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
APRIL 10, 2012

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(PROCEEDINGS STARTED AT 10:33 AM.)

THE COURT: Good morning. We're here this morning in the multidistrict case styled *In re: NuvaRing*, 4:08-MD-1964.

Would counsel make their appearances, please?

MR. DENTON: Good morning, Your Honor. Roger Denton for plaintiffs.

MS. BRITTAIN: Good morning, Your Honor. Ashley Brittain for plaintiffs.

MS. KRAFT: Good morning. Kristine Kraft for plaintiffs.

MR. BALL: Dan Ball for defense.

MS. GEIST: Good morning, Your Honor. Melissa Geist for the defendants.

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

THE COURT: Very good. We're here today on a status conference. We have a few items on the agenda. Are there any announcements before we get started?

Ms. Geist, you're usually the voice of reason.

MS. GEIST: Thank you, Your Honor. I appreciate that.

THE COURT: Mr. Ball, you keep looking like it's "To Tell the Truth" and you're about to stand up and take over. I mean, that's not the case, is it?

MS. GEIST: Your Honor, I --

THE COURT: To the podium, I'm sorry.

MR. BALL: We had an announcement, too.

MS. GEIST: Your Honor, I do not believe I have an announcement, although Ms. Kraft and I didn't have a chance to discuss any of the agenda items before the conference, so from the discovery perspective and the motions -- the motion that is before the Court today, I do not have any announcements. Mr. Ball has something.

(A PORTION OF THE HEARING WAS ORDERED SEALED, AND THE FOLLOWING PROCEEDINGS CONTINUED AS FOLLOWS:)

THE COURT: We'll go back on the record here. So plaintiffs' submission of agenda for April 10 status conference. We might as well do the hardest things first, right? Pending issues associated with defendants' supplemental disclosure of company expert witnesses.

Mr. Denton, on "To Tell the Truth," you stood up, so it must be you.

MR. DENTON: Good morning, Your Honor. Yes, it is me. We renewed our motion after receiving the defendants' disclosure. What, in broad brush terms, has happened is we think they have now disclosed that their experts, although they continue to have the same language that they're merely fact witnesses, but they go on then to list for all three witnesses a summary of expert opinions. And that half of the disclosure is sufficient, in our view, under Rule 26(a)(2)(C),

but the other half of the disclosure is missing, which requires a summary of the factual basis to support those opinions.

There's not a single fact cited in their disclosure to support conclusions like: Our clinical trial studies were adequately done; our label is adequate; the epidemiology literature that concludes third generation is more risky than second generation progestin-containing pills is flawed or is invalid; and our literature is appropriate. It goes on and on and on.

We have listed this in our various supplements and particularly our amendment or our appendix to our supplemental motion. I think we've called it Exhibit A.

And so what we have here, Judge, is they're halfway home, but they can't just list these witnesses with summary opinions without the factual support. I anticipate, although I don't know, that their argument will be, Well, see their depositions, because you've taken lengthy factual depositions.

That is not appropriate under the rules if that's their argument, and that would be the only splinter or sliver of some disclosure of the facts or the basis for those opinions.

And so we ask one or the other. If they're going to be experts, then you got to comply with the rule and give us the summary factual basis. I understand they don't have to be

a report, but there has to be some basis. You can't just say, Our product's safe and we did everything right. You have to have some basis for that opinion, and that's what they're failing to do under the rule. The rule clearly says opinions and the factual basis for those opinions, and that's what's lacking, is the factual basis.

If the Court wants to get specific, we can go through it, but it's all in our Exhibit A, and it's just not there. And without that, they're deficient under the rules, and we're entitled to have that information before we go forward with their deposition, or we may choose not to take their depositions if we would get the factual basis, but that's to be determined.

So they've got halfway there, but they're not all the way there, and Rule 26(a)(2)(C) clearly indicates that they have to provide the summary basis for the opinions, which is lacking. Thank you.

THE COURT: This feels like Mr. Yoo to me, but I don't know. Yeah.

MR. YOO: Good morning, Your Honor. Okay. At the risk of being predictable, Your Honor --

THE COURT: Nothing's predictable, but there is a pattern.

MR. YOO: Your Honor, we believe we've fully complied with the Court's order in Rule 26(a)(2)(C). (a)(2)(C), as

Your Honor knows, is different from (a)(2)(B), and much of what Mr. Denton just recited, I think, is a fair description of (a)(2)(B) but not Subsection (C).

