnett, Esq.
Liz Natter, Esq.
Sean Deskins, Esq.
Michael Hasken, Esq.
Doug Marvin, Esq.

Official Court Reporter: Toni Doyle Tusa, CCR, FCRR
500 Poydras Street, Room HB-406
New Orleans, Louisiana 70130
(504) 589-7778
Toni_Tusa@laed.uscourts.gov

Proceedings recorded by mechanical stenography; transcript produced by computer.

or have some other privilege that should be kept from public view. I have to look at them.

MR. BARNETT: Your Honor, it's Ben Barnett again, just briefly.

We have made clear to many if not most of the individuals on the phone that we have no objection to resolving issues related to the MDL documents produced in the MDL subject to the MDL protective order in the MDL. What we don't think would be appropriate is to have documents that weren't actually produced in another matter de-designated under that matter's protective order. We think that you, as the judge who entered the protective order and retained authority, really has the final say regarding de-designation.

THE COURT: I don't disagree with that. I am interested in giving everybody an opportunity to tell me why the documents should be kept under designation.

And, of course, you having the documents, or at least the party with the greatest interest in keeping them under the protective order, you have the burden of showing why they should be kept. If there's no reason that they should be kept, then they shouldn't be kept under the protective order.

DR. EGILMAN: Your Honor, this is Dr. Egilman.

I'm not so clear exactly what you just said, maybe because I'm not a lawyer. Does that mean you're instructing the judge, Judge Shepherd, to not rule on any MDL

documents that were used in the Kentucky case?

THE COURT: I think that the judge ought to be ruling on the documents that the judge has used in his litigation. I'm not, as a federal court, going to instruct a state court judge not to act on material that he had, but I don't think that his ruling on them is necessarily the only ruling that's necessary. If those documents are also under the MDL protective order, then I'm going to have to weigh in on that.

Now, I'm going to certainly take into consideration the fact that a state court colleague felt that it ought to be released. Under Rule 23 that is very persuasive to me, that he felt it should be released, but I don't think that he would wish to try to release documents in the MDL proceeding, documents that were not even involved in the Kentucky litigation. I don't think he would feel comfortable doing that. I would urge him to not deal with documents that were not introduced in his litigation.

Let me go back to the log because I think that it is necessary to have some logs of these documents. We can't just dump them. We ought to have a log of those documents. At least if it comes to me in a motion, I will need a log showing which documents should continue, according to the moving party, under protective order and what they are and why they should remain under the protective order.

It's not as if at this point we don't know what

the documents are. So it's not like a privilege where you say very little about the document and the other person responding knows very little about the document. Here, everybody knows what the documents are, and the only issue is whether or not they should be released to the public.

So just in summary, the documents that my protective order are covering are still under the protective order. If anyone wishes that the documents under the protective order be removed from the protective order, then a motion should be made.

Doctor, from your standpoint, I don't have any problem if an attorney on your behalf moves, but there is an issue as to whether or not you have standing, and I'll have to deal with that issue. What I'm hearing is that whether or not you have standing, Ms. Oldfather's position may have standing. So if she's on the same motion that you are on, then I guess to some extent your standing is mooted.

DR. EGILMAN: Right. That's the difference between your order and the state's order. The judge specifically wrote in third-party standing in the state order. He is going to determine whether that will apply to me on Wednesday. That's a huge difference. I'm the only one who has asked for de-designation, as far as I know, in this litigation in general.

THE COURT: All right. I have a transcript of this

EXHIBIT 4

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 09-CI-1671

COMMONWEALTH OF KENTUCKY, EX REL.
JACK CONWAY, ATTORNEY GENERAL PLAINTIFF

vs.

MERCK & CO., INC, n/k/a
MERCK SHARP & DOHME CORP. DEFENDANT

HEARING HELD MARCH 5, 2014
BEFORE THE HONORABLE PHILLIP J. SHEPHERD

COUNSEL FOR PLAINTIFF:
Elizabeth U. Natter
William R. Garmer
LeeAnne E. Applegate

COUNSEL FOR DEFENDANT:
Ben Barnett
Susan J. Pope

THE OLDFATHER LAW FIRM:
Michael R. Hasken

PRESENT BY SPEAKERPHONE:
Dr. David Egilman

ACTION COURT REPORTERS
116 Mechanic Street
Lexington, Kentucky 40507
859.252.4004

THE COURT: ...on Wednesday, March the 5th for a hearing on some post-judgment matters in the case of Commonwealth of Kentucky vs. Merck, which is No. 09-CI-1671.

And this hearing is prompted by a request from Dr. Egilman, who is an -- served as an expert witness in the case, for the de-designation of a number of documents that have been designated as confidential during the discovery in this case, and there has been quite a bit of exchange of correspondence with regard to that.

And then, finally, we had a preliminary hearing on it a couple of weeks ago and -- or a week or so ago, and now we're going to have a hearing just to hear out all parties on that request to de-designate these documents.

