

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS
LIABILITY LITIGATION

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MDL Docket 1657
Section L
August 3, 2016

This document relates to:

Jo Levitt v. Merck Sharp & Dohme Corp.
2:06-CV-09757-EEK-DEK

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ORAL ARGUMENT BEFORE THE
HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

Appearances:

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1 PROCEEDINGS

2 (August 3, 2016)

3 **THE COURT:** Call the case.

4 **THE DEPUTY CLERK:** MDL 1657, *In re Vioxx Products*
5 *Liability Litigation.*

6 **THE COURT:** Counsel make their appearance for the
7 record, please.

8 **MR. MCCLAIN:** On behalf of the plaintiffs, Kenneth
9 McClain, Your Honor.

10 **MR. BARNETT:** Good morning, Your Honor. Ben Barnett
11 on behalf of Merck.

12 **THE COURT:** First, I apologize for the inconvenience.
13 We are rewiring my court. They have a number of bellwether
14 cases coming up soon, so we have some new gismos and gadgets.

15 We are here today regarding a discovery issue in
16 the *Vioxx* matter. I'm familiar with this matter because I have
17 visited with it a time or two before. I put various documents
18 under seal. I felt that my first obligation was to the
19 requirements of the Seventh Amendment, namely, giving parties
20 an opportunity to have a fair and complete trial. I postponed,
21 if you will, viewing the First Amendment, which is the public's
22 right to know. That was what I tried to do in this particular
23 case.

24 The documents involved are made available to
25 people who are interested in looking at them in connection with

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1 cases and trials and depositions that they have coming up.
2 There are some requirements on it, but basically they have free
3 access to the material.

4 We are here today because the plaintiff feels
5 that it's timely to remove the restriction on the documents and
6 expose them to the public in general outside of the courtroom.
7 I will hear from the parties now.

8 **MR. BARNETT:** Your Honor, good morning. Ben Barnett
9 on behalf of Merck. It's good to be before Your Honor again,
10 albeit in a different courtroom.

11 Your Honor, Merck has two pending motions, both
12 of them for a protective order, the first motion related to
13 four specific documents which in our view remain confidential,
14 and the basis for the confidentiality is plain on their face.

15 More importantly, Your Honor, we have now gotten
16 a whole series of requests from plaintiff's counsel in the
17 *Levitt* case, which as the Court knows is the last personal
18 injury case in the MDL. She has asked, in sort of serial
19 fashion, for potentially thousands of documents that are not
20 under seal, they are actually just designated as confidential,
21 and she has been free to use them in her case. She is asking
22 that those be publicly disclosed.

23 Our view on that is, particularly in the current
24 setting, that's completely inappropriate, unnecessary, and
25 exactly the sort of oppressive burden that Rule 26(c) is

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1 designed to prevent.

2 The affidavit from Ms. Levitt, attached to the
3 plaintiff's opposition, makes it very clear there is no
4 litigation purpose in this effort at all. She just wants to
5 make all the documents public. As set out in both our original
6 motions and our reply, under the controlling case law,
7 documents produced in civil discovery under protective order
8 are private. They are not public documents.

9 These are not documents that have been attached
10 to a motion. These are not documents that have been admitted
11 as exhibits at trial. In those instances -- as the Court is
12 aware because we have been doing this for a decade now -- when
13 the Court held bellwether trials and there were confidential
14 documents that were used as exhibits, we removed the
15 "confidential" designation after that trial.

16 PTO 13 was designed to accelerate efficient
17 document production, to give Merck the comfort that they could
18 produce confidential, sensitive documents with the
19 understanding that they would only be used in this litigation.
20 The design of this current effort is not litigation driven.
21 It's not going to resolve any issues in this case. It's an
22 effort to make all these documents, produced over a decade
23 time, public.

24 There's a cost and there's a burden associated
25 with that challenge. We know that because this is just yet

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1 another challenge similar to the one the Court addressed in
2 2014 involving Dr. Egilman, who is also an affiant in the
3 present motion. When he made his challenge in Kentucky for
4 thousands of documents, we had to spend time first identifying
5 the documents he was challenging, which was difficult, and then
6 determining whether, in fact, those documents remained
7 confidential. He had five separate requests, and the result of
8 that is five separate charts over 300 pages long that detail
9 what is confidential and what is not confidential.

10 We know that if this effort is permitted --
11 which there's some indication they are starting now with
12 thousands of documents, but they may eventually get to all
13 documents -- it's going to cost Merck hundreds of thousands of
14 dollars to do that. Not only to do the review, but if we have
15 to produce documents, we are essentially going to have to
16 rebuild a document review and production structure that has
17 been shut down, effectively, since 2013 because, as the Court
18 can appreciate, there have been fewer and fewer *Vioxx* cases.
19 To the extent we have had to produce any documents, it's been
20 on a case-specific basis, as we have done in the *Levitt* case.

