

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: NUVARING PRODUCTS)
LIABILITY LITIGATION)
) Case No. 4:08-MD-01964 RWS
)

MOTION AND STATUS HEARING
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
JANUARY 26, 2012

APPEARANCES

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(Appearances continued on page 2)

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(PROCEEDINGS STARTED AT 10:35 AM.)

THE COURT: Morning. We're here this morning in the case styled *In Re: NuvaRing Products Liability Litigation*, Cause No. 4:08-MD-1964. Would counsel make their appearances, please?

MR. DENTON: Morning, Your Honor. Roger Denton for the plaintiffs.

MS. KRAFT: Kristine Kraft for plaintiffs.

MS. BRITTAIN: Ashley Brittain for the plaintiffs, Your Honor.

MR. MCEWEN: Good morning, Your Honor. Greg McEwen for the plaintiffs.

MR. BALL: Go ahead.

THE COURT: Ladies first, Mr. Ball.

MS. GEIST: Thank you, Your Honor. Melissa Geist from Reed Smith for the defendants. Good morning.

MR. BALL: Dan Ball, Bryan Cave, defendant.

MR. STRAUSS: Steve Strauss for the defendants.

MR. YOO: Morning, Your Honor. Thomas Yoo for the defendants.

THE COURT: Good morning. And we hooked up the conference call for anyone who wanted to listen in, but when it was transferred into the room, there was nobody on line. But if there is anyone, no dogs, no cats, no music, no papers. Keep your phone on mute at all times so that we can accomplish

1 the task at hand here in the courtroom.

2 Okay. Ms. Kraft, randomly, are there any matters
3 that have been resolved between the parties before we got
4 together today? And one of the things we were going to do was
5 go over the pending motions and then go to some of the more
6 discrete topics that each of you had set forth on your agenda.
7 So why don't you tell me where we are, if anywhere, and then
8 we'll get going.

9 MS. KRAFT: In terms of pending motions, the only
10 pending motion that is on the docket is defendants' motion to
11 compel the plaintiffs' answers to certain contention
12 interrogatories, and that item is on the defendants' agenda.

13 THE COURT: Now, my order said we were going to
14 resolve all pending motions. It didn't say "and you guys get
15 to pick." So here are the pending motions, and you tell me if
16 any of these have been resolved or if there's some reason we
17 shouldn't engage the discussion today.

18 Motion to compel defendants to remove all redactions.
19 Now, I thought we had resolved that; that we weren't going to
20 go back, but going forward the defendant agreed to deal with
21 that issue on a document-by-document basis. Is that correct
22 or not correct? Maybe I should turn to Ms. Geist for that
23 because you seem to be the document guru.

24 MS. KRAFT: That is correct from our perspective.

25 THE COURT: But at least on my docket sheet that

1 still showed as an open motion. So I just want to make sure
2 we're in agreement.

3 MS. GEIST: We are in agreement, Your Honor. It
4 certainly was not on plaintiffs' agenda. My understanding
5 from reviewing the transcript of a couple of our last
6 conferences with the Court is that the plaintiffs were going
7 to raise that with the defendants on a document-by-document
8 issue.

9 THE COURT: That was my understanding. And if that's
10 the plaintiffs' understanding, then that's no longer a pending
11 motion.

12 MS. KRAFT: That is correct, Your Honor.

13 THE COURT: There was a motion for protective order
14 that dealt with authentication of documents, and we had a
15 lengthy discussion about that last time, but I don't know that
16 we actually resolved anything other than you all were going to
17 try to work on it because it was -- it's not reasonable to say
18 here's a thousand documents in one document. You know, are
19 they -- you know, is the foundation and authentication
20 appropriate? You were going to go back and then be more
21 specific about which documents.

22 MR. BALL: Yeah. I think where we are on that is,
23 they have withdrawn the request for admissions that they set
24 out on those documents. That's been withdrawn. They have
25 recently, this week, filed another document in an attempt to

1 move that issue along. We are in the process of having
2 discussions with them about that. That's where that stands.

3 THE COURT: To give the plaintiffs their due, there
4 are certainly documents that you produced that they should be
5 able to work with you and say yes, these are in fact -- this
6 is the drug application, for example, and there's no reason to
7 have to lay a foundation and authentication for that document.
8 It's discrete documents will be appropriate, bulk documents
9 would not be, was how we left it, but that's still a work in
10 progress is what I'm hearing.

11 MR. BALL: Yes.

12 MS. KRAFT: Yes. It's a definite work in progress.
13 We haven't withdrawn our requests for admissions. They
14 responded, listed a series of objections to the request for
15 admissions. You filed a motion for protective order -- yes.
16 Okay. Back it all up. Let me just back it all up.

17 We served three different sets of requests for
18 admissions all aimed at the sole purpose of: Let's figure out
19 now the foundational issues so that we can get --

20 THE COURT: If you have one, you can deal with it.

21 MS. KRAFT: Deal with the evidence at trial. They
22 filed a motion for protective order. We engaged in a series
23 of discussions back and forth. Frankly, we didn't get
24 anywhere as a result in terms of getting this issue resolved.
25 That motion is still pending.

1 MR. BALL: Well, our --

2 THE COURT: One at a time. Mr. Ball, you know you'll
3 get a chance to talk as long as you want.

4 MR. BALL: Sorry.

5 MS. KRAFT: We don't intend to withdraw those
6 requests for admissions. Frankly, we intend to file a motion
7 to compel on those issues. In another context, we have just
8 served the defendants with a deposition notice aimed at
9 requesting the defendants to produce a witness, and frankly,
10 I'm sure it will result in multiple witnesses for deposition
11 to go through these authentication issues of the documents.

12 That's the way in which we are bringing this issue to
13 a head, by asking them to produce witnesses to address these
14 issues on foundation. In conjunction with that, we do plan to
15 file a motion to compel because this is an issue that we need
16 to resolve one way or the other.

17 THE COURT: Mr. Ball, obviously, you have a different
18 view of what's transpired to date.

19 MR. BALL: Yes. And I think it may be a
20 communication gap. Mr. Denton and I have discussed this. It
21 was our understanding that the bulk request for admissions,
22 which were hundreds -- thousands and thousands of documents,
23 that those were being withdrawn; that they, this week, filed
24 specific depo notices with specific exhibits attached to
25 those. We just got those this week. They're on foundational

1 depo notices.

2 We've talked to them this morning that some of those
3 documents that they are asking us to admit the authenticity,
4 that they've kind of gotten a little overbroad because some of
5 them are things like deposition notices, like their own
6 experts' reports, and I believe that they said what they would
7 do is go back and fix that and be more targeted, and that's
8 where we are.

9 It's my understanding that this bulk request for
10 admissions filed some time ago that was the subject of a
11 motion for protective order was being withdrawn and taken off
12 the table and that they were going this direction. That was
13 my understanding.

14 MR. DENTON: I think we are close. If I may, Your
15 Honor? Roger Denton.

16 THE COURT: All right.

17 MR. DENTON: I think at least the communication
18 -- and it may be myself who has been inconsistent here or
19 confused, I think, would be the situation. The large bulk one
20 that had millions of pages, we are withdrawing. That is too,
21 too overburdensome, and we're not seeking a response from
22 that.

23 We had two other sets that were fairly narrowly
24 tailored in our view, most of which -- one set was the
25 exhibits that had been attached to depositions. It's my

1 understanding the defendants have responded to those. We
2 don't agree with some of their responses. They've denied a
3 lot of them, and we don't think they're appropriate, but we
4 intend -- we don't want to withdraw ones they have responded
5 to, and I think that's where the confusion is.

