

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

**IN RE: NUVARING PRODUCTS
LIABILITY LITIGATION**

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Case No. 4:08-MD-01964 RWS

**MOTION AND STATUS TELECONFERENCE
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
NOVEMBER 20, 2012**

APPEARANCES

For Plaintiffs:

Kristine Kraft, Esq.
Roger Denton, Esq.
Ashley Brittain-Landers, Esq.
SCHLICHTER AND BOGARD
100 S. Fourth Street, Suite 900
St. Louis, MO 63101

Hunter J. Shkolnik, Esq.
Nicolas R. Farnolo, Esq.
NAPOLI AND BERN
350 Fifth Avenue
New York, NY 10118

For Defendants:

Melissa A. Geist, Esq.
REED SMITH, LLP
136 Main Street, Suite 250
Princeton, NJ 08540

Thomas J. Yoo, Esq.
REED SMITH, LLP
355 S. Grand Avenue, Suite 2900
Los Angeles, CA 90071

(Appearanced continued on Page 2)

REPORTED BY:

SHANNON L. WHITE, RMR, CRR, CSR, CCR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7966

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APPEARANCES CONTINUED:

For Defendants: Dan H. Ball, Esq.
BRYAN CAVE, LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102

1 (PROCEEDINGS STARTED AT 10:32 AM.)

2 THE COURT: Good morning, everybody. We are here in
3 *In Re: NuvaRing Products Liability Litigation*, Cause No.
4 4:08-MD-1964. Would plaintiffs counsel make their
5 appearances, please?

6 MS. KRAFT: Kristine Kraft, Roger Denton, and Ashley
7 Brittain-Landers with plaintiff.

8 MR. FARNOLO: Nick Farnolo for the plaintiffs.

9 THE COURT: And would you make your appearance? I'm
10 sorry.

11 MR. SHKOLNIK: Hunter Shkolnik.

12 THE COURT: On behalf of the defendants?

13 MR. BALL: Dan Ball, Melissa Geist, and Thomas Yoo
14 for the defendants.

15 THE COURT: Very good. So any announcements before
16 we go through the proposed agendas?

17 MS. KRAFT: No, Your Honor, not on behalf of
18 plaintiffs.

19 THE COURT: Ms. Geist, anything on behalf of the
20 defendants before we proceed?

21 MS. GEIST: No, Your Honor. I think we can proceed
22 with the agendas.

23 THE COURT: All right. Judge Martinotti told me he
24 had a delightful meeting with you all last week.

25 MS. GEIST: Yes, indeed, Your Honor.

1 THE COURT: All right. Plaintiffs' agenda. Number
2 one: Modification to briefing schedule for Daubert motions
3 and summary judgment motions consistent with New Jersey
4 proceedings. Someone want to walk me through that?

5 MS. KRAFT: Yes, Your Honor. This is Kristine Kraft.
6 In New Jersey, as I believe you are aware, Judge Martinotti
7 entered an order on November 14 extending the deadlines for
8 the Kemp motion, the summary judgment motion as well, and we
9 would like to propose to the Court to submit a joint order,
10 deadlines for the Daubert briefing, as well as the summary
11 judgment motions to be consistent with the New Jersey order.

12 THE COURT: Does that include both generic and
13 case-specific Daubert motions, or am I missing something?

14 MS. KRAFT: I'm not really sure, Your Honor.
15 Melissa, you may want to address that.

16 THE COURT: I take it this is by agreement; so,
17 Melissa, you're going to speak for everybody?

18 MS. GEIST: Yes, Your Honor. Well, let me step back
19 a minute and just explain what we did in New Jersey. Your
20 Honor, I'm sure you're well aware, as everyone is on the
21 phone, that New Jersey and the New York area was sort of very
22 heavily affected by the recent hurricane, and based on that
23 counsel has started communicating about some deadlines and the
24 need to move some things back.

25 So what we did was, we had -- we have Kemp, generic

1 Kemp reply briefs, and some summary judgment reply briefs that
2 were due on November 30. We agreed to move those back to
3 December 14. We have reply briefs due on the Daubert generic
4 challenges in the MDL, and consistent -- given that there's
5 much overlap between the experts at issue in the Daubert and
6 Kemp challenges, we agree that the reply briefs for those
7 motions would similarly be pushed back to December 14.