21 In our view, the Court has clear authority under
22 Rule 26(c) to grant both motions for protective order. We
23 think that's the right outcome in this case. We would ask the
24 Court also to bar future challenges as well because given where
25 this case is -- as I understand it, there's motions to be

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1 argued later in this month. Given where the case is, given
2 where the MDL sits, there's literally no litigation purpose
3 served by this request, and it ought to be denied because of
4 the cost and burden to Merck. Thank you, Your Honor.

5 **THE COURT:** Thank you.

6 Let me hear from the plaintiff.

7 **MR. MCCLAIN:** Kenneth McClain on behalf of
8 Ms. Levitt.

9 Judge, I was struck today -- I was coming over
10 here and I picked up my news feed and read that Judge Curiel,
11 out in California, had unsealed all of the records regarding
12 Trump University because there was a public interest, not a
13 litigation interest, for the public to know about the matters
14 that were under litigation in that case.

15 We would suggest to the Court -- and the Court
16 has recognized this and said repeatedly that it is no less
17 important to the general public the way in which drugs get
18 approved for use in this country and the ways in which the
19 mechanisms of our medical professionals are utilized to gain
20 access to markets and to spread drugs of various types
21 throughout the American public.

22 The Court was very clear that the tension
23 between the Seventh Amendment and the First Amendment is
24 something that you're always wrestling with and that at some
25 point in time the Court would come back to the First Amendment

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1 issues after the Seventh Amendment issues had been resolved, in
2 your view, and now we are down to the very last case. You
3 invited us to come at some point and to bring a motion if we
4 believed that, in fact, there was a legitimate First Amendment
5 issue to be addressed by the Court in regard to these
6 documents.

7 CMO 13 lays out a very clear procedure by which,
8 if there is a legitimate business interest or trade secret
9 interest or some interest that can be articulated by Merck,
10 that they can keep these documents privileged or under seal,
11 however, you want to look at them. You laid out the procedure
12 whereas when they are challenged, come forward, and you even
13 suggested an expedited way in the hearing that we had on the
14 telephone with you, you know, "At least give me a log,
15 something I can deal with, so I can see why you are claiming
16 that these documents are still privileged."

17 Well, other than on the four documents that he
18 mentioned, there has been no attempt by Merck to even identify
19 what they are claiming about these documents. We certainly
20 can't discern why it would be that documents relating to a drug
21 that is no longer on the market, hasn't been on the market for
22 12 years, involving matters sometimes even a decade beforehand,
23 before it was taken off the market, still would be somehow
24 relevant.

25 Are the individuals that are mentioned in here

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1 still witnesses for them? Are they consultants? What is the
2 basis that they are claiming these documents still have to be
3 maintained as confidential or it will do some great damage to
4 their business?

5 **THE COURT:** The one thing that they are concerned
6 about -- and I think it's a legitimate concern -- is the cost.
7 I'm going to shift the cost. So it looks like that one way of
8 handling this, if they are distributed, is to require the party
9 to at least post a bond of, say, half a million dollars because
10 it's going to be in that category.

11 There are 9 million documents in this particular
12 case. The plaintiffs have spent, in preparation for the case,
13 \$41 million to collect those documents and collect the
14 discovery. One thing that I'm concerned about and the elephant
15 in the room here that we are not talking about is this case is
16 now about 20 years old. It's been off the market almost
17 15 years. The case started in 2005, February 16, 2005. We are
18 finished 50,000 claims. There are 26 class actions, in
19 addition to that about 10,000 consumer cases, and this is the
20 last particular case.

21 Merck takes the position that it's harassment,
22 that it's going to not only be harassing to them but also
23 expensive to them. I'm trying to figure out why you need the
24 documents for the *Levitt* case. You have access to them. You
25 can see them. You know what they are. Your experts can review

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1 them, whatever document you are concerned about. You want to
2 go forward with that, and I think the elephant in the courtroom
3 is that there may be some other reason for doing that.

4 **MR. MCCLAIN:** No, there's no question. We say it
5 very clearly in our papers. Two points. One, Ms. Levitt, as
6 you know -- and we have discussed this off the record, and I
7 don't want to go into some of these details that I have shared
8 with the Court about her mindset in regard to this
9 litigation -- believes that the public has a right to know
10 about what happened in regard to Vioxx because she believes it
11 ruined her life. She doesn't think that the lawsuit is ever
12 going to compensate her for what she lost, but she would like
13 to prevent this from happening to anybody else.

14 So the defendants place this all on Dr. Egilman
15 and say it's all Dr. Egilman. I wouldn't be standing here if
16 my client really wasn't interested in having these documents
17 released because she truly believes that an injustice was done
18 here to her that will never be compensated. She lost a
19 business that was worth \$20 million and they are paupers now.
20 They have lost their home. She truly believes that this ruined
21 her life and does believe that she has an obligation to the
22 public to let them know about the way the drugs are approved in
23 this country and what Merck did to circumvent that process.
24 The Court is aware of the evidence on both sides of that issue.
25 I won't debate that right now, but that's what she believes.