6 Our intent with the deposition is to go through these
7 targeted documents mostly -- at least initially exhibits to
8 depositions, and we're going to go through and try to lay the
9 foundation for their admissibility if the defendant persists
10 on objecting to agreeing that documents that came from their
11 file cabinets, created by their employees, are in fact not
12 business records. And that's where it is.

13 And I think if there's any confusion, it's because we
14 probably didn't get all the details out in the conversation,
15 but that was my intent.

16 MS. GEIST: Your Honor, Melissa Geist for the
17 defendants. May I offer, hopefully, a practical solution to
18 this? Mr. Denton is correct. We did respond to two sets of
19 RFAs that were not voluminous like the third set on which we
20 filed a motion for protective order. We now have a different
21 list, which, in large part, overlaps the documents at issue in
22 the two RFAs.

23 I suggest that the most pragmatic solution is for
24 plaintiffs to withdraw the RFAs because they do overlap with
25 this new list we just got earlier this week. We now have for

1 the first time a list. We have raised some issues with
2 plaintiffs about what is contained on the list. It's 571
3 documents. Plaintiffs certainly do not want us to
4 authenticate their own expert reports and deposition notices,
5 right?

6 THE COURT: Right.

7 MS. GEIST: So I suggest we look at the list together
8 and rework the list and move forward from there. That, I
9 think, is going to get all of the parties where we need to be.

10 THE COURT: What I get from this, without getting too
11 immersed in it myself, is that there's still a lot of room for
12 you all to talk, but this should definitely be on our list to
13 cover the next time we get together so that we continue to
14 make progress on it.

15 MR. DENTON: I think so, Your Honor, but as to the
16 specific and narrower list of the 500 documents, or whatever
17 they are, but they're basically deposition exhibits, we do not
18 want to withdraw those requests to admit because under the
19 rules --

20 THE COURT: They can't make you withdraw them, and I
21 can't make you withdraw them, but I'll rule on a motion for
22 protective order that's properly filed the next time we get
23 together, and you understand that the more narrowly tailored,
24 the more likely you are to prevail on the request. The more
25 broad or the more unrelated if, in fact, you inadvertently

1 listed your own plaintiffs' expert report, I'm not going to
2 require them to authenticate it.

3 MR. DENTON: Of course not.

4 THE COURT: The common sense to the practical is
5 going to govern here.

6 MR. DENTON: Right.

7 THE COURT: You understand that.

8 MR. DENTON: Right.

9 MS. GEIST: Your Honor, I don't think we disagree.
10 My only comment is because there is overlap in the RFAs and
11 the list, I'm trying to deal with a list. And since
12 plaintiffs apparently don't want to withdraw the RFAs, then at
13 least we need that list, the new list, modified, to remove
14 deposition notices, plaintiffs' own expert reports, and any
15 documents to which we have already admitted authenticity and
16 admissibility of business records exceptions in the RFA.

17 MR. DENTON: That's what we just agreed to -- I'm
18 sorry, but that's what we just agreed to out in the hallway
19 before we came in here.

20 THE COURT: Didn't sound like it when you were
21 speaking two minutes ago.

22 MR. DENTON: No, no. That's the deposition notice,
23 Your Honor. We intend to file an amended notice of deposition
24 with an amended -- well, in an amended list of --

25 THE COURT: Here's the only way I can govern that.

1 If they ask you the same question in two different RFAs, at
2 some point a motion for sanctions is appropriate for forcing
3 you to do the same thing over and over again. The case is
4 expensive enough without advertently or inadvertently
5 continuing to do the same thing over and over again like
6 you'll get a different result. That's not what we're going to
7 do. So they will govern themselves accordingly.

8 I'll either grant a motion for protective order or
9 sanctions or a motion to compel when the issue's finally
10 forged, but you understand where we'll end up. If you've
11 asked the same request for admission in three different
12 documents, you need to figure that out so they're not being
13 required to respond to the same question in three different
14 times unnecessarily.

15 MR. DENTON: We agree, Your Honor, and we --

16 THE COURT: That probably is a drop in the bucket in
17 this whole thing, but it's at least an easy place to draw the
18 line about redundancy here.

19 MR. DENTON: It's not only that, Your Honor, but the
20 reason we can't withdraw our very specific set is we believe
21 we are going to be able to establish business record
22 foundation for a lot of these documents that they have failed
23 to admit, and we're going to be in here asking for those
24 costs. So I just want --

25 THE COURT: It's a two-way street.

1 MR. DENTON: I understand that. That's the reason we
2 can't withdraw them.

3 THE COURT: All right. You'll figure it out, but
4 when the dust settles, I'll know what I need to do with it.
5 But it's on the agenda for next time. There's nothing for me
6 to do today.

7 The contention interrogatories as to each of the
8 individual plaintiffs and in the bellwether cases, have we
9 made progress on that, or are those issues still out there?

10 MS. KRAFT: I guess that's really in their court.
11 It's on their agenda for today to argue that motion.

12 MS. GEIST: Right. Your Honor, it was on our agenda
13 as part of our continuing discussions to try to resolve
14 discovery disputes. We were asked by plaintiffs' counsel not
15 to argue that motion today and proceed with that motion.

16 MR. DENTON: We just made a deal out in the hall --

17 MS. GEIST: Your Honor, so I mean, with respect to
18 our ongoing communications in attempting to resolve the
19 issues, we did discuss this prior to coming into Your Honor's
20 courtroom. We agree with plaintiffs' counsel to hold off that
21 motion for the time being while we work on some issues.

22 THE COURT: So that's something I should raise next
23 time we get together. You've either resolved it or it will be
24 time for me to make a ruling on a --

25 MS. GEIST: I think that's fine, Your Honor. Thank

1 you very much.

2 THE COURT: All right. One of the easier things
3 that's probably on your agenda is the motion for leave to
4 replace dismissed cases in the trial pool. Since those were
5 cases all of them were dismissed -- and here's what I recall,
6 and you tell me where you are. They were all cases that the
7 defendants selected for the trial pool that have resulted
8 ultimately, for whatever reason, in a dismissal; that you
9 should pick replacement cases but not cases that you've
10 previously proposed that were struck by the plaintiffs. And
11 have you managed to accomplish that task?

12 MS. GEIST: Your Honor, we have. And Your Honor has
13 the facts right. Your Honor did grant our motion to replace
14 three of the defense picks in the original bellwether pool of
15 26 cases. We have done that, Your Honor.

16 Before we began the conference, I had an opportunity
17 to chat with plaintiffs' counsel about our proposed discovery
18 schedule for those three new replacement cases, but because
19 the actual plaintiffs' lawyers who represent those three
20 individuals are not present here today, Mr. Denton and Ms.
21 Kraft asked for the opportunity to speak to those lawyers and
22 just obtain their consent to our proposed discovery schedule.

23 Your Honor, just for the record, the defendants
24 proposed the following three cases as replacement bellwether
25 cases: Vanita McKissack, which is Case No. 4:10-0679, Emily

1 Zenda, Case No. 4:09-0717, and Cheryl Zrioka -- it's
2 Z-R-I-O-K-A -- Case No. 4:09-1015. Thank you, Your Honor.

3 MR. MCEWEN: Your Honor, may I --

4 THE COURT: I thought you had four. You only had
5 three?

6 MS. GEIST: Just three, Your Honor. And again, just
7 for the record, these are to replace the three dismissed
8 cases: Jennifer Anderson, Easter Brown, and Sherrika James.