8 THE COURT: Okay.

9 MS. GEIST: Your Honor, in New Jersey we also moved
10 back the summary judgment motions in large part due to the
11 change in the trial date in New Jersey. We understood from
12 Judge Martinotti that both you and he had gotten on the phone
13 and discussed the trial settings, and the first trial setting
14 in New Jersey will now be May 6, which had been the date set
15 for the first MDL case.

16 THE COURT: Correct.

17 MS. GEIST: Based on that, Your Honor, Judge
18 Martinotti asked us to work backwards from that May 6 first
19 trial date and propose some new deadlines for the pending
20 summary judgment motions. So we did that. Mr. Shkolnik and
21 other counsel and I sat back, we worked together, and we came
22 up with a new schedule for the summary judgment motions with
23 oral argument proceeding in New Jersey on March 4 and 5 of
24 2013.

25 THE COURT: So what do you propose here?

1 MS. GEIST: Your Honor, to be honest with you,
2 counsel here in the MDL other than the agreement on the reply
3 briefs for the Daubert challenges being filed now on December
4 14, counsel here had not had an opportunity yet to talk about
5 what changes, if any, would be made to the summary judgment
6 schedule in the MDL.

7 THE COURT: Do you want to submit a proposed schedule
8 to me by November 30?

9 MS. GEIST: I think that would be fine, Your Honor.

10 THE COURT: That's a week from Friday. Obviously not
11 asking you to work Thursday and Friday of Thanksgiving.

12 MS. GEIST: Thank you, Judge.

13 THE COURT: Does that work for you, Ms. Kraft?

14 MS. KRAFT: Yes, it does, Your Honor.

15 THE COURT: That's for both the summary judgment and
16 case specific? No. Okay.

17 MS. GEIST: Yes, Your Honor.

18 THE COURT: Okay. All right. Trial settings, number
19 two. Should we take that up last? It's number two on the
20 plaintiffs' list.

21 MS. KRAFT: Yes, Your Honor. We can take that up
22 last.

23 THE COURT: All right. Plaintiffs' request for entry
24 of an order establishing deadline for defendants' obligations
25 to supplement production of documents and answers to

1 interrogatories. Ms. Kraft?

2 MS. KRAFT: Yes, Your Honor. Melissa and I have been
3 working on a proposed stipulation that addresses their
4 supplementation of their documents production, which would
5 include all document requests that have been previously
6 submitted by plaintiffs as well as updating the custodian
7 files and the recent communications back and forth with the
8 FDA regarding potential label change.

9 We have in the works a draft stipulation that we are
10 close to agreeing to. There are a couple of remaining issues
11 that we are discussing, which includes the final deadline for
12 their responding to interrogatories, as well as a couple other
13 timing issues. So we will be submitting that to the Court, my
14 anticipation, maybe even by the end of this week or early next
15 week.

16 THE COURT: Ms. Geist?

17 MS. GEIST: Your Honor, this is Melissa Geist, and
18 yeah, I'm in full agreement with Ms. Kraft. We have been
19 working on a stipulation over the last maybe week and a half.
20 We've had a couple calls about it. We're very close to
21 finalizing it. So we'll be happy to present that to Your
22 Honor for consideration by next week.

23 THE COURT: We will just do a no later than November
24 30, too. November, comma, too. The court reporter is looking
25 at me like I'm insane. All right.

1 Now, have we resolved once and for all the
2 authentication issues that seemed to trouble us so much a few
3 months ago?

4 MS. KRAFT: Your Honor, we have not in a final
5 fashion. We have worked through many of the potential
6 exhibits and have come to an agreement on many issues, but
7 there are some remaining topics that we do need to submit to
8 the Court. So perhaps we can set a deadline to do that as
9 well.