And we've got a motion in support of Dr. Egilman's request that has been filed by the Ann Oldfather Law Firm, and I think -- and the -- Merck, as defendants, are contesting the standing of both Dr. Egilman and the Oldfather Law Firm to seek de-designation of these documents under the protective order that was entered by the Court.

So with that background, why don't we -- let's do this for the record before -- we will call

Dr. Egilman here in just a minute. We had told him that he could appear by telephone.

And let's go ahead, though, before we do that and get the entry of appearances for all parties who are represented here today; so...

MR. HASKEN: Good afternoon, Your Honor. My name's Michael Hasken. I'm here on behalf of Ann Oldfather and the Oldfather Law Firm.

THE COURT: Okay. And we've got representatives of the Commonwealth, who I understand are -- you all are not taking a position; is that right? We have Ms. Natter and Mr. Garmer and Ms. Applegate.

MS. NATTER: Your Honor, we are here to assist the Court. As Your Honor knows, in our letter we said it was our impression that Dr. Egilman was a proper party for the purpose of standing, although we're not taking a position as to the redesignation of documents.

THE COURT: Correct. Okay. All right. So, again, we do have representatives of the attorney general's office who are the -- representing the Commonwealth in the matter. And then we've also got counsel for Merck; so...

MR. BARNETT: Good afternoon, Your Honor.

Ben Barnett on behalf of Merck, and I'm joined by my colleague, Susan Pope, on behalf of Merck as well.

THE COURT: Okay. Okay. Well, why don't we go ahead and let's see if we can get Dr. Egilman.

Let me ask, before we do that, are there any preliminary matters we ought to address before we get Dr. Egilman on the phone?

MR. HASKEN: Your Honor, I just want to state that I'm here on behalf of Ms. Oldfather because she is currently in trial. I do want to let you know that I'm still making myself comfortable with the Vioxx litigation. I kind of got thrown in here. I'm here kind of pinch-hitting.

THE COURT: Okay.

MR. HASKEN: So I just wanted to let you know that beforehand, that I'm here to help Ms. Oldfather the best I can.

THE COURT: Okay. And I guess -- and it's your -- Mr. Deskins was another associate of Ms. Oldfather who filed the pleading, so you're -- you're really...

MR. HASKEN: I'm down the totem pole.

THE COURT: You're being thrown -- you've been thrown in at the -- into the mix here maybe, as often happens in a small law office, as being the

tour of duty in the MDL, I guess.

MS. NATTER: It's also true that Judge Fallon, although -- Judge Fallon's order required two things. It required Merck to keep a log of de-designated documents, and I've mentioned this before, but we have not been able to get it.

It originally did require -- paragraph 23 of that order requires -- required that documents that had been de-designated in other courts would be considered de-designated in the MDL.

Judge Fallon, last week, did say -- that's what his order said -- that Judge Fallon, last week, though, did say that he -- while he would grant deference to this Court's determination on any of those documents, that he ultimately would rule on this.

THE COURT: Right. He would make an independent determination of -- which I think is entirely correct, so -- you know, and I certainly don't want to -- I don't want to become the forum in which every dispute over confidentiality of documents that have been produced in the multidistrict litigation is in -- is in dispute, but, by the same token, you know, I do think that, you know, to the extent that there are documents that were designated as confidential in other cases that were brought into this litigation by virtue

of the expert testimony of Dr. Egilman and formed the bases of his opinions that were testified to under oath in this case, that there is some, you know, again, legitimate interest in -- in having some means of public access or public discussion or public scrutiny of that testimony.

So, you know -- and that's not to say that there's not -- that many of those documents may be -- you know, may be the subject of a very legitimate claim of confidentiality and may well be entitled to continuing protection, you know, if there is a specific, you know, basis that would qualify as good cause under Rule 26, you know.

But, again, I don't -- this is the difficulty we get into with these -- you know, these kinds of confidentiality orders in which -- you know, in order to -- in order to efficiently proceed with the litigation and not spend years in dispute over fights about confidentiality, we agree to essentially a provisional but binding court order giving confidential treatment to large volumes of documents, but the requirement of Rule 26 is still in effect that there's got to be good cause to support it.

And, you know, we try to defer those fights and, you know, sometimes even post-judgment in the

situation that we're in now, it still becomes an issue.

So, you know, that's -- I'm not sure what the most efficient way to resolve that dispute is, but I do think there's a legitimate public interest in examining those issues.

And I do think that Merck has a duty -- and, again, just pursuant to the order under which they obtained confidential designation, I do think that Merck's got a duty to demonstrate good cause.

That may be a very burdensome undertaking for Merck at this point, but I'm not sure there's any way -- I'm not sure that there's any way to avoid that, although I do think that, you know, the order that was entered does contemplate a period of time in which the party requesting disclosure or de-designation and the party that has claimed the confidential treatment are -- I think the order contemplates that there would be an effort to try to resolve those requests without the intervention of the Court, and if they can't be resolved without the intervention of the Court, then, you know, I think there would have to be a -- you know, a further hearing and the burden would be on Merck to demonstrate good cause.

