

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
MARCH 14, 2012

APPEARANCES

For Plaintiffs: Kristine Kraft, Esq.
Ashley Brittain, Esq.
SCHLICHTER AND BOGARD
100 S. Fourth Street, Suite 900
St. Louis, MO 63101

John Kirtley, III, Esq.
FERRER AND POIROT
2603 Oak Lawn, Suite 300
Dallas, TX 75219

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

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

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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1 (PROCEEDINGS STARTED AT 2:05 PM.)

2 THE COURT: Hello, everybody. So we're here in the
3 *In Re: NuvaRing Products Liability Litigation*, Cause No.
4 4:08-MD-1964. On behalf of the plaintiffs, who is on the
5 phone?

6 MS. KRAFT: Kristine Kraft.

7 MR. KIRTLEY: John Kirtley.

8 THE COURT: Is that it?

9 MS. BRITTAIN: Ashley Brittain.

10 THE COURT: Anyone else? I take it by your silence
11 the answer is no.

12 On behalf of the defendant?

13 MS. GEIST: Melissa Geist, Your Honor. Good
14 afternoon.

15 THE COURT: How are you?

16 MR. YOO: And Thomas Yoo. Good afternoon, Your
17 Honor.

18 THE COURT: Mr. Yoo, okay. Things must not have gone
19 well.

20 MR. YOO: I fear I have a reputation.

21 THE COURT: Well, Ms. Kraft, why don't you tell us
22 where we are, and then we'll see what's happening.

23 MS. KRAFT: Yes, Your Honor. First of all, we have
24 worked towards the generation of two proposed stipulations on
25 a certain group of documents. The first stipulation deals

1 with the business records exception and covers approximately
2 one-fourth of the documents that were in our initial request.

3 And with respect to that stipulation, we really have
4 just raised two points to address with defense counsel, and
5 they are taking it under consideration. So we're not quite
6 finished agreeing to all the wording of the stipulation, but
7 the bottom line is that right now they have agreed to the
8 business records exception with respect to again about
9 one-fourth of the documents that we asked for. So we have
10 that part covered.

11 And then on the other stipulation deals with Rule
12 901, authenticity, and that stipulation covers quite a large
13 volume of documents that the defendants previously produced,
14 and those documents are identified on an attachment.

15 Likewise, there's the two same points of that
16 stipulation that we, you know, just started discussing this
17 afternoon, before the conference, and so the defendants are
18 taking that under consideration.

19 We're left with, I guess, approximately 350 documents
20 that the defendants have agreed to continue to work through to
21 advise us whether or not they're going to raise any foundation
22 arguments with respect to them at the time of the trial.
23 That's really what we want to know. We want to get the lack
24 of foundation objections out of the way.

25 Whether they agree they're business records, whether

1 they just simply state no objection as to foundation at the
2 time of trial, whether they agree they are learned treatises,
3 or fall under the admission of a party opponent, it doesn't
4 really matter. We just need to know as to that group of
5 documents are they going to raise any objections on
6 foundation, and they're going -- they have agreed to go
7 through the remainder of those documents and report to us
8 within two weeks as to the amount of documents they're able to
9 complete by that time and then with any remainder documents by
10 one additional week.

11 So that March 28 -- no, 29, and April 5 that we'll
12 come to a bottom line on foundation as to the deposition
13 exhibits. After that, we'll notice depositions to address any
14 remaining documents, if applicable. And then, at least so
15 Your Honor knows, we then plan to carve out additional
16 documents that we would anticipate a possibility of being used
17 as exhibits at trial.

18 So right now we tried to start with what we thought
19 was the, I guess, more defined universe of documents that we
20 had all seen before and visited with witnesses during
21 depositions with all deposition exhibits of the defense
22 witnesses, but we will go beyond those documents as we move
23 forward.

24 THE COURT: Ms. Geist, did she correctly state where
25 you are?

1 MS. GEIST: Good afternoon, Your Honor. Essentially,
2 yes. We had a very good call this morning, Ms. Kraft, Mr.
3 Shkolnik, and myself, to review our proposed draft
4 stipulations and then our resolution on the remainder of the
5 documents that were not on the list.

6 The only caveat I would add, Your Honor, is we are
7 going to agree to Ms. Kraft's proposal that we provide them
8 with the next round of documents by March 29 and the next
9 round by April 5. By that time we should know whether or not
10 we have any issues with any of the remaining documents.

11 My only point, Your Honor, is as to the concept of
12 foundation issues generally. I think the concept may be a
13 little loose. I mean, what we are continuing to do is look to
14 see whether any of the documents not already on our
15 stipulation meet the business records exception or whether
16 they can be deemed to be a learned treatise.