10 MS. GEIST: My only -- Your Honor, I agree. My only
11 hesitation there is, Ms. Kraft and I had -- I believe had
12 tried to set a call to work out to sort of narrow what any
13 final issues were, and I think that call must have gotten away
14 from us mutually. So we need to reset that and just see what
15 issues, if any, we need to present to the Court. I think it
16 will be a small subset.

17 THE COURT: So, Ms. Kraft, how do you think we should
18 proceed?

19 MS. GEIST: Yeah, Your Honor, if we can tee this up
20 at the next status conference, that would enable Ms. Kraft and
21 I to talk through the issues and get it done.

22 THE COURT: All right. We have a confidential issue.
23 Ms. Kraft?

24 **(A PORTION OF THE PROCEEDINGS WAS ORDERED SEALED AND THE**
25 **PROCEEDINGS CONTINUED AS FOLLOWS:)**

1 THE COURT: Supplementation of expert reports and
2 limited depositions is on the defendants' agenda.

3 MR. DENTON: Yes, Your Honor. I think the parties
4 are in agreement that there are some experts on both sides who
5 need to supplement their reports because there have been new
6 studies that have come out since expert depositions were
7 previously done.

8 I think the issue on the table is defendants' belief
9 that with supplemental reports there should be some limited
10 supplemental depositions of those experts who choose to
11 supplement their opinions so that the parties have an
12 opportunity to inquire.

13 While plaintiffs' counsel, as I understand it, agree
14 that supplemental reports are appropriate, there's resistance
15 to allowing any supplemental deposition to go forward. So
16 that's the disagreement that we are currently grappling with.

17 THE COURT: All right.

18 MR. YOO: It would be our proposal, Your Honor, that
19 consistent with the way the expert discovery was structured,
20 that we had a staggered set of deadlines whereby in about
21 three weeks plaintiffs provide supplemental expert reports for
22 those experts who wish to offer a supplemental opinion on the
23 new data. So this wouldn't be going back and doing anything
24 over again but just limited to new data that have come out
25 since expert discovery.

1 And then the defendants would have until about
2 January 30, given the holidays, to depose plaintiffs' experts,
3 and then about three weeks thereafter the defendants would
4 provide defense supplemental expert reports, and then the
5 plaintiffs would have until the end of March to complete the
6 depositions of the defense experts. That would be our
7 proposal.

8 MR. DENTON: Your Honor, Roger Denton. And I'd like
9 to put this in a factual context before I get to the
10 substantive response to Mr. Yoo. As the Court probably knows,
11 this birth control product remains on the market, and as a
12 result, there have been, and will continue to be, additional
13 scientific studies that are published relative to this
14 product, including the VTE risk.

15 This is not unlike other products we have been
16 involved with. In the Ortho-Evra litigation, there was a
17 series, I think, of about five or six epidemiological studies
18 and some other scientific studies assessing risk. It came out
19 throughout the litigation, in fact continued to come out even
20 after the litigation was ultimately resolved.

21 The same thing happened in the Yaz and Yasmin
22 litigation. There's probably six or seven scientific studies
23 that have come out during the litigation. And this case is no
24 different. As the Court may or may not know, there have been
25 two articles published this year, actually three now, two

1 articles, one in the *New England Journal of Medicine* and one
2 in the *BMJ* both by Dr. Lidegaard concerning the venous
3 thromboembolism risk as well as the arterial risk, and there
4 was an article published in *Contraception* about a month or so
5 ago, the study that the FDA funded. As a practical matter, if
6 history repeats itself, there will be continued studies as
7 this litigation goes forward.

8 There's also likely to be a label change on this
9 product because of these studies, and there may be a series of
10 label change over the length of this litigation. And so while
11 we don't dispute the concept that experts need to supplement
12 their list of authorities they rely upon, the defendants will
13 want to do that for the studies that are favorable to them.
14 I'm sure the plaintiffs would wish to do it on studies
15 favorable to them.

16 But if none of those studies do anything other than
17 reaffirm the expert's opinion, which is what I expect in large
18 part would be true on both sides of the aisle here, there
19 really is no need to supplement the reports. There may be
20 there is a need to supplement the authorities relied upon, but
21 specifically the content of another series of depositions and
22 argue makes no sense because it will be series after series,
23 if that's the logic we go forward with, every time some new
24 studies come out.