So, you know, it does seem to me like at this point I'm certainly not prepared to say what documents

can be -- are required to be disclosed and which ones are required to be kept confidential at this point except maybe with regard to the ones we discussed here today on the autopsy.

But I do think that -- I do think Dr. Egilman has got standing to make the request for de-designation. And that being said, I think that we need to provide a process for Merck to attempt to meet and confer with Dr. Egilman to try to resolve the request that he makes.

And, Dr. Egilman, I would say that, you know, I don't know the volume of documents you're talking about. We have got two kind of very different perspectives about how extensive that is, but I think that -- I'm going to give you the opportunity to make another -- for you and Merck to try to resolve some of these things, and I think to the extent that you can maybe break those requests down into manageable parts, it might -- it might be helpful in the attempt to try to get a resolution of these things.

DR. EGILMAN: I don't think that's going to be too much of a problem.

THE COURT: Okay. Well, that's what I'm inclined to do. I think -- I think, you know, to the extent that the documents that have been requested to

EXHIBIT 5

Andrew Goldman

From: Andrew Goldman
Sent: Monday, March 17, 2014 2:03 PM
To: 'David Egilman'
Cc: Eric H. Weinberg ; 'Kenneth Lougee'; bvines@hwnn.com
Subject: RE: Hi there

Dr. Egilman, I have reviewed your email below, and Merck respond as follows:

1. You are a non-party to the MDL Attorney General Actions and therefore you lack standing to assert any challenges to the confidentiality designations to the testimony and exhibits to your January 25, 2014 deposition;
2. At the outset of your deposition, I objected to your entire January 25, 2014 deposition as confidential under the terms of the MDL Protective Order. (1/25/14 Egilman Dep. Tr., at 26:8:10), which covered both your testimony about confidential exhibits and the exhibits themselves. There is no requirement in PTO 13 that Merck subsequently re-assert objections to previously deposition exhibits that were previously designated as confidential; and
3. If you do not abide by the non-disclosure requirements in MDL Protective Order #13, we will seek Judge Fallon's intervention.

Andy

Andrew L. Goldman
GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP
564 West Randolph, Ste. 400 · Chicago · IL · 60661
312.881.5960 (direct)
773.251.2064 (cell)
312-881-5196 (fax)
agoldman@goldmanismail.com · www.goldmanismail.com

From: David Egilman [mailto:degilman@egilman.com]
Sent: Friday, March 14, 2014 12:54 PM
To: Andrew Goldman
Cc: Eric H. Weinberg ; 'Kenneth Lougee'; bvines@hwnn.com
Subject: Hi there

Dear Mr. Goldman:

I hope all is well with you and yours.

I think thirty days have passed since my deposition was provided to you. (I got it after you did.) Since you have not followed up with a letter designating portions of the deposition or attached exhibits confidential I consider the material to be public.

Let me know if you disagree.

David Egilman MD, MPH
Editor IJOEH
Clinical Professor
Department of Family Medicine
Brown University
8 North Main St
Suite 404
Attleboro, Ma 02703
Cell 508-472-2809
Office 508-226-5091
Skype 508-216-0667
degilman@ijoeh.com

EXHIBIT 6

Andrew Goldman

From: David Egilman <degilman@egilman.com>
Sent: Thursday, March 20, 2014 7:44 AM
To: Andrew Goldman
Cc: 'ehw@erichweinberg.com'; 'Kenneth@sjatty.com'; 'degilman@egilman.com'; 'bvines@hwnn.com'
Subject: Deposition designations

March 20, 2014

Dear Mr. Goldman:

In my experience in Vioxx litigation Merck has complied with PTO 13 paragraph 8. I am required to follow the procedures in PTO 13 paragraph 8 which states unambiguously:

"Information disclosed at a deposition taken in connection with this Action may be designated as Confidential Information by:

(a) stating on the record during the taking of the deposition that the deposition, or some part of it, may constitute Confidential Information; **and**

(b) designating the portions of the transcript in a letter to be served on the court reporter and opposing counsel within thirty (30) calendar days of the Supplying Party's receipt of the transcript of a deposition. [Emphasis added]"

Merck has failed to comply with the PTO as no letter was sent pursuant to subpart (b) above. Therefore, none of my deposition testimony is confidential and no exhibits are confidential. If you think otherwise, I suggest that you seek guidance from the Court.