9 MR. MCEWEN: Your Honor, Greg McEwen. I am here,
10 I've worked well with Ms. Geist, but one of the proposed
11 replacement lawyers is here. That's myself. I represent
12 Emily Zenda. And, Your Honor, I didn't realize Ms. Zenda was
13 going to be substituted until this morning, about 10:20.

14 I need to work with Mr. Denton and Ms. Kraft to see,
15 number one, the status of Ms. Zenda's case at this time, and
16 the other is that I need to work with the defense and lead
17 counsel on an appropriate discovery schedule because, you
18 know, all of a sudden -- I haven't received any notice at all
19 until this morning --

20 THE COURT: Well, there has to be a moment where
21 you're up.

22 MR. MCEWEN: There does, but I --

23 THE COURT: And now you're up. And here's the way we
24 manage it. If the schedule -- and you'll agree on a discovery
25 schedule that works, and if not, you'll file a motion for

1 protective order that you're being asked to do fact discovery
2 at a pace that's faster than you can accomplish it, and we'll
3 get together and I'll figure it out. But there has to be -- I
4 mean, at some point the light goes on above your client and
5 here we are. So we'll see where it takes us.

6 MR. MCEWEN: And I'm more than happy with that, sir.

7 THE COURT: I mean, you can't say you can't be
8 selected, right?

9 MR. MCEWEN: I don't have any qualms about the
10 selection process. What I do have, Your Honor, is that I'm
11 sure it wasn't decided this morning on the airplane who
12 they're going to have. And there's no reason that they know
13 who these clients' lawyers are, and there is absolutely no
14 reason that they couldn't have notified me and/or the other
15 lawyers ahead of time to say, you know, your client is going
16 to be picked, and that would have allowed both the other
17 lawyers and myself to be here.

18 I anticipated because I have a number of the cases on
19 the plaintiffs' side that it's possible that one of my clients
20 would be picked, but I think I just want to bring that to the
21 Court's attention.

22 THE COURT: They've given notice to lead counsel.
23 Lead counsel, in their job as lead counsel, will discuss it
24 with the counsel for an individual plaintiff, and if there's a
25 problem, I'll know about it. But I assume there's no problem.

1 MR. MCEWEN: About what?

2 THE COURT: Getting started on the discovery that
3 affects your individual client in that case.

4 MR. MCEWEN: I don't know, because I didn't know
5 until 10:30 this morning who the --

6 THE COURT: We can't know. We can't know. But you
7 had to know that at some point, whether it was this year or
8 next year, that your client had to be ready to go to trial.

9 MR. MCEWEN: Absolutely. And we're ready to go to
10 trial.

11 THE COURT: So now is the time.

12 MR. MCEWEN: My frustration is that we need the time
13 to review that file to see if it's appropriate --

14 THE COURT: You're borrowing trouble. That's all
15 you're doing, is borrowing trouble. There isn't any trouble
16 yet. When there is trouble, you'll let me know about it. We
17 have enough trouble without borrowing it. And Ms. Kraft will
18 keep you current as best she can.

19 MS. KRAFT: Yes, I will.

20 THE COURT: All right. Let's go to -- we'll lapse to
21 the agenda then. Provide update on discovery issues. We have
22 covered, I suspect, most of that.

23 Ms. Kraft, the first was authentication of foundation
24 issues which you talked about. Issues as to the requests for
25 admissions as to foundation issues. Discovery disputes

1 regarding defendants' objections to plaintiffs' ninth and
2 tenth request and the request involving the Kaiser study. Are
3 there issues there that I should know about?

4 MS. KRAFT: There really aren't at this point, Your
5 Honor. We just simply tried to give you a status of
6 discovery. We're going to address after the conference some
7 issues with respect to discovery answers, so there's nothing
8 for the Court with respect to either C or D. The defendants
9 have supplemented some documents, and we're working out a
10 schedule.

11 THE COURT: It's a lifetime job for Ms. Geist to
12 manage document production in this case, so why wouldn't we
13 have, as a topic, discussion of document production?

14 MS. KRAFT: That's right. We don't want to leave her
15 out.

16 THE COURT: She still has Ms. Weissman in the boiler
17 room somewhere in Oakland kicking them out.

18 MS. KRAFT: So no further issues with respect to Item
19 1.

20 THE COURT: Expert depositions for plaintiff have
21 been completed?

22 MS. KRAFT: They have. And as far as defendants'
23 experts, we have all the expert depositions on the calendar
24 right now scheduled periodically, I think, through about the
25 first week or so of April.

1 MR. BALL: Yeah. We'd like to address a little
2 something there while we're on that topic, Your Honor. Just
3 to bring you up to date on where we are, we have completed all
4 of the depositions, both generic experts and case-specific
5 experts on the plaintiffs' side, okay? Those were completed.

6 THE COURT: Except for the new cases. You don't want
7 to scare counsel that somehow you already took his expert's
8 deposition.

9 MR. BALL: Unbeknownst to Mr. McEwen, we've also done
10 all the experts in his case as well. Just kidding. Just
11 kidding.

12 THE COURT: He'll have a stroke. Before he leaves
13 the building, he'll stroke out. You don't want that.

14 MR. BALL: Where we are on the defense experts is
15 here. There have been some scheduling issues on the
16 plaintiffs' side. We understand those. They've communicated
17 with us about those. We, as of now, have the depositions of
18 our generic experts -- I believe there's 12 -- that are set in
19 February, March, and April.

20 The only concern the defendants have on that, on the
21 12 generic experts, is that the one set in April were
22 accompanied by an e-mail that said: We may have some problems
23 with the Yaz litigation, and if we do, we may not --

24 THE COURT: It's too late. They already have
25 problems with the Yaz litigation.

1 MR. BALL: Right. My problem is this. We have been
2 back to our experts on multiple occasions to get dates. We've
3 organized the schedule, and there needs to be -- I almost said
4 "with all due respect," but I know that's not a good saying
5 here.

6 THE COURT: The trapdoor will spring, and we'll never
7 find you again.

8 MR. BALL: Right. So I won't say it. But we need
9 some finality on these dates that are set in April, and this
10 uncertainty is causing both us and our experts some problems
11 because of the repeated going back.

12 I've talked to Mr. Denton about this. He expects to
13 know something more in the next several weeks, but we're just
14 saying that we would like to have those dates be the dates and
15 not have to go through this again.

16 MR. DENTON: Judge, I'm doing the best I can.
17 Unfortunately, or fortunately, one way or the other, I was
18 lead counsel on the first Yasmin case that had been set
19 January 9 for more than 12 months. On New Year's Eve, we
20 found out that it was being stayed ten days so --

21 THE COURT: Well, "stayed" would be the wrong word.

22 MR. DENTON: Whatever. It was put off and then
23 another order was put on about January 10 rescheduling it for
24 April 30, followed by a minute order that said: But those
25 deadlines are going to be suspended depending on how the

1 parties do in settlement discussions.

2 So I intend -- the deposition dates in April are ones
3 that I intend to take in this litigation, and I am doing
4 everything I can. And the reason we couldn't take those
5 depositions in December in this case is because I had every
6 expectation that we were trying the case on January 9. We
7 were literally working seven days week, and so that's why we
8 scheduled them into this year.