25 We didn't redepose experts in the Ortho-Evra

1 litigation. We didn't redepose experts in the Yasmin
2 litigation. They're very parallel litigations and very
3 similar-type studies, and neither side was prejudiced by that
4 process, and we would strongly oppose another series of
5 depositions on both sides. We don't think there will be any
6 surprises and certainly no prejudice.

7 And we would object to the defendants' proposal. We
8 would suggest that as literature comes out, each side can
9 supplement their authorities. If expert opinions change,
10 obviously, that may be different. I don't expect that to be
11 the case on either side.

12 And so as a result, we think it's frankly a waste of
13 time and money and no one is prejudiced, and we urge the Court
14 to not accept the defendants' proposal and to simply ask the
15 parties to supplement the authorities relied upon and move
16 this litigation forward. Thank you.

17 MR. YOO: Your Honor, I disagree with that. I think
18 that's --

19 THE COURT: I'm shocked, shocked, shocked, I say.

20 MR. YOO: And I think it's disingenuous. I think
21 when Mr. Denton says the new literature doesn't do anything
22 other than affirms an opinion that a plaintiff expert already
23 has, I think what he really means is that until the Lidegaard
24 paper came out in May of this year -- and we did the
25 depositions of plaintiffs' experts last year -- that that's

1 the first published study that has criticized the risk of
2 blood clots with NuvaRing compared to other products. That's
3 the first study that did that.

4 The reliability of that study, the credibility of Dr.
5 Lidegaard, all of those things are in play, but Mr. Denton
6 would just have his experts, whereas previously they rendered
7 an opinion about NuvaRing and had no data in support, now glom
8 onto this Lidegaard paper but without giving the defense an
9 opportunity to cross-examine any of those witnesses on the
10 reliability of the Lidegaard study. That's just one example.

11 THE COURT: Melissa.

12 MR. YOO: Long story short, Your Honor, we now have
13 three or four studies that are very important to the issues in
14 this litigation that have come out, including the TASC study
15 which had interim data come out over the last five years, but
16 its completion wasn't until just a couple of months ago.

17 So all of those things should be dealt with with an
18 opportunity for both sides to do an appropriate
19 cross-examination. We are not talking about going back and
20 redeposing everyone. We're talking about a deposition limited
21 to any supplementation that an expert does.

22 If Mr. Denton doesn't want one of his experts to be
23 deposed, all he has to do is not provide a supplemental report
24 for that expert. But if he does provide a supplemental report
25 for that expert, it's only fair that the defense have an

1 opportunity to inquire and vice versa.

2 MR. DENTON: Judge, I guess my only rebuttal to that
3 is, is that's pretty disingenuous because safety studies
4 transcend all experts on both sides, and I presume the defense
5 experts will all want to rely on TASC who's not just
6 published, and so we will be redeposing all the defense
7 experts or they won't be able to mention TASC in their
8 testimony. So it really is a redo of every expert they're
9 proposing on both sides.

10 THE COURT: So, Melissa, when you think about your
11 summary judgment schedule, what are the parameters you're
12 looking at?

13 MS. GEIST: I'm sorry, Your Honor?

14 THE COURT: Without negotiating with Kris Kraft yet,
15 when you think about when summary judgment is likely to be
16 teed up, I mean, I understand we got a little bit of a moving
17 target here, but you know, at some point we're going to try
18 these cases and you're going to submit them to me on summary
19 judgment. But what do you think the time frame is reasonably
20 at this point, given everything going on in New Jersey and
21 here, for summary judgment to be fully briefed?

22 Because this is a slippery slope for us. If we
23 suddenly have new expert depositions and then we're going to
24 be doing summary judgment motions, and then the next thing Mr.
25 Yoo and Mr. Denton are going to be arguing about is

1 supplementing their summary judgment motions, right? So I'm
2 trying to figure out the sequence here that makes the most
3 sense.

4 MR. YOO: Your Honor, if I may, I think conceptually
5 there is that possibility. I don't know that there is
6 anything anyone can do about it.