David Egilman MD MPH
Professor Dept of Family Medicine Brown University
President GHETS.ORG
8 N Main Street
Attleboro, Ma 02703
508-472-2809 cell
508-226-5091 office
425-699-7033 fax
508-216-0667 Skype
Degilman Skype
Degilman@egilman.com

From: Andrew Goldman [mailto:AGoldman@goldmanismail.com]
Sent: Tuesday, March 18, 2014 7:38 AM
To: David Egilman
Cc: Eric H. Weinberg; Kenneth Lougee; bvines@hwnn.com
Subject: RE: Hi there

Dr. Egilman, as counsel for plaintiffs in the Vioxx MDL litigation know, typically the parties have not gone back to designate particular lines and pages of deposition as confidential particularly where, as in your case, the examiner designated at the outset the entire deposition as confidential under the MDL Protective Order. At your MDL Attorney General deposition, at the very end of your deposition and without asking any questions, Utah AG's outside counsel (Eric Weinberg) simply dumped a hodgepodge of exhibits consisting of all of the multi-color folders and documents contained therein that you brought with you to the deposition. I did not have the time then nor have I taken the time since your deposition to review each of those exhibits to determine if all of the documents marked by Mr. Weinberg contained confidential documents produced by Merck or whether they also contained documents not produced by Merck but that were prepared by you or others on your behalf using in part the contents of Merck's confidential documents. Thus, even these non-Merck documents may contain confidential Merck information. In terms of your deposition testimony, all of that is confidential under the Protective Order to the extent it disclosed or is based in any way on the content of Merck's confidential documents.

Thanks,

Andy

From: David Egilman [mailto:degilman@egilman.com]
Sent: Monday, March 17, 2014 3:02 PM
To: Andrew Goldman
Cc: Eric H. Weinberg; Kenneth Lougee; bvines@hwnn.com; David Egilman
Subject: Re: Hi there

Dear Mr. Goldman:

Just to be clear exhibits that we're not stamped confidential remain non-confidential? I think PTO 13 requires that you specify page and lines that you are designating within thirty days of the deposition. I take it you think otherwise. Is it your position that the entire deposition is confidential?

David Egilman md mph
8 N Main Street
Professor Dept of Family Medicine Brown University
President GHETS.ORG
Attleboro, Ma 02703
508-472-2809 cell
508-226-5091 office
425-699-7033 fax
Degilman@egilman.com

On Mar 17, 2014, at 3:03 PM, "Andrew Goldman" <AGoldman@goldmanismail.com> wrote:

> Dr. Egilman, I have reviewed your email below, and Merck respond as follows:
>
> 1. You are a non-party to the MDL Attorney General Actions and therefore you lack standing to assert any challenges to the confidentiality designations to the testimony and exhibits to your January 25, 2014 deposition;
> 2. At the outset of your deposition, I objected to your entire January 25, 2014 deposition as confidential under the terms of the MDL Protective Order. (1/25/14 Egilman Dep. Tr., at 26:8:10), which covered both your testimony about confidential exhibits and the exhibits

themselves. There is no requirement in PTO 13 that Merck subsequently re-assert objections to previously deposition exhibits that were previously designated as confidential; and

3. If you do not abide by the non-disclosure requirements in MDL Protective Order #13, we will seek Judge Fallon's intervention.

Andy

Andrew L. Goldman
GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP
564 West Randolph, Ste. 400 · Chicago · IL · 60661
312.881.5960 (direct)
773.251.2064 (cell)
312-881-5196 (fax)
agoldman@goldmanismail.com · www.goldmanismail.com

From: David Egilman [mailto:degilman@egilman.com]
Sent: Friday, March 14, 2014 12:54 PM
To: Andrew Goldman
Cc: Eric H. Weinberg ; 'Kenneth Lougee'; bvines@hwnn.com
Subject: Hi there

Dear Mr. Goldman:

I hope all is well with you and yours.

I think thirty days have passed since my deposition was provided to you. (I got it after you did.) Since you have not followed up with a letter designating portions of the deposition or attached exhibits confidential I consider the material to be public.

Let me know if you disagree.

<image001.jpg>

David Egilman MD, MPH
Editor IJOEH
Clinical Professor
Department of Family Medicine
Brown University
8 North Main St
Suite 404
Attleboro, Ma 02703
Cell 508-472-2809
Office 508-226-5091
Skype 508-216-0667
degilman@ijoeh.com

EXHIBIT 7

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

DIRECT DIAL
(202) 371-7410
DIRECT FAX
(202) 393-5760
EMAIL ADDRESS
JOHN.BEISNER@SKADDEN.COM

March 25, 2014

VIA E-MAIL

Honorable Eldon E. Fallon
United Stated District Court
500 Poydras Street, Room C-456
New Orleans, LA 70130

RE: Vioxx Confidential Documents – Dr. David Egilman

Dear Judge Fallon:

I am writing to request an additional conference call at the Court's earliest convenience regarding the continued efforts by Dr. David Egilman to secure release of certain Merck documents that were produced with confidential designations and remain subject to protective orders in the MDL proceeding. The need for such a call has been prompted by almost-daily e-mails from Dr. Egilman to Merck's counsel regarding a wide array of confidentiality issues. Most recently, Dr. Egilman has claimed that his recent deposition in the MDL is not confidential because of a technicality that was allegedly not observed by the parties and that he plans to release that deposition and the accompanying exhibits shortly unless Merck seeks relief from this Court.