9 So I, in good faith, told these folks, Mr. Ball
10 specifically, that these dates will work subject to what Judge
11 Herndon does, and I would think by the end of February he
12 would let us know whether I'm going to trial April 30 or some
13 other date.

14 THE COURT: Do you want me to call Judge Herndon?

15 MR. BALL: Oh, no.

16 THE COURT: Oh, I'm happy to. I have no trouble
17 calling Judge Herndon to find out what his intentions are,
18 because you can't call and say, "Do you really mean it?"

19 MR. DENTON: Well, Judge, I think in fairness, I
20 think what I expect, and this is again not trying to
21 anticipate what a particular judge may do, but I expect he's
22 going to call lead counsel in, which I'm one of them, between
23 now and the end of February and say, "Where is it at on
24 settlement, and here's what we're going to do with the
25 bellwether process."

1 That would be my expectation, and I think he will,
2 and I think I'll know by the end of February what is
3 happening. And that is my hope and expectation, to take all
4 these depositions in April, but I just can't be in two places
5 at once, and I'm trying to accommodate that.

6 THE COURT: At some point -- I'll be candid -- you're
7 going to have to decide -- because let's suppose -- and I'm
8 talking out loud. I don't have a thought about it. The
9 bellwether cases in Yaz start going, and let's suppose he gets
10 on a Judge Fallon-type role where every three or four months
11 you're trying one. We're going to start trying bellwether
12 cases in this case, and we're not going to wait until Yaz is
13 done for a couple of years to get to NuvaRing.

14 So at some point you're going to have to decide how
15 you're going to manage that because we can't wait for Yaz to
16 wind out. I mean, you're going to have to develop a second
17 you -- not Yoo -- or Ms. Kraft's going to have to become lead,
18 but you're going to have to figure out a way to manage this.
19 I know you're not fungible, but you're also not the only one
20 who can do it.

21 MR. DENTON: Well --

22 THE COURT: Otherwise, I'm going to have to take you
23 off of lead counsel in this case.

24 MR. DENTON: Judge --

25 THE COURT: And you don't want me to do that.

1 MR. DENTON: No, sir, I don't. And the only
2 distinction is, is that I'm only going to have one bellwether
3 in Yaz. It happens to be that the first case happens to be
4 mine.

5 THE COURT: Okay.

6 MR. DENTON: If case number two can't be mine,
7 because I know what's in the pipeline, I'm not going to be in
8 that trial.

9 THE COURT: Okay. That's a fact I didn't know. If
10 the other cases that are teed up in Yaz, you've only got one
11 of them, then we don't have quite the same bottleneck that I
12 was worried about if you were going to be on the trial team
13 for each of the Yaz cases.

14 MR. DENTON: No. And I appreciate that, Judge. I
15 have no intention of not handling this litigation and moving
16 it forward.

17 THE COURT: And I wasn't suggesting that you weren't,
18 but there is a potential schedule on both these cases that
19 becomes problematic that we would have to address.

20 MR. DENTON: Correct, correct.

21 THE COURT: And we couldn't just go, oh, no, we're
22 not; we're busy.

23 MR. DENTON: No. I appreciate that, Judge.

24 THE COURT: In fact, this case is older.

25 MR. DENTON: Yes, sir.

1 THE COURT: If anything, I feel bad. Judge Herndon
2 is better, he's quicker, he's meaner, or something, you know,
3 to get those cases teed up before we got ours teed up, because
4 Judge Martinotti is in both of them, you know. So it's not
5 Martinotti. You know, which of these doesn't look like the
6 other? It must be me.

7 MR. BALL: So it sounds like where we're at is --

8 THE COURT: He's giving you dates. If there's a
9 problem, you're going to know within the next 28 days.

10 MR. DENTON: That's my expectation, Judge.

11 MR. BALL: So the second part of this, while Roger is
12 up here that we also discussed is, so that takes care of our
13 12 generics. We've got the dates in April. Hopefully,
14 they'll hold. And if they're not, we'll have an issue and
15 we'll deal with that issue when it comes up.

16 THE COURT: Right.

17 MR. BALL: The second part is the present situation
18 as to we have case-specific experts in each of both your
19 cases, the ones here, and the ones with Judge Martinotti, all
20 right? We are submitting our case-specific expert reports
21 Monday on those.

22 Between the two litigations, there are 17 cases.
23 There are two or three case-specific experts per case, so
24 doing the math, there are forty-ish.

25 THE COURT: I would have come up with 51, but that's

1 okay.

2 MR. BALL: Two to three, okay?

3 THE COURT: All right.

4 MR. BALL: So Roger and I talked yesterday, and that
5 will not be accomplishable by April 15. And I believe that
6 we've kind of reached the conclusion that it will go into May
7 and probably into June in order to get all of those scheduled
8 and completed, and so that's the status of the rest of the
9 defense experts.

10 THE COURT: Other than -- okay. I'm sorry. Mr.
11 Denton, go ahead.

12 MR. DENTON: The only point I would make, Your Honor,
13 is that for whatever reason, of those 17 cases, none of those
14 are my firm's cases, and so as far as the --

15 THE COURT: They're afraid of you.

16 MR. DENTON: I'm not sure what the reason, but --

17 THE COURT: Judge Herndon is meaner. They're afraid
18 of you.

19 MR. DENTON: Perhaps. But so I need to talk to the
20 folks that are in these cases, but I do think that May and
21 June is a reasonable amount of time to get these done. We
22 haven't seen the reports yet, but --

23 THE COURT: You're going to see them Monday.

24 MR. DENTON: Yeah, right.

25 MR. BALL: So should we establish a June 30 cutoff

1 for scheduling purposes to get those done? Is that what we
2 should do?

3 THE COURT: You need to talk to the individual
4 counsel before you agree to that?

5 MR. DENTON: Yes, yes, Your Honor.

6 THE COURT: That's your job, but --

7 MR. DENTON: Yes, I do.

8 THE COURT: Within the week come up with a schedule
9 for these, and let me know what it is so we can amend the --

10 MR. DENTON: What I would suggest, Judge, we're going
11 to see the reports on Monday, that could we have till the
12 following Monday to let the defendants know as to what the
13 schedule might be, seeing the nature of the -- after we've had
14 a chance to review the nature of these 40 reports?

15 MR. BALL: Fine.

16 THE COURT: Okay. So report to the Court, that's
17 February 6.

18 MR. BALL: February 6.

19 THE COURT: Okay. February 6 for amended schedule
20 for plaintiff specific defendants' experts schedule. I said
21 schedule twice. But then there are apparently three
22 individuals that there's some dispute about as to whether -- I
23 take it these are more not case-specific experts. Hans
24 Rekers, Titia Mulders, and Wouter de Graff.

25 MR. BALL: Yes. Hans Rekers, Dr. de Graff, and Titia

1 Mulders. Those are employees of the company and that have
2 been deposed multiple occasions, and the plaintiffs have
3 filed -- we've had some discussions about depositions on that.
4 The plaintiffs have filed a motion this morning. They agreed
5 for us to have a 14-day extension to respond to that motion,
6 which would be February 10. So we can discuss it now or we
7 can --

8 THE COURT: I'll just tell you what I normally would
9 do. Remember the mantra, don't treat this case any different
10 than you would any other case. A doctor, garden-variety
11 doctor if there is such a thing, can be a fact witness. This
12 is what I saw. This is what I did. But if they want to give
13 an opinion and have an opinion about causation or an opinion
14 about long-term prognosis, they cease to be a fact witness and
15 they turn themselves into an expert.