7 THE COURT: Mr. Yoo, you're not going to take these
8 depositions if they don't have value.

9 MR. YOO: Yes, Your Honor. But what I was going to
10 say is, in terms of the summary judgment motions, I think the
11 current briefing schedule would take us to the beginning of
12 February to complete the briefing on those motions. I think
13 the issues in each of those cases that are driving the summary
14 judgment motions are set.

15 THE COURT: All right. So they are independent of
16 what you're going to do here.

17 MR. YOO: I think in large respect that's true.

18 THE COURT: All right.

19 MR. YOO: We have seen already the plaintiffs in some
20 of the briefing in New Jersey interject some of these new
21 studies in their opposition papers, and we're dealing with
22 that. I don't have a simple solution to deal with all
23 scenarios, but I think in terms of trying to get these
24 depositions done our objective is to have a fair and level
25 playing field for purposes of trial. I don't think that what

1 we are proposing on supplemental expert discovery is going to
2 disrupt what's going on on the summary judgment motions.

3 THE COURT: All right.

4 MR. YOO: And I just wanted to add just two points.

5 One is I wanted to make you aware that this issue was
6 discussed with Judge Martinotti at the last case management
7 conference in New Jersey. There is a briefing schedule that's
8 been set to deal with these issues. So I just wanted you to
9 know that Judge Martinotti will be considering the same
10 proposal.

11 THE COURT: Briefing whether or not to supplement
12 and, if so, whether depositions should be permitted?

13 MR. YOO: That's correct, Your Honor. Plaintiffs'
14 counsel in New Jersey requested an opportunity to brief the
15 issues, and so a scheduling order was set.

16 THE COURT: Mr. Denton, do you --

17 MR. SHKOLNIK: Your Honor, I'm sorry, this is Hunter
18 Shkolnik. I participated in those discussions.

19 COURT REPORTER: Mr. Shkolnik, I can't quite hear
20 you. Would you please start over?

21 MR. SHKOLNIK: Sure. I apologize.

22 Your Honor, this is Hunter Shkolnik. I participated
23 in the argument before Judge Martinotti, or the discussion,
24 and it's an issue we are briefing because, as Mr. Denton said,
25 this is really a supplement of authorities that are consistent

1 with prior opinions. And rather than deciding on just an oral
2 argument that day, we did ask a briefing on the issue.

3 THE COURT: Mr. Denton?

4 MR. BALL: Your Honor, this is Dan Ball. Could I say
5 a word?

6 THE COURT: You may.

7 MR. BALL: Okay. I think the only thing that I would
8 add in terms of context here is, Thomas said there were no
9 published papers on NuvaRing specifically until after the
10 plaintiffs had already been deposed, and I think it's
11 important to note that what is going to happen in a trial here
12 is the plaintiffs are going to come in and say, This study
13 supports the fact that NuvaRing has an increased risk. And
14 they're going to -- they've already used and will be using
15 those -- some of those studies, at least, to support that
16 theory.

17 And I think it's very important for us and the Court
18 and the jury and everyone to understand what the basis is for
19 them saying that, what the flaws or strengths are in those
20 studies on both sides.

21 So this is not just, oh, this is another paper coming
22 out that that has to be dealt with. These are very important
23 studies. Both sides need an opportunity to understand what
24 the strengths to explore with the other experts, what the
25 strengths and weaknesses are of those studies in order to

1 properly testify at trial.

2 THE COURT: Mr. Denton, it is your intention, I take
3 it, to supplement your expert reports?

4 MR. DENTON: No different than the defendants, Your
5 Honor, correct.

6 THE COURT: No, no, no. I wasn't -- I wasn't picking
7 on you. I just --

8 MR. DENTON: No. I understand. I mean, certainly
9 the defendant experts are going to want to discuss TASC, which
10 is yet to be published.