Merck seeks the Court's assistance in two respects:

First, Dr. Egilman refuses to resolve his issues regarding document confidentiality through proper legal channels. Instead, he communicates directly with Merck's counsel via e-mail, forwards Merck's responses to other courts, engages in purported legal analysis, and even has applied a computer program to his e-mails so that he can determine who reads attachments to his emails and to whom

they are forwarded. Dr. Egilman's constant communications have become a huge distraction for Merck's counsel and are highly irregular, particularly given his lack of standing to address these issues in the first place. Merck believes that any further communications regarding these issues should be handled through counsel to minimize harassment and ensure that the dispute is resolved in an orderly, efficient manner.

Second, Dr. Egilman has threatened to unilaterally disclose confidential depositions unless Merck seeks court intervention. In a recent letter to Merck's counsel Andrew Goldman, for example, Dr. Egilman asserted that his deposition in the AG cases is not confidential because "I think thirty days have passed since my deposition was provided to you" and "you have not followed up with a letter designating portions of the deposition or attached exhibits confidential." Thus, Dr. Egilman "consider[s] the material to be public."[1] Mr. Goldman reminded Dr. Egilman that he began the deposition by stating on the record that the entire deposition was confidential and therefore covered by PTO 13.[2] Dr. Egilman then responded with his legal analysis that PTO 13 requires written designation of the transcript as confidential even if it had already been made clear at the deposition that the entire transcript would be subject to the protective order.[3] The fact that the practice in the MDL has been to the contrary did not sway Dr. Egilman. He then followed up with a letter to Judge Shepherd in Kentucky that copied Mr. Goldman's statement about prior practice, calling the precedent Merck cited "inapposite" and alleging that Merck's adherence to longstanding practice was "a delaying tactic and effort to exhaust my energy and resources."[4] And on the same day, he insisted in yet another e-mail to Mr. Goldman that "none of my deposition testimony is confidential and no exhibits are confidential," and "[i]f you think otherwise, I suggest you seek guidance from the Court."[5] In short, Dr. Egilman has given us no choice but to return to the Court and seek further assistance in light of his threat to unilaterally release documents without Court permission to do so.

We are available for a telephone conference on this subject at the Court's convenience.

---

[1] E-mail from David Egilman to Andrew Goldman, Mar. 14, 2014 (attached as Ex. 1).

[2] E-mail from Andrew Goldman to David Egilman, Mar. 17, 2014 (attached as Ex. 2).

[3] E-mail from David Egilman to Andrew Goldman, Mar. 20, 2014 (attached as Ex. 3).

[4] Letter from David Egilman to Hon. Phillip Shepherd, Mar. 20, 2014, at 2 (attached as Ex. 4).

[5] E-mail from David Egilman to Andrew Goldman, Mar. 20, 2014.

Sincerely,

John H. Beisner

cc: Dawn Barrios
Russ Herman
Leonard Davis
Dr. David Egilman

Enc.

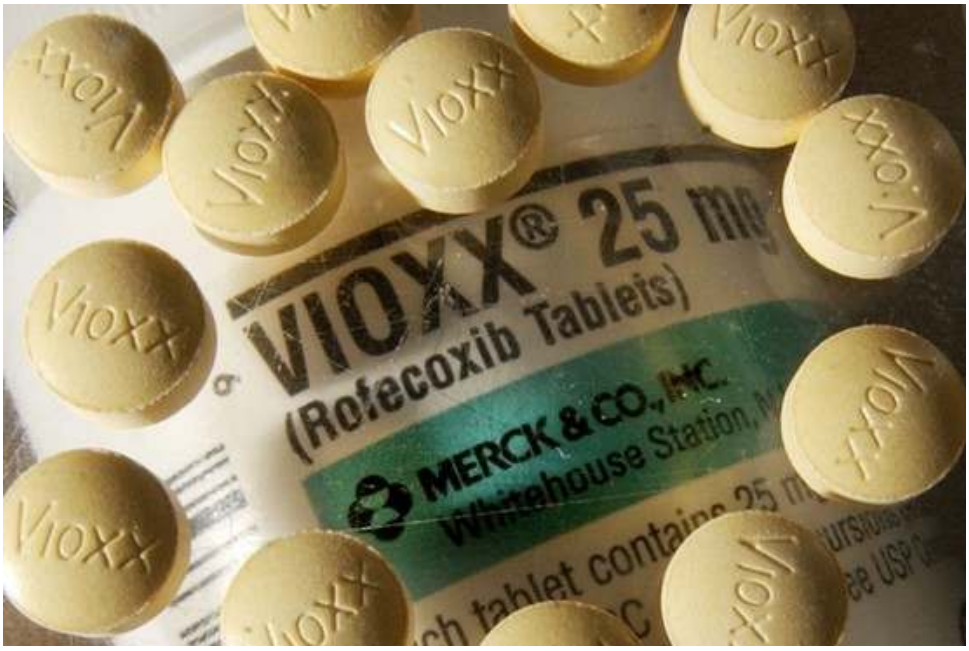
EXHIBIT 8

THE WALL STREET JOURNAL.
WSJ.com

March 26, 2014, 12:41 PM ET

More Disclosure Coming in Merck's Decade-Long Vioxx Nightmare

By Ed Silverman



Associated Press

In a little-noticed ruling, a Kentucky state judge has permitted a Brown University professor to seek disclosure of countless Vioxx documents that were marked as confidential during years of litigation over the controversial painkiller.