16 I mean, the biggest, greatest expert in the universe
17 can be a fact witness, but the minute they want to tell the
18 jury what they think based upon their training and experience,
19 based upon what they saw, this is their opinion, they
20 transform themselves into experts under Rule 26. That's my
21 general rule. If that helps you figure out what to do with
22 it, you know, knowing my thought process may help you decide
23 how to bring this to some closure.

24 MR. BALL: These witnesses do not have specific
25 litigation-related opinions here. They are scientists of the

1 company.

2 THE COURT: But, see, you modified the word
3 "opinion," by litigation-related opinions. If they want to
4 give an opinion, they want to -- you know, if they want to
5 give the jury an opinion, invade the province of what the jury
6 should conclude from the facts, then they are moving into the
7 category of Rule 26.

8 MR. BALL: I understand that. And what these
9 witnesses are, this is what the company --

10 THE COURT: I don't know enough.

11 MR. BALL: These are the scientists that developed
12 the drug, that worked on the warning, that did the studies on
13 the drug, that kind of thing, okay, the manufacturing issues
14 in the case.

15 THE COURT: If they want to give the opinion that the
16 warning covers all possible things that could be a result of
17 the drug, that's more of an opinion than a fact. That's a
18 conclusion, not a fact. When it's a conclusion, then it
19 becomes an opinion.

20 MR. BALL: These witnesses are -- their testimony
21 is --

22 THE COURT: I'm making Mr. Yoo very nervous, you
23 understand.

24 MR. BALL: Their testimony is: This is what the
25 company did and why the company did it. And we believe those

1 are facts.

2 THE COURT: Well, those could be facts. Those could
3 be facts. We did this, and then based on that knowledge, we
4 took this step, and then based on that knowledge, we took this
5 step. But if they then want to give an opinion about that
6 being an adequate warning, they've become experts then because
7 they want to give an opinion.

8 It's a difficult thing sometimes, but the closer you
9 get to "this is my conclusion based on these facts" or "this
10 is my opinion based on these facts," you've moved into Rule 26
11 territory.

12 MR. BALL: I understand that, and this is an area of
13 gray.

14 THE COURT: It's a tough one.

15 MR. BALL: It's a gray area, and that's why we
16 probably in an abundance of caution identified them the way we
17 did, but we do truly believe they are fact witnesses. This is
18 what the company did and why they did it.

19 THE COURT: Your only risk there, of course, is, is
20 if I conclude they are giving an opinion and I preclude it
21 because you didn't comply with Rule 26, you won't have any
22 recourse when we get there.

23 MR. BALL: Right.

24 THE COURT: That's the way a lawyer would think, you
25 know.

1 MR. BALL: I can feel that Thomas wants to --

2 THE COURT: Mr. Yoo wants to go to Muskogee,
3 Oklahoma, I can feel it.

4 MR. DENTON: And I guess at some point I'll get to
5 talk about my motion.

6 THE COURT: Apparently, you gave them more time to
7 think about it anyway.

8 MR. DENTON: Apparently, they know what their
9 arguments are and don't need 14 days, but let's go.

10 THE COURT: They're trying to convince you, is what
11 they're trying to do.

12 MR. YOO: Your Honor, I would just add the
13 distinction here is, I think we've collectively had cases
14 where a defendant would say, We don't need to hire an outside
15 expert, we'll have one of our engineers give an opinion about
16 causation.

17 THE COURT: Sure.

18 MR. YOO: That's not what we're dealing with here.
19 As Mr. Ball was explaining, we're really talking about people
20 who are going to testify about the product and why the company
21 did what it did and what the company's position is on these
22 issues, issues that have already been covered by the 30(b)(6)
23 deposition. It's the scientific technical nature of their
24 testimony, necessarily so, that we wanted to put on the record
25 so that there was no misunderstanding.

1 But that said, I think as Mr. Denton alluded to, we
2 may be getting a little bit ahead of ourselves for this
3 proceeding. I think we have worked out an agreement where we
4 are going to have an additional 14 days to get our papers
5 filed, so we'll elaborate on all of this in the briefing, and
6 we'll look forward to a hearing to talk about the substance of
7 these arguments.

8 THE COURT: Mr. Denton feels left out.

9 MR. DENTON: I do, Your Honor, since it was our
10 motion, but the bottom line is, is they disclosed them as
11 experts. The problem is that in their expert disclosure they
12 don't provide any basis or substance of their opinions, which
13 even Rule 26, I think it's (c) as to employee witnesses,
14 requires a summary statement of the facts and the opinions.

15 Interestingly, their catchall at the end of every one
16 of these disclosures are that these witnesses will also
17 comment about the opinions of plaintiffs' experts. That
18 clearly ventures into opinion-type testimony. So those are
19 just a few of the brief highlights.

20 Judge Herndon ruled on this already in a similar
21 situation that we've attached to our papers, and so we'll let
22 them brief it, but I think this is something that will come to
23 a head. And then we've got to deal with the scheduling of
24 their depositions, and there's some issues with regard to the
25 fact that none of these witnesses were very good at answering

1 responsive questions.

2 THE COURT: That's an opinion.

3 MR. DENTON: I understand that, but --

4 MR. BALL: That you didn't disclose.

5 MR. DENTON: But having said that, Judge, we've
6 attached that in the deposition. If you'll read Dr. Mulders
7 30- and 40-page rants as to whether or not something was in an
8 article or not, and never did agree whether it was yes or no,
9 you will see our frustration.

10 THE COURT: I guess I'll get to read all about it and
11 figure out where we are.

12 MR. DENTON: Yes.

13 THE COURT: All right. So that exhausts the issue of
14 defendants' expert issues, correct?

15 MR. YOO: I'm sorry, Your Honor?

16 THE COURT: One of the topics was defendants'
17 experts. We're talking about scheduling plaintiff-specific
18 experts, and then we still have to exhaust the briefing on the
19 three employees who there's some discussion about whether they
20 should be required to produce expert disclosures or not.

21 MR. YOO: That's correct, Your Honor.

22 THE COURT: We've got Daubert motions. I guess we
23 should set a schedule once you close out expert depositions.

24 Mr. Denton, have you all talked about this?

25 MR. DENTON: No. We just thought we'd put it on the

1 calendar and talk about it to throw out the topic. And I
2 think it came up in New Jersey as well, the concept with Judge
3 Martinotti to have one set of briefing and arguments. I don't
4 know what your --

5 THE COURT: They tried to do that in Yaz.

6 MR. DENTON: In fact we did, and then --

7 THE COURT: And Judge Herndon got so upset with what
8 he got, that he just ruled it on the papers.

9 MR. DENTON: Well, actually, what he said was, it was
10 the best --

11 THE COURT: That's not what happened?

12 MR. DENTON: No. Actually, what he told us in
13 chambers was, it's the best set of briefing he's ever seen and
14 that he didn't see any reason to have a hearing and then he'd
15 rule.

16 THE COURT: Okay.

17 MR. DENTON: That's what he told us. I don't know
18 what he's told you, but that's what he told us.

19 MR. YOO: He didn't tell me anything, so I hate to
20 talk about Yaz, Your Honor. The issue of Daubert and the
21 issue of ADR came up with Judge Martinotti at the recent case
22 management conference.