11 THE COURT: Is there an expected date for publication
12 on that?

13 MR. DENTON: You'll have to ask the defendants, Your
14 Honor.

15 MR. YOO: Your Honor, I don't have an expected date
16 of publication. I do expect it to be published in a medical
17 journal at some point. The development is in a litigation in
18 terms of the new documents that have now become available
19 relate to the final study report. That report, like some of
20 these published papers that we've been talking about, came out
21 in just the last couple of months. So we've got the final
22 data and the final analysis reflected in the final report, and
23 so that's substantive information that should go into
24 supplemental reports.

25 THE COURT: So here's what we're going --

1 MR. YOO: I don't think -- I don't think the idea
2 that if we do this, we're going to have to keep doing this
3 every time a new paper comes out, is right. As Mr. Ball said,
4 we're not talking about just another paper or somebody's
5 commentary published in a journal. We're talking about
6 studies directly dealing with NuvaRing.

7 There have now been four epidemiological studies
8 specifically on NuvaRing, and the only one of those that helps
9 the plaintiffs' case is one by Lidegaard which came out in May
10 of this year.

11 We know Mr. Denton and his colleagues are going to
12 make that a centerpiece of their case at trial, and we think
13 it's just totally inappropriate for us to be denied an
14 opportunity to question their experts about their reliance on
15 that one study.

16 MR. DENTON: And it goes both ways, Judge. That's
17 why we come back to, it just makes no sense to spend this time
18 and money to redepose people also knowing that history will
19 likely repeat itself in contraceptive litigation, that more
20 and more studies about NuvaRing will come out. There are
21 certain investigators that have a history of looking at this.
22 They did it in the past. They've done it in the third versus
23 second generation way back in the eighties and nineties and
24 have every reason to expect they'll be doing it on NuvaRing.

25 So there will be a series of articles as this

1 litigation marches forward, and so I'm trying to put some
2 context here. And, frankly, neither side will be prejudiced
3 if we are playing on the same level playing field. And I'm
4 trying to move this forward and not another series of
5 depositions into next spring as I understand they're being
6 proposed.

7 And that assumes we can even get it done that quickly
8 because I'm not sure we can when we're talking about ten or
9 fifteen experts on both sides.

10 THE COURT: Are you going to supplement all experts'
11 opinions?

12 MR. DENTON: Well, Judge, yes. I mean, a VTE safety
13 study on NuvaRing affects everybody's opinion on both sides.
14 Everybody has talked about the literature so far and
15 epidemiological on both sides. I can't expect they would then
16 ignore a published study on both sides about NuvaRing.

17 I think, yes, this is really suggesting to the Court,
18 to put this in context, that every expert on both sides within
19 maybe --

20 THE COURT: So let me ask you this. Are you going to
21 just --

22 MR. DENTON: Every OB-GYN, every epidemiologist,
23 every hematologist, every epidemiologist, every case-specific
24 expert on causation is going to have to be deposed under that
25 proposal.

1 THE COURT: Let's make a distinction --

2 MR. DENTON: That's why we object to --

3 THE COURT: Let's make a distinction, okay? Are you
4 just going to amend the authorities table of your witnesses,
5 or are they going to amend their opinion? It's one thing to
6 say, Here's one more thing that supports --

7 MR. DENTON: This is going --

8 THE COURT: Stop, stop, stop, stop, stop, stop. I'm
9 not letting you talk. I'm asking a question. Everybody's got
10 to slow down a little bit. It's one thing to say, Here's one
11 more article that supports everything we've already said.
12 It's another thing to change the opinion they're going to
13 have. What are you going to amend when you amend your
14 experts' disclosure? Now you can answer.

15 MR. DENTON: Thank you, Judge. We are going to list
16 this as additional authorities, and I have no expectation that
17 any of the opinions will change or need supplementing.

18 MR. BALL: Judge, that's the problem there, because
19 if that's all he does, if all he does is add it to the list,
20 then that means he can't say anything about the strengths or
21 weaknesses of those studies at trial. And if that's -- and if
22 that's the position they're taking, that's where we get into
23 the issue: Are they going to then be allowed to do more than
24 that when it comes time for trial?