Vioxx, you may recall, was a highly controversial and widely prescribed painkiller that Merck withdrew a decade ago over links to heart attacks and strokes. However, the documents allegedly contain fresh information about the extent to which the drug maker disclosed side effects on a timely basis and its handling of clinical trial data.

"In general, there's information on the toxicity of the drug that's not been previously published by Merck and there is information that Merck published that misrepresents the health effects of the drug," says David Egilman, a clinical professor of family medicine who has regularly served as an expert witness for plaintiffs' lawyers in Vioxx litigation in a half dozen state courts over the past several years.

A Merck spokeswoman declined to comment, although the drug maker has the right to negotiate with Egilman over which documents are held back and return to court to have the confidentiality designations upheld if an agreement cannot be reached.

Egilman has previously used his perch to co-author papers that examined Merck research practices and the risks of the painkiller, which became a sort of poster child in the debate over drug safety and regulatory oversight. In 2011, Merck agreed to pay $950 million and plead guilty to a criminal misdemeanor to resolve government allegations that Vioxx was promoted illegally and deceived the government about the drug's safety.

For its part, the drug maker has repeatedly maintained that Vioxx was withdrawn as soon as worrisome cardiovascular signals were detected. Following the recent court ruling, the Merck spokeswoman said that "from a transparency perspective, we provided all the information in a timely manner to the FDA and stand behind the actions we did, from approval to the time we pulled it off the market."

Egilman, however, believes otherwise. After having an insider's look at various Merck documents that were designated confidential and, therefore, kept out of courtrooms, he says that raw study data, company emails and internal analyses "provide new information on the health hazards of the drug and evidence of fraud in the conduct of the studies. I've been able to see documents few others have." The Merck spokeswoman declined to comment.

Egilman served as a paid expert witness in a lawsuit that had been filed by Kentucky Attorney General Jack Conway, who alleged the drug maker violated consumer protection laws. The litigation was settled last November for $23 million, although Egilman continued to battle Merck over access to documents, some of which he argues demonstrate a failure to properly inform research subjects of side effects and risks. He declined to say how much he was paid for his work in Kentucky.

In reaching his decision, Franklin Circuit Court Judge Phillip Shepherd wrote that Egilman has standing to seek disclosure of the documents as a third party and that "important public policy questions regarding consumer protection and public health have been raised. The public has an interest in evaluating Dr. Egilman's opinions and the documents on which they were based."

But if Egilman ultimately prevails, he says he plans to provide documents to the FDA and the Yale University Open Data Access Project, which coordinates efforts to independently review clinical trial data. The project is overseen by Yale cardiology professor Harlan Krumholz, who co-authored two Vioxx papers with Egilman.

Egilman, by the way, has famously tussled before with a drug maker over documents marked confidential as part of litigation. In 2007, he agreed to pay $100,000 after admitting to violating a protective order for leaking documents about the Zyprexa anti-psychotic pill that that made their way to the New York Times, although he did not admit to any illegal activity. Eli Lilly later reached a $1.4 billion settlement and pled guilty to promoting the drug for unapproved uses.

EXHIBIT 9

COLORADO COURT OF APPEALS

Court of Appeals No. 01CA1982
Jefferson County District Court No. 96CV2532
Honorable Frank Plaut, Judge

David Egilman, M.D.,

Appellant,

v.

District Court, First Judicial District, County of Jefferson and The Honorable Frank Plaut, one of the Judges thereof,

Appellees.

ORDERS AFFIRMED IN PART,
AND VACATED IN PART

Division IV
Opinion by JUDGE NEY
Rothenberg and Vogt, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
September 5, 2002

Elzi Pringle and Gurr, Bruce D. Pringle, Denver, Colorado, for Appellant

Ken Salazar, Attorney General, M. Terry Fox, Assistant Attorney General, Denver, Colorado, for Appellee

Appellant, David Egilman, appeals two orders entered in Ballinger v. Brush Wellman, Inc., Case No. 96CV2532. We vacate one of the orders in part and otherwise affirm.

Appellant is a physician who was retained as an expert by the plaintiffs in the Ballinger case. Concerned with the possibility of juror contamination, the trial judge issued an "Order Prohibiting Certain Extrajudicial Statements" (gag order), which prohibited the parties, attorneys, expert witnesses, and witnesses within the control of the parties from making any extrajudicial statements about the case, including statements made on Internet websites.