17 I don't know in a vacuum, Your Honor, if we can
18 simply say that there's no foundation issue. We would be
19 looking specifically to the federal rules of following their
20 criteria there. I hope I've explained that adequately.

21 THE COURT: Sounds like a trap door to me, I'm not
22 sure.

23 MS. GEIST: And I don't intend for it to be a trap
24 door, Your Honor. I just -- when we started this exercise, as
25 I told Ms. Kraft this morning, we were looking as I understood

1 we were expected to do: To see whether the documents at issue
2 meet the criteria for the business records exception.

3 THE COURT: Right.

4 MS. GEIST: And when we talked earlier, as Ms. Kraft
5 indicated, she and Mr. Shkolnik said that they had general
6 concerns regarding foundation generally. And I think the
7 parties probably need to just talk through that a little more,
8 Your Honor, because what we would propose to do is continue to
9 work through the documents, see if they meet the exceptions to
10 the hearsay rule, whether it's business records or learned
11 treatise or some other exception, and then see what -- how
12 many documents we have that the defendants cannot agree meet
13 the exceptions to those rules.

14 So I'm not sure if we're necessarily saying different
15 things, Your Honor. I just want to be clear on what we're
16 going to do going forward.

17 THE COURT: Ms. Kraft? Ms. Kraft, are you still
18 there?

19 MS. KRAFT: I'm sorry. I didn't hear.

20 MS. GEIST: Let me --

21 THE COURT: Did you hear what Melissa said?

22 MS. KRAFT: Yeah, I heard. My response to that, if
23 the Court is asking --

24 THE COURT: I think you all are saying the same
25 thing, because I think part of what Ms. Geist is guarding is,

1 just because you agree that it meets the business record
2 criteria doesn't mean the document isn't otherwise
3 objectionable.

4 MS. KRAFT: Oh, certainly. And we have acknowledged
5 that from the very outset, I mean that they preserve their
6 objections to relevancy, prejudicial, being --

7 THE COURT: Hearsay. Any list of the things that for
8 which they might be objected to. These are just going to the
9 foundation of the document.

10 MS. KRAFT: Exactly, Your Honor. What we discussed
11 from the very outset a month back is we addressed with
12 defendants, you know, let's look at the group of documents
13 that we can potentially use at trial and address these
14 foundation issues so that we don't waste, you know, the
15 Court's time, our time, the jury's time, and these
16 technicalities of, you know, calling in a witness to address
17 was this kept in the regular course of business or, you know,
18 is it a learned treatise, is it admission by a party opponent,
19 whatever the case may be.

20 So that's exactly what we're going toward, is to get
21 those foundational issues out in the open way in advance of
22 trial so that they can be addressed properly.

23 THE COURT: All right. So you're working towards a
24 March 29 and April 5 date. So would we get together again on
25 April 12?

1 MR. YOO: Your Honor, we have a case management
2 conference set for April 10.

3 THE COURT: You're right. It's at 10:30. So there
4 is no reason to worry about it. We'll see you on the 10th.
5 And if we've got open issues, we'll figure out what to do
6 about it.

7 MR. YOO: We'll see you on the 10th, yes, Your Honor.

8 THE COURT: Yeah, I'm glad you're ahead of me on
9 that. I wasn't paying attention.

10 MR. YOO: When we leave this issue, I have a small
11 request of the Court on another issue that we had talked about
12 two weeks ago --

13 THE COURT: Sure.

14 MR. YOO: -- or in front of Your Honor. We had said
15 that by this Friday, March 16, we would be in a position to
16 provide a supplemental expert disclosure for company
17 scientists. I would like to request one extra week to get
18 that in the can. We've been working on it. I've been working
19 on it. I just need a little more time to coordinate with our
20 Dutch witnesses who are busy with their regular business
21 activities and travel and whatnot, so one more week would be
22 very helpful to me.

23 THE COURT: Any objection?

24 MS. KRAFT: No objection, Your Honor.

25 THE COURT: Okay. So the 21st -- or, no. You want

1 to the 23rd, right?

2 MR. YOO: Yes, Your Honor.

3 THE COURT: So we'll extend that to the 23rd. And
4 that's not that you have to. It's only to the extent that
5 you're going to identify a witness as an expert and you're
6 going to supplement by the 23rd.

7 MR. YOO: Yes, Your Honor.

8 THE COURT: Anything further while we're together?

9 MS. GEIST: Not from me.

10 MS. KRAFT: Nothing further, Your Honor.

11 THE COURT: Great. Thank you all very much.

12 **(PROCEEDINGS CONCLUDED AT 2:20 PM.)**

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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 10 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 19th day of March, 2012.

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