25 If it's -- the rule doesn't just apply to opinions,

1 obviously; it applies to the basis for the opinions. If
2 this -- picking this on a list is another authority relied
3 upon is one thing, but if they're going to come in and say, I
4 have relied upon this new Lidegaard study and it's great and
5 let me tell you why, or the TASC study, or the FDA papers that
6 reached contrary conclusions, those are not good science and
7 let me tell you why, if they're going to do all that, then we
8 have a right to depose them, in our view. If they're not
9 going to do all that, all they're going to list them, then
10 they can't really talk about them very much. That's the place
11 we are.

12 MR. YOO: Yes, Your Honor. And if I could add, the
13 issue of whether or not this new literature is going to change
14 their opinion, I think -- I mean, when we really look at that
15 issue, what we're talking about is, we've got plaintiffs'
16 experts who have said they believe NuvaRing has a higher risk.
17 When we deposed them based on the data they had in support of
18 that opinion, they didn't do very well because there weren't
19 any data in support of that opinion.

20 Now they've got a study that they believe supports
21 that opinion so they want to put it on the list, and of
22 course, their position is: It doesn't change their opinion
23 because their opinion all along has been NuvaRing has a higher
24 risk.

25 What's critical for us is to know, well, how does

1 this opinion -- how does this literature support that opinion,
2 and do you acknowledge the weaknesses in that study? They
3 want to hide the ball on all of that and then dump it on us at
4 trial. That's what we're trying to avoid.

5 Now, if Mr. Denton wants to, in his words, move
6 things along and not get bogged down with this new literature,
7 then I think the fair thing is he doesn't put it on a
8 supplemental list, but he can't have it both ways.

9 And from our perspective, we've got the final TASC
10 results, we've got some of this new literature that we want
11 our experts to be able to talk about at trial, and we believe
12 that the fair thing is to give plaintiffs' counsel an
13 opportunity to inquire of our witnesses. We don't want to
14 have it both ways. We want our witnesses to be able to talk
15 about it, so we think that plaintiffs' counsel should be able
16 to cross-examine them prior to trial. All we're doing is
17 asking for the same thing with respect to their witnesses.

18 MR. DENTON: What he's asking, Judge, is a redo of
19 every expert deposition, is what they're getting to. And
20 that's what I'm trying to avoid.

21 MS. GEIST: Your Honor, this is Melissa Geist. May I
22 just speak briefly --

23 THE COURT: Yes.

24 MS. GEIST: -- on the redo issue? Your Honor, this
25 topic was discussed with Judge Martinotti at some length, and,

1 you know, to give a sense of comfort really to both sides, we
2 had suggested to the Court, while there is briefing on the
3 issue, that perhaps the parties could hammer out a stipulation
4 to ensure, you know, that there are some rules to the
5 supplemental expert depositions so there would be no redo,
6 because that's exactly what we don't want.

7 What we are suggesting are sort of narrow, focused,
8 perhaps even limited-by-time depositions because we don't want
9 plaintiffs' counsel to go back and redo questions with our
10 experts, and I'm sure that the feeling is mutual. The
11 depositions would be limited solely to the new opinions by the
12 experts.

13 And I would think that the parties could work out a
14 stipulation to that effect so there is transparency about what
15 we're doing going forward.

16 THE COURT: What's your briefing schedule with Judge
17 Martinotti?

18 MS. GEIST: Your Honor, it's quick so we can resolve
19 the issue. We are actually the moving party, and we are
20 filing our brief tomorrow. The plaintiffs are responding by
21 December 5, and the reply from the defendants is due December
22 12.

23 At that time, Judge, we would be asking Judge
24 Martinotti to entertain any argument he feels might be
25 necessary by phone or otherwise, giving us a quick decision on

1 the papers so we can resolve the issue.

2 THE COURT: Well, we're going to do the same schedule
3 here. Just put a different caption on it, file tomorrow,
4 response December 5. And what did you say for your reply
5 brief was due, December 12?

6 MS. GEIST: On December 12, Your Honor.

7 THE COURT: Okay. Same schedule.

8 MR. BALL: The law would be a little bit different in
9 New Jersey versus the federal court. Could we have like till
10 a couple few extra days to --

11 THE COURT: Okay. You're wearing me out. November
12 26, December 7, December 14. Careful what you ask for. You
13 would have rather had it done tomorrow.