Appellant allegedly published certain statements concerning the trial and the judge on his password-protected website.

Without any service of process on appellant, the trial judge issued a second order, entitled "Findings, Conclusions, and Orders Concerning Sanctions" (sanctions order), sanctioning appellant for his violation of the gag order. Among other sanctions directed at appellant's testimony in the Ballinger case, the sanctions order prohibited him from testifying as a witness in the trial judge's courtroom in the future.

Appellant contends that the sanctions order was issued without procedural due process. Appellant also contends that

the gag order was a violation of his right to freedom of expression. We agree with the first contention and do not reach the second.

I.

Before addressing the merits, we first conclude that appellant has standing to challenge the sanctions order.

To raise a constitutional claim in Colorado, a party must allege an injury in fact to a legally protected interest. Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1977). An injury in fact may be potential. See Romer v. Board of County Commissioners, 956 P.2d 566 (Colo. 1998).

Liberty interests may be implicated when the government restricts an individual's ability to pursue a chosen occupation. For liberty interests to be implicated, the restriction must involve total exclusion from a profession. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). A restriction that only partially limits a party's ability a party to pursue a certain occupation, however, does not implicate a liberty interest, unless such restriction damages a party's "good name, reputation, honor, or integrity" and thus hampers his ability to obtain future employment. Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548, 559 (1972).

Here, the sanctions order only excludes the appellant from appearing as an expert witness in one courtroom in Colorado, which does not constitute total exclusion from a chosen profession. However, the sanctions order finds that the appellant is biased, prejudiced, hostile, vindictive and "neither objective [n]or reliable." This negative characterization may potentially jeopardize appellant's ability to obtain future employment as an expert witness.

As a result, we conclude that appellant has a potential injury in fact to a protected interest and thus has standing to challenge the sanctions order.

II.

Appellant contends that the sanctions order was imposed without providing him procedural due process. We agree.

The trial court did not classify the sanctions against appellant as a contempt proceeding under C.R.C.P. 107. Although the sanctions order implicated a protected interest of appellant, appellees contend that contempt procedures were not mandatory because the sanction was primarily directed at the Ballinger plaintiffs. As a result, the trial court did not provide the appellant with the procedural protections of C.R.C.P. 107.

We need not determine whether a trial court's inherent authority includes the power to sanction an individual outside of the contempt procedures as provided by C.R.C.P. 107. However, if, as here, such a sanction affects a protected liberty interest, it must comply with the constitutional minimums of procedural due process. Ealy v. District Court, 189 Colo. 308, 310 539 P.2d. 1244, 1246 (1975)("[P]etitioner is entitled to detailed notice and an opportunity to be heard before the contempt sanction can be imposed against her.").

C.R.C.P. 107 protects the procedural due process rights of the sanctioned individual. See In re Marriage of Johnson, 939 P.2d 479 (Colo. App. 1997). Thus, any other proceeding that attempts to sanction an individual must comport with the procedural due process requirements of C.R.C.P. 107 and can not be used to circumvent such protections.

Any punished conduct that takes place outside of the sight of the court is considered indirect contempt. C.R.C.P. 107(a)(3). In indirect contempt, an individual must be afforded formal service of the proceedings against him at least twenty days before such hearing. C.R.C.P. 107(c).

Here, appellant was not provided with any formal service of process regarding the proceedings against him. There is no evidence in the record to reflect that appellant had actual

knowledge of the specific substance of the allegation against him and thus had no notice or opportunity to be heard. See C.R.C.P. 107(c) (service must include affidavit explaining the grounds for indirect contempt).

Because appellant was not provided with formal notice by the court that he faced sanctions for violating the gag order, the sanctions order was entered against appellant in violation of his rights to procedural due process.

III.

Appellant additionally contends that the gag order is unconstitutional. While we note that the gag order was entered without the required findings, based on our holding here, we do not reach this issue.

The sanctions order is vacated to the extent that it affects the future ability of the appellant to appear before the trial court. In all other respects, the orders are affirmed.

JUDGE ROTHENBERG and JUDGE VOGT concur.

EXHIBIT 10

DISTRICT COURT, JEFFERSON COUNTY, COLORADO
100 Jefferson County Parkway
Golden, CO 80401-6002

Δ COURT USE ONLY Δ

Case Number: 96-CV-2532

Div.: 5 Ctrm:

Plaintiff(s): **MICHAEL D. BALLINGER, *et al.*,**

v.