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1 **THE COURT:** Is she willing to pay for the cost?

2 **MR. MCCLAIN:** You know, Judge, it will depend. Let's
3 talk about that just for a moment.

4 The issue is Merck claims to have gone through
5 and made a finding, in regard to each of these documents, that
6 they were confidential. There has to be a log somewhere.
7 There has to be something that was done and saved. Even in my
8 little law firm of 20 lawyers, we save stuff because people
9 leave all the time. We don't let people -- or we try not to --
10 create work product and then leave and then we are in the lurch
11 to have to re-create it.

12 I don't understand. I don't understand that
13 argument that a firm such as Williams & Connolly did not save
14 the work that they did in regard to making the determination on
15 these documents. I would believe, absent a showing to the
16 contrary, that in fact the information that we are seeking
17 regarding these documents exists to determine if there is any
18 continuing privilege in regard to them. We can do it pretty
19 expeditiously, Judge.

20 So I was thinking about this because in my
21 experience with you, you are always looking for a practical
22 solution to difficult problems that lawyers create and cut
23 through it. Why wouldn't it make sense to sit down with these
24 documents and present them to a master of some type and make an
25 argument yes, no, yes, no about these documents? I think most

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1 of the arguments would go away, and most of them would be
2 producible at that point, and Merck may remove most of the
3 designations and then we wouldn't have a fight about anything.
4 Yeah, I would be willing to pay for half of the cost of
5 something like that.

6 **THE COURT:** I don't know about half of the cost. You
7 would pay for the whole cost. The masters generally cost
8 between \$300 and \$500 an hour. You can at least talk to your
9 client about that.

10 **MR. MCCLAIN:** Okay.

11 **THE COURT:** I understand the issue. I'll take it
12 under consideration. Whatever I do, a cost is going to be
13 forthcoming on somebody. You're asking for material that has
14 nothing to do with your litigation. You have access to all of
15 the material, and you have access to it in the use of the
16 litigation. Your experts can review all of the material in
17 preparation for the litigation. Your client feels, in addition
18 to that, she owes the public in general the right to have
19 everything looked at or everything available. That's
20 commendable on her part, but also there's a cost involved in
21 these things, and I have to look at that.

22 **MR. MCCLAIN:** I understand the Court's position. We
23 are willing to consider that.

24 **THE COURT:** All right.

25 **MR. BARNETT:** Your Honor, if I could just very

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1 briefly. Just for the sake of clarification and perhaps to
2 defend the honor of Williams & Connolly, there's no question
3 that the log exists. The log that I was referencing to before
4 was attached as an exhibit to some of the correspondence from
5 Ms. Levitt's counsel. The log exists. Nobody has lost the
6 log.

7 The point of the log is we have already invested
8 hundreds of thousands of dollars to do this. The logs tell
9 them what documents we no longer claim are confidential. Those
10 can be disclosed. Whether by Ms. Levitt or published by
11 Dr. Egilman, it doesn't matter. The point is if we have to go
12 through all of the rest of them, that's where the cost gets
13 incurred by Merck, and that's clearly something we don't think
14 is necessary. Thank you, Your Honor.

15 **THE COURT:** Thanks very much, both of you all. I
16 appreciate it.

17 Also, in this particular case, we have a couple
18 of other motions. I'm getting to the point where I really have
19 to think in terms of sending them back for trial. I'm going to
20 be talking to the judge in that area so that -- well, this is a
21 Missouri case. It looks like that the case needs to be tried,
22 so that's where it will go back to.

23 **MS. HORN:** Elaine Horn from Williams & Connolly for
24 Merck.

25 We have the open issue concerning the dates in

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1 place after the August 17 hearing on the summary judgment
2 motion and the *Daubert* motions, the motions in limine, and so
3 forth. There was a joint proposed order entered into the
4 record but hasn't been acted upon.

5 **THE COURT:** No, I will. If it's the joint order that
6 I have seen, I will enter that.

7 **MS. HORN:** So we can assume those dates are in
8 effect?

9 **THE COURT:** Yes.

10 **MS. HORN:** Thank you.

11 **THE COURT:** I assumed it was good for everybody.

12 **MS. HORN:** Yes.

13 **MR. BARNETT:** Yes, it is.

14 **THE COURT:** If you need to do it by phone, we can
15 hook you up by phone. I don't want you to incur any expenses
16 if you don't need to.

17 **MR. BARNETT:** For the August 17 hearing?

18 **THE COURT:** Yes. Give it some thought. It doesn't
19 matter one way or the other to me.

20 **MR. BARNETT:** I appreciate it. Thank you, Judge.

21 **THE COURT:** Let's take a couple minutes and then come
22 back and hear the other argument. Thanks.

23 **THE DEPUTY CLERK:** All rise.

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CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of proceedings in the above-entitled matter.

s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter

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