23 With regard to Daubert, our position is, let's wait
24 until the plaintiffs have finished taking the depositions of
25 our experts, and then sometime after that we should -- the

1 parties should get all their Daubert and Kemp motions filed,
2 along with dispositive motions. At this point, something like
3 60 days after the completion of the --

4 THE COURT: I was thinking 45. I can live with 60.
5 When you all work out the schedule on the plaintiffs'
6 experts -- I mean on the plaintiff taking your experts, it's
7 time to get this in motion, obviously.

8 MR. YOO: We can do that and propose a briefing
9 schedule. So I think that all makes sense, and that's
10 consistent with the discussion we had with Judge Martinotti.

11 THE COURT: And I'll leave it to you all to put --
12 maybe when you come up with the schedule for the defendants'
13 expert depositions, you can plan out after that dispositive
14 motions and Daubert motions.

15 MR. YOO: Very good, Your Honor.

16 MR. DENTON: That's my guess.

17 THE COURT: ADR. How did it end up with Judge
18 Martinotti?

19 MR. YOO: Well, what we told Judge Martinotti is what
20 I'm going to tell Your Honor, and that is, as we set forth in
21 our agenda, we don't think ADR is going to be meaningful to us
22 until we get adjudication on the merits.

23 We've told this Court from day one that there's no
24 basis to the claims that have been alleged by the plaintiffs.
25 We have said from the very beginning that the product is not

1 defective, that there is no scientific data showing that there
2 is a higher risk of thrombosis with this product compared to
3 other products, and we've said from day one that the risk of
4 thrombosis, including both sides of the controversy on the
5 third versus second generation birth control pills, all of
6 that was set forth in the product label approved by FDA from
7 day one.

8 THE COURT: So the recent FDA study doesn't change
9 your analysis?

10 MR. YOO: It doesn't change our analysis, and we can,
11 at the appropriate time, discuss with Your Honor what that
12 study showed and didn't show, but there is no scientific data
13 that proves that NuvaRing has a higher risk of thrombosis
14 compared to other products.

15 And our position at this time, Your Honor, is fact
16 discovery is now done, and now that the plaintiffs' expert
17 depositions have been taken and the plaintiffs have had their
18 best shot, we believe the record is as we said it was from the
19 very beginning and including at the science day proceedings.
20 This isn't Yaz. They're totally different products. The
21 hormones involved are different. The recent studies that
22 reported a higher risk with Yaz compared to other products
23 don't show a higher risk with NuvaRing.

24 The FDA recently convened an advisory committee to
25 discuss the safety data concerning Yaz. There's been no

1 request for an advisory committee concerning the safety of
2 NuvaRing. It appears FDA may require a label change on
3 thrombosis with respect to Yaz. There's been no suggestion
4 that such a label change is being requested for NuvaRing.

5 The fact of the matter is, the studies on fourth
6 generation -- that's the progestin in Yaz -- fourth generation
7 versus second generation products, those are new studies. The
8 studies on third generation versus second generation, those
9 studies are 17 years old. All of that data was processed
10 years ago by the regulators and has been included in the
11 NuvaRing label, just as it was with other third generation
12 products at the time NuvaRing came on the market.

13 So this is nothing new. The litigations and the
14 issues involved are very different. NuvaRing remains the
15 lowest estrogen dose product on the market, and from all the
16 depositions we've taken, except for the plaintiffs' experts,
17 the medical community believes NuvaRing is an excellent and
18 very safe product.

19 So we believe, having deposed all of the plaintiffs'
20 experts, that there is nothing in the record to the contrary.
21 Sure, there are accusations and allegations that fly, but when
22 those are tethered to the applicable law on Daubert, on Kemp,
23 on admissibility at trial, we are confident that there are
24 dispositive issues throughout the trial pool that should
25 resolve the litigation.

1 Now, if the plaintiffs want to just give up and talk
2 about closing costs, so to speak, we'll sit down with them
3 now, but you know, we disagree with their approach. From
4 their ADR statement, it sounds like they are asking Your Honor
5 to just hand the keys to the car over to a special master and
6 have him set some kind of illusory case value and try to force
7 that on the parties. We don't think that's the right
8 approach.

9 We've done the work to prove that we deserve
10 dispositive rulings dismissing these cases, and we want a
11 chance to obtain those rulings in this court and in New
12 Jersey. After the motions are heard, the Kemp, Daubert,
13 summary judgment motions are heard in these cases, if there
14 are remaining issues, we want to take those issues to the
15 jury. We think the jury will agree with us.

16 So we don't think that until the merits have been
17 tested in these trial pool cases, sitting down for ADR makes
18 any sense to us, and I hope Your Honor understands we're not
19 trying to be obstructionists here or just, you know, beat our
20 chest. This is not like other litigations where some times
21 you have admittedly a gray area. We think the evidence and
22 the data here are pretty black and white as to whether the
23 product is defective, as to whether a thrombosis warning was
24 in the label or not.

25 So our position here, as it was with Judge Martinotti

1 is, if ADR is going to be ordered, we think it should be done
2 after the merits have been heard on these dispositive motions
3 and, if necessary, bellwether trials here and in New Jersey.

4 MR. DENTON: Judge, I guess I missed the filing of
5 their motion for summary judgment. I thought we were here to
6 talk about an ADR procedure that you ordered us to discuss,
7 and I would like to bring it back to that and the reality of
8 where we're at.

9 And just to respond in kind a bit to the substance,
10 Mr. Yoo must not be reading the published literature because
11 in the last few months, and just two weeks ago there's been
12 literature that continues to be published that the progestin
13 in their product, desogestrel and etonogestrel, do cause an
14 absolute increase risk of venous thrombosis, and yet their
15 label continues to say it's unknown whether those -- whether
16 the VTE risk in NuvaRing is higher than second generation.
17 It's an absolutely incompetent label, and there's a disputed
18 fact about that. It's been on the market for 11 years, and
19 they claim they still don't know its safety.

20 But setting aside the facts, I want to talk big
21 picture. You asked us to present an ADR position to you, and
22 here is what I have learned, frankly, over the last year or
23 so, and I think a lot of MDLs give us some guidance. MDLs
24 don't settle unless a trial court either themselves or their
25 designee gets involved in some kind of a resolution concept,

1 whatever it may be.

2 The example to the contrary is HRT out of Little
3 Rock. Judge Wilson. It's been around since 2003. There's
4 been many cases tried. Big plaintiff verdicts, some affirmed
5 in the Eighth Circuit. Some affirmed in state supreme courts
6 and some defense verdicts.

7 He has taken no role in any kind of ADR procedure and
8 has now started remanding hundreds and hundreds, if not
9 thousands, of cases throughout the country, some of which have
10 come back to you, Your Honor, and there is no end in sight.
11 They will be trying cases until we all retire in that
12 litigation, notwithstanding major bellwether victories on both
13 sides.

14 Ortho-Evra was the opposite. Judge Katz, at the time
15 of Daubert briefing, called everyone in and he said the
16 obvious. This is not a Daubert case. There is no novel
17 science here that your product causes VTE. The dispute in the
18 science as to whether or not it's an increased risk is one for
19 the jury and not one for Daubert. You all need to get these
20 cases resolved.

21 Judge Katz -- I was involved in that case -- came in
22 himself and called plaintiffs' lawyers in with defense lawyers
23 and a representative of Johnson & Johnson, in his chambers,
24 sometimes in Florida, and during the winter months, and was
25 able to get the parties together on 3,500 cases in round

1 numbers.