Defendant(s): **BRUSH WELLMAN INC., an Ohio corporation.**

FINDINGS, CONCLUSIONS, AND ORDERS CONCERNING SANCTIONS

After considering the submitted evidence and the oral argument of the parties at the hearing held June 18, 2001, the Court makes the following specific findings and enters the following Order:

The Court finds that Dr. Egilman knowingly, deliberately, intentionally and willfully violated the Court's 5/30/01 Order Prohibiting Certain Extrajudicial Statements. While there is always room for legitimate disagreement between opposing expert witnesses, the scurrilous and inflammatory statements posted by Dr. Egilman on his web site go so far beyond the bounds of legitimate disagreement as to cast great doubt on his legitimacy and integrity as a witness. It is clear to the Court that Dr. Egilman's testimony was motivated by his personal agenda and by his

06-22-01

animosity, bias, prejudice, hostility and vindictiveness against defendant and defendant's law firm. Dr. Egilman is not a credible witness.

The Court finds that Dr. Egilman's hostile, inflammatory and intemperate statements and attitude were well known to plaintiffs' lead counsel ("plaintiffs' counsel") before this trial began. Plaintiffs' counsel nonetheless persisted in trying to justify Dr. Egilman's grossly inappropriate behavior, and elected to call Dr. Egilman as a witness at trial when it must have been obvious to them that he was neither objective nor reliable. Not only has Dr. Egilman been "playing games" but, to a lesser extent, so has plaintiffs' counsel. By calling Dr. Egilman as a witness at trial when plaintiffs' counsel knew he was out of control, said counsel placed in jeopardy the integrity of this entire trial.

The Court rejects the position of plaintiffs' counsel that counsel believed in good faith that the statements on Dr. Egilman's web site did not violate this Court's order. The Court has made it very clear in entering its 5/30/01 Order that it considered Dr. Egilman's vituperative web site statements to be grossly inappropriate and to place at risk the fairness of the trial. The e-mail communications from plaintiffs' counsel to Dr. Egilman cannot reasonably be given any innocent connotation. The Court finds that these communications indicate that plaintiffs' counsel was to some degree complicit with Dr. Egilman in his flagrant violations of this Court's order.

It is therefore ORDERED that:

1. The testimony of Dr. Egilman is stricken.

2. The jury is instructed to disregard Dr. Egilman's testimony in its entirety.

3. Dr. Egilman shall not be permitted to testify with regard to the claims of any other plaintiff in this case, or in any other case which may later come before this Court.

DATED this 22 day of June, 2001.

Frank Plaut
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

In re: VIOXX PRODUCTS LIABILITY LITIGATION	)	**MDL NO. 1657**
	)	**SECTION: L**
THIS DOCUMENT RELATES TO ALL CASES	)	**JUDGE FALLON**

NOTICE OF SUBMISSION

Please take notice that Defendant Merck Sharp & Dohme Corp.'s Motion for Sanctions Against Dr. David Egilman will be brought for hearing on April 23, 2014, at 9:00 a.m., before the Honorable Eldon E. Fallon, Judge, United States District Court, Eastern District of Louisiana, 500 Poydras Street, New Orleans, Louisiana.

Dated: April 4, 2014

Respectfully submitted,

/s/ Dorothy H. Wimberly

Phillip A. Wittmann, 13625
Dorothy H. Wimberly, 18509
STONE PIGMAN WALTHER
WITTMANN L.L.C.
546 Carondelet Street
New Orleans, LA 70130

Douglas R. Marvin
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005

John H. Beisner
Jessica Davidson Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005

ATTORNEYS FOR MERCK SHARP & DOHME CORP.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Notice of Submission has been served on Liaison Counsel, Russ Herman, Ann B. Oldfather, and Phillip Wittmann, by U.S. Mail and e-mail or by hand delivery and e-mail, on Dr. Egilman via e-mail, and upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with Pre-Trial Order No. 8(C), and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system which will send a Notice of Electronic Filing in accord with the procedures established in MDL 1657 on this 4th day of April, 2014.

/s/ Dorothy H. Wimberly

Dorothy H. Wimberly, 18509
STONE PIGMAN WALTHER
WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Phone: 504-581-3200
Fax: 504-581-3361
dwimberly@stonepigman.com

Defendants' Liaison Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

In re: VIOXX PRODUCTS LIABILITY LITIGATION	)	**MDL NO. 1657**
	)	**SECTION: L**
THIS DOCUMENT RELATES TO ALL CASES	)	**JUDGE FALLON**

ORDER ON MERCK'S MOTION FOR SANCTIONS AGAINST DR. DAVID EGILMAN

Considering the foregoing Motion for Sanctions Against Dr. David Egilman,

IT IS ORDERED that Merck's motion be and it hereby is **GRANTED.**

IT IS FURTHER ORDERED that the following sanctions are hereby imposed on Dr. David Egilman:

- Dr. Egilman shall return any and all materials in his possession that are governed by Pretrial Order # 13 to Merck by _____, 2014;
- Dr. Egilman shall pay to Merck an amount to be determined by the Court.

NEW ORLEANS, LOUISIANA, this ____ day of _____, 2014.

_____
ELDON E. FALLON
UNITED STATES DISTRICT JUDGE