14 MR. BALL: Probably.

15 MS. GEIST: I think Mr. Ball is just thinking of me,
16 Your Honor.

17 MR. BALL: Right.

18 THE COURT: Well, I'll leave that alone.

19 MS. GEIST: Thank you, Judge.

20 THE COURT: All right. Parties' agreement as to
21 timing of Daubert brief, reply briefs. We've already covered
22 that.

23 Trial date. So you're going to spend May in New
24 Jersey instead of St. Louis. I think you're a loser on that
25 account. How long have you all thought about this case is

1 going to take to try, each of these cases?

2 MR. BALL: I think we've talked -- Roger and I have
3 talked in the neighborhood of three weeks. Right, Roger?

4 MR. DENTON: Yes. But I don't have any involvement
5 in New Jersey, so you need to talk to somebody else.

6 MR. BALL: No. He meant -- I think the judge was
7 asking how long we thought it would take in his court to try.

8 MR. DENTON: Oh, okay. Well, he was mentioning May.

9 THE COURT: Yeah. I mean, I was looking at May,
10 trying to think. You need time to recover, regroup, and then
11 come here. I'm looking at July 8. That will give you, you
12 know, the month of June to turn whoever is involved or not
13 involved to turn around.

14 I mean, I always kind of figured we'd hopscotch
15 months back and forth. What's that do for folks? Or should I
16 just be an imperial federal judge and tell you today it's July
17 8? Well, that's what I'm going to do. If there's problems
18 with that, you'll let me know and you'll talk among yourselves
19 before you get back to me.

20 **(A PORTION OF THE PROCEEDINGS WAS ORDERED SEALED AND THE**
21 **PROCEEDINGS CONTINUED AS FOLLOWS:)**

22 THE COURT: When do we want to get together again? I
23 take it back. I was going through the pending motions list,
24 and Merck, in August, filed a motion to exclude the testimony
25 of Kishore Udipi, and there was never a response filed. Is

1 that an oversight?

2 MR. DENTON: Judge, that's probably our fault. We
3 withdrew him as an expert, plaintiffs did, so there will be
4 no --

5 THE COURT: So that's moot.

6 MR. DENTON: I apologize for not notifying the Court.

7 THE COURT: So that's moot.

8 MR. DENTON: Yes.

9 THE COURT: All right. When do we want to get
10 together again?

11 MR. BALL: I was going to suggest early January.

12 MR. DENTON: That's fine, Judge, from our side.

13 THE COURT: January 3 work for you guys? Kind of
14 take everybody's temperature the first of the year.

15 MR. YOO: That first week might be tough with people
16 coming back from the holidays. How about the week of January
17 7?

18 THE COURT: January 10?

19 MR. DENTON: That would be our preference as well,
20 that week if possible.

21 THE COURT: January 10. Is this something we should
22 do in person or on the phone?

23 MR. DENTON: I'm happy to show up in person, Judge.
24 I enjoy the walk in the winter down in the cold.

25 THE COURT: Mr. Yoo, Ms. Geist, you're the most

1 affected.

2 MR. YOO: I prefer to do it by phone, Your Honor.

3 THE COURT: All right. So January --

4 MR. YOO: Not that I don't enjoy seeing you, but it
5 takes me a --

6 THE COURT: Don't be a sycophant. January 10 at
7 eleven o'clock so Mr. Yoo can come into the office at a normal
8 time.

9 MR. YOO: Thank you, Your Honor.

10 THE COURT: All right. I'll look forward to all your
11 papers, and we'll go from there, unless there's anything I'm
12 missing for the good of the group.

13 MS. GEIST: Thank you, Your Honor.

14 MR. DENTON: Thank you, Your Honor.

15 THE COURT: Thank you all.

16 **(PROCEEDINGS CONCLUDED AT 11:25 AM.)**

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 29 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 27th day of November, 2012.

/s/Shannon L. White
Shannon L. White, RMR, CRR, CCR, CSR
Official Court Reporter