2 The Fosamax case, it's a Merck case, Judge Keenan in
3 New York has tried several bellwether cases. The first one
4 was tried to a hung jury. The second one, the same case, an
5 \$8 million plaintiffs' verdict. He then remitted it. The
6 plaintiffs didn't like the remittitur of 1.5, and now they're
7 trying it a third time. What has that done for anyone?

8 He now has realized what needs to be done in that
9 case, and he recently appointed a settlement master to get the
10 people involved.

11 I think the other most relevant situation is Yasmin.
12 Judge Herndon, right before trial, as he saw everybody getting
13 ready, it became obvious to him that one case, two cases, or
14 even five or six cases probably aren't going to get the
15 parties together and that they need to focus, and ordered a
16 settlement master. Whether or not that will work or not is to
17 be seen.

18 The Vioxx case is another Merck case. They tried
19 about 20 cases. I think there was two plaintiffs' verdicts
20 and only one affirmed on appeal; yet, when Judge Fallon got
21 the people together, 60,000 claims got settled.

22 So I think the lesson to learn from these is,
23 frankly, the bellwether trials give us some information, but
24 they don't give us much, and I can tell you it will give very
25 little to me because I'm not involved in the process because

1 the defendants have figured out a way to eliminate all my
2 cases.

3 So the facts of every case are different. The
4 testimony of doctors are different. Experts are different.
5 And even if you would grant some Daubert motions on part or
6 even some of these experts, they only apply to the first seven
7 cases. We'll fix those issues if there are issues. We'll
8 continue to go forward.

9 So my point is, and why we presented this to you, is
10 based on that knowledge and based upon your order, frankly,
11 that says come up with an ADR proposal, not kick the can down
12 the road another year or so, which is apparently what the
13 defendants want to do.

14 So I suggest to the Court that if you don't want to
15 be involved, that you appoint someone who can focus on this.
16 And if the parties get together and the first impasse is it's
17 too early, well, then we'll deal with that, but if we're going
18 to get our hands around this litigation and the legacy is
19 going to be a fair resolution for all parties, which I believe
20 that's what one would want, or the legacy is the HRT, which
21 we're going to try them forever no matter what the results,
22 you know, I guess ultimately the philosophy has to be what is
23 it that this Court wants to accomplish?

24 And we think that what Judge Katz has done, what
25 Judge Herndon has done, is a good, reasoned approach, and then

1 we can talk to a settlement master who can then talk to you
2 and give you guidance. Right now we just have this -- we're
3 in a fight over getting ready for trial, and there needs to be
4 also a process about some resolution.

5 So we think our proposal makes sense. There's no
6 specific time deadlines other than to get someone appointed
7 and get the parties starting down this road. And I think if
8 we wait another year or so, which is what I understand the
9 defendants' proposal to be, that we're losing time, and it
10 doesn't make a lot of sense, particularly when they've
11 excluded my firm from the bellwether process.

12 Thank you.

13 MR. YOO: Your Honor, first before I respond in
14 substance, just as a housekeeping issue, last time I checked,
15 Mr. Denton's firm was involved with at least one of the trial
16 pool cases, so I don't know why he keeps saying he doesn't
17 have any case in the trial pool, but from what I've seen, he
18 does, and his firm has defended --

19 THE COURT: It is what it is, whatever it is.

20 MR. YOO: -- virtually all of the plaintiff expert
21 depositions that have been taken in the trial pool cases.

22 But that aside, we have no interest in settling cases
23 just because they filed them. We don't think there's any
24 merit to these cases, and we have a right to prove that and
25 get dispositive rulings, and if necessary go to trial and

1 prove our defense.

2 In the examples that Mr. Denton just cited, I mean,
3 you know, I didn't know what the point of that was, because
4 it's kind of a mishmash of different litigations with varying
5 circumstances. In the Vioxx situation, as Mr. Denton said,
6 about 20 cases were tried with the defense prevailing in the
7 overwhelming majority of those, and in some of the other
8 cases, including Yaz, I understand they went to early
9 mediation because the defendant wanted to.

10 We don't want to. We are not Yaz. I think when
11 stripped of everything else, at its core what's happening here
12 is the plaintiffs think that they have a leg up because of
13 this development in the Yaz litigation and they want to ride
14 the momentum and try to persuade Your Honor and Judge
15 Martinotti that somehow it's in everyone's best interest to go
16 talk about settlement. It's not in our best interest. We
17 think these cases should all go away.

18 THE COURT: Here is what I'm thinking, though. This
19 will be number one on our list next time we get together
20 because what I don't want to do, and maybe it goes nowhere --
21 and, Mr. Yoo, the best part about my job is, I don't care
22 whether someone goes to trial or doesn't go to trial or who
23 wins or who loses. I just want to make sure the process is
24 fair and that whatever the jury decides, the jury decides
25 given as much information that they can have within the bounds

1 of the rules of evidence and relevancy, and then we get a
2 picture from the jury. They speak for all of us when they're
3 done.

4 What I don't want, and I'm just speaking out loud, is
5 I don't want to get through Daubert and dispositive motions
6 and, okay, now is the time to have a discussion. I don't
7 think -- we would lose a few months, maybe six months, than
8 saying, okay, who's going to be the -- who should handle the
9 ADR process? Who should we go see? How long is it going to
10 take to get them up to speed?

11 I'd like to think about getting someone kind of
12 gradually up to speed about the case so that when dispositive
13 motions are over, and if, obviously, dispositive motion's
14 granted, there's nothing left to talk about. And maybe
15 there'd still be nothing left to talk about there. You want
16 to hear what the jury has to say.

17 But in every case I would urge you to at least have a
18 conversation before that specific case went to trial. And
19 maybe I'm not asking you to settle 700 cases, but think about
20 what's the value of this particular case with this particular
21 plaintiff with these particular experts.

22 You may reach the same conclusion. You may say this
23 case is different than many of the others and we should treat
24 it differently, because I'm not sure -- I mean, there's a lot
25 being written recently about this aggregation of litigation,

1 and what is from -- even the plaintiffs' point of view, it's a
2 hard thing for the plaintiffs' class, the group, coordinating
3 counsel, because you're asking some of these plaintiffs who
4 may have a really good case and some of the plaintiffs who may
5 not have such a good case to work together, and there's an
6 issue there about the fundamental sense of fairness of the
7 disparity in the value of the claims, if you give it any
8 credibility that the claims have value.

9 Even if they do, they're not going to all be the
10 same. I don't want to treat them as if it's cookie-cutter
11 justice. I want to treat, as I said in any other instance,
12 this case like I would any other case. And I would always ask
13 in any case to stop, take a look and make an evaluation, but I
14 don't want to wait till we've exhausted everything.

15 So I want you all to think about who should be
16 involved as a settlement ADR advisor in this case. I'm not
17 saying do it today, I'm not saying have it done in two weeks,
18 but next time we get together think about that parallel track.
19 In any case you're having settlement discussions as you
20 proceed to trial. I don't know of any case where at least
21 that conversation wasn't had.

22 And I don't want to have to stop and get somebody in
23 January because we're going to trial in March to get them up
24 to speed to have at least a passing understanding about your
25 defenses and their claims so that they can have a reasonable

1 conference with the parties.

2 The other thing I know, I mean just from our
3 statistical experience in this building, given how far we've
4 gone in this case, as you said the fact discovery is done, the
5 plaintiffs' experts are done, you're ready to tee up your
6 dispositive motion. That alone statistically says 50 percent
7 less likely to settle because you -- good, bad, or
8 otherwise -- you've told your client you're going to win,
9 right? Absolutely.

10 So the one thing they're going to say after they've
11 spent all this money -- and you wouldn't tell them otherwise
12 because you would be wasting their time. But you've spent all
13 this money to get to this point. They're going to say, "Make
14 the judge do his job," right? File your dispositive motions,
15 see where we end up, and then we'll evaluate it. I just don't
16 want to wait until we have that moment to suddenly for the
17 first time have the conversation about an ADR plan. We
18 probably should have had a discussion a year ago. Think how
19 much money you could have saved. But in an MDL case that's
20 not necessarily as persuasive as it is in an individual case
21 because we're talking about that much money times 700 cases as
22 opposed to an individual case.

23 So I don't want to abandon it. I'm going to give you
24 your due that you're entitled to push and go and try wherever
25 we end up. Remember the best part about my job is, I don't

1 have any interest in what the outcome is other than everybody
2 leaves this building knowing that the system worked fairly and
3 you had a fair shot. Then whatever happens, happens. The
4 jury will speak from the jury box with their verdict.

5 And if we have to do it one time, ten times,
6 eventually you'll get tired of me, and you'll say we're not
7 consenting to jurisdiction and venue in this court anymore.
8 We'd much rather go to Muskogee, Oklahoma and see Judge Payne.
9 You might get your wish ultimately before this is over.

10 But I don't want to abandon the ADR. I don't know if
11 now is the right time, but next time we get together I want
12 from the defendant more than "no," you know. When we do this
13 parallel track of settlement discussions, what's the best way
14 to accomplish it so we don't lose ground after I rule in
15 dispositive motions and try to start from ground zero then.

16 We want to have some system already in place that's
17 going to push it, you know, that we have the opportunity to
18 continue to go forward without losing any more time in this
19 case.

20 That's my thoughts for the day. I liked in general
21 what the plaintiffs suggested, but let's talk about some
22 format that the defendant feels is comfortable to get to that
23 same place. I have thoughts about who might be a good
24 settlement master in this case. There's a lot of retired
25 federal judges floating around the country now who that's what

1 they do, but you may have ideas yourself from other litigation
2 you've been involved in, and so we'll take it from there.

3 Anything else on behalf of the plaintiffs today?

4 MS. KRAFT: No, Your Honor.

5 MR. DENTON: No, Your Honor.

6 THE COURT: Ms. Geist, anything else on behalf of the
7 defendants?

8 MS. GEIST: No, Your Honor.

9 THE COURT: All right. When should we get back
10 together again? We've got a few things to do.

11 MR. BALL: Let me just throw out -- it sounds like
12 Roger's situation will be more clear by the end of February,
13 so I was going to suggest the first week in March. End of
14 March, I'm sorry. End of March.

15 THE COURT: End of March.

16 Mr. Denton, what do you think?

17 MR. BALL: I'm hearing that there are people who have
18 vacations and things in earlier parts of March.

19 MR. DENTON: Well, the only thing -- two things,
20 Judge. The motion related to Mulders, Rekers, and de Graff we
21 want that teed up. I don't know, as soon as --

22 THE COURT: Do you think I need oral argument on that
23 given what we did today?

24 MR. DENTON: I'm happy to waive oral argument.

25 MR. BALL: I think it would be helpful to Your Honor.

1 It's going to be difficult to get all of everything out in a
2 brief that you're going to --

3 THE COURT: It doesn't mean -- we don't need to have
4 the whole assembly to accomplish that.

5 MR. BALL: No.

6 MR. DENTON: No, no, no.

7 THE COURT: Ten days for -- they need ten more days
8 to respond.

9 MR. BALL: Fourteen.

10 THE COURT: Fourteen.

11 MR. BALL: I think we can do it by telephone, in
12 fact, Your Honor, the oral argument part.

13 MR. YOO: I don't see what the prejudice would be
14 doing it at the end of March if plaintiffs aren't going to be
15 able to finish defense expert depositions until --

16 MR. DENTON: There's a lot of issues, and we need to
17 get those depositions on the calendar. That was the reason we
18 didn't want to give you the extension to brief it.

19 THE COURT: So two weeks from today is your response?

20 MR. BALL: It was due tomorrow, so we're saying two
21 weeks from tomorrow would be February 10.

22 THE COURT: February 10. Then, Mr. Denton, you want
23 time to respond, I take it?

24 MR. DENTON: I think we'll reserve it, but I doubt
25 that we will need it, but we would only need five days.

1 THE COURT: So I'm going to say February 17 for their
2 reply. Who would have to come on behalf of the defendant to
3 participate or participate by phone?

4 Mr. Yoo, how does February 27 or 28 look to you?

5 MR. YOO: I could do the 28th.

6 THE COURT: Afternoon of the 28th, Mr. Denton?

7 MR. BALL: I know the 27th there's already a
8 deposition set of one of our experts, so the 28th would be
9 preferable.

10 THE COURT: So the afternoon of the 28th, Mr. Denton,
11 does that work for you?

12 MR. DENTON: I'll make it work, Judge.

13 THE COURT: Two o'clock central time on the afternoon
14 of the 28th, and I'll defer to you if you want to participate
15 by phone or in person. It would be your local option.

16 MR. DENTON: Okay.

17 THE COURT: For the argument on the three employees
18 issue as to whether or not they should be required to comply
19 with Rule 26.

20 Now, as to the next status conference, the parties
21 seem to think the end of March would be the time to get
22 together, is that right, to wrap up other open issues for like
23 a big get-together like this so we can stay on track? Oh,
24 you're worried about Yaz.

25 MR. DENTON: Well, I am, but the other thing, Judge,

1 is the one comment would be is if we can hear from the
2 defendants by the same day of that motion, their ADR position.

3 I don't want to kick that can down the --

4 THE COURT: You mean take that up on the --

5 MR. DENTON: Same day we take up the motion.

6 THE COURT: February 28? We can have a discussion
7 about ADR on the 28th.

8 MR. DENTON: Then with that I'm okay with a status
9 conference towards the end of March.

10 THE COURT: How about 10:30 on March 28?

11 MR. DENTON: I've got trial that week.

12 THE COURT: Oh, you do?

13 MR. DENTON: I do. I'm sorry, I have a trial the
14 last week. The week before I would be open.

15 THE COURT: The week before is spring break.

16 MR. BALL: I would like to do it then, move it the
17 other direction because I have a trial through the end of
18 March.

19 MR. DENTON: So do I.

20 THE COURT: So April 11 at 10:30, Wednesday.

21 MR. BALL: What day of the week was that?

22 THE COURT: Wednesday.

23 MR. BALL: Can we do that one day earlier?

24 THE COURT: Do you want to do the 10th? Do I hear
25 the 9th? Do I hear the 10th? Do I hear 12?

1 Mr. Yoo says the 10th at 10:30 on Tuesday, April 10.

2 We will send out an order.

3 Mr. Ball, don't worry. I didn't lose track. 10:30
4 on April 10.

5 Anything else on behalf of the defendants?

6 MS. GEIST: No, Your Honor. Thank you.

7 THE COURT: Very good. We'll talk to you in late
8 February. We will see you on April 10. Thank you.

9 **(PROCEEDINGS CONCLUDED AT 11:45 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 53 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 31st day of January, 2012.

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