Subsection (B) requires a statement of all opinions and the basis for the opinions and the facts considered. That's what Mr. Denton is talking about. Subsection (C), which is clearly less than Subsection (B), says -- you describe two things: The subject matter of the anticipated testimony and a summary of the facts and opinions to be offered by the witness.

We provided a supplemental disclosure that provides 15 pages of information summarizing the facts and opinions of the three company scientists. We provided an itemization of 29 summaries of facts and opinions for Dr. Mulders, 13 for Dr. de Graaff, and 51 for Dr. Rekers.

If plaintiffs want to go forward with their supplemental motion, which was filed yesterday while I was in transit, then we'll need an opportunity --

THE COURT: That is a threshold question, and I'm always -- one of the things -- there is a sense of urgency moving forward, but I am not going to force you to address this motion that was filed yesterday if you feel you want to file a written response.

MR. YOO: We would like to, Your Honor, and I would ask for 14 days to get an opposition on file.

THE COURT: I'll tell you and Mr. Denton, just so we are not hiding the ball, I mean, obviously these people have been deposed before, and there is a little bit of tonality, if you will, for lack of a better word, even in the contention interrogatories, that we're using discovery now more as a weapon than a discovery tool, but that's not an inappropriate use of discovery, but that's kind of what's going on here, too. Okay, we've already talked to these folks, we know all the facts, and the -- I mean, I have no doubt that they have been exhaustively deposed. I haven't read the depositions, but they've told an awful lot.

To require you to go back and now say, We believe that this was properly designed, or the manufacturer was appropriate because. Because what? Because of everything I did or everything I oversaw or everything I supervised and every decision we made in the product development. I mean, you would have to write a book. I mean, that's the truth of it.

MR. YOO: That's right.

THE COURT: And I'm kind of -- I am headed towards, but I haven't seen your response and we haven't discussed contention interrogatories yet, I'm almost better off where I was last time in terms of managing the case, and that is, if they have an opinion that doesn't show up in the disclosure or they're relying on facts that haven't been previously

disclosed, I can deal with that when the parties come back and say, We want a motion in limine on this topic, or, We want a motion in limine that this opinion cannot be expressed because it was not adequately disclosed.

I don't think there's a lot of secrets left between the parties at this point as to what these individuals did in the case, so now to require you to go back and rewrite all that seems a little over the top. One of the things I do is manage the amount and scope of discovery to get to the right place.

But this cuts both ways today probably in some part on contention interrogatories and the discovery disclosure. But I will limit the scope of the testimony if the opinion wasn't disclosed and the underlying basis wasn't already on the record in this case.

So I may be making my life more miserable six months from now, but I think it's a better way to manage it, but I will give you an opportunity to respond in writing. And 14 days is by April 24. And I suspect we'll be getting back together again in early May and we'll bring this to closure because we do need to have this case ready, at least the first case ready to go to trial, as soon as you're done with the case in front of Judge Martinotti because we got to get -- something has to happen here for the plaintiffs and, I know, for the defendants as well. So that's where we are in this

thing.

MR. YOO: Very good. Thank you, Your Honor.

THE COURT: I think everyone understands what I'm thinking, and we'll see where it takes us.

All right. Provide update on discovery issues. Pending issues associated with the authentication and evidentiary foundation of defendants' documents, including outstanding documents and depositions to be noticed on this issue.

MS. KRAFT: Thank you, Your Honor. With respect to the topic of working out some sort of stipulation, if at all, with respect to the records that the defendants have produced, this is where we're at. We're really now at a phase of talking about two different categories of documents, and the first category that I would like to talk about consists of those documents to which there has been no agreement to date to place them on and include them as part of this stipulation.

And that consists -- first of all, just to remind the Court, the universe of documents that we're talking about right now consists of largely the deposition exhibits that we marked during the course of taking defendants' depositions.

THE COURT: Right.

MS. KRAFT: And of that universe of documents, we've got about 260 documents approximately that defendants have not taken a position on at all. And by that, I mean -- I guess I

should back up. They really have taken a position, and that is not to stipulate as to their authenticity or to their business foundation.

In that regard, Your Honor, we are really at the point now where we need to schedule depositions, and we need to do that under a strict time frame because this has gone on for quite a long period of months.

And I'd like to give the Court some examples of the documents that are not included on the present proposed stipulation to really show what we believe is the outrageous nature of the position that they're taking.

THE COURT: And we were doing so well.

MS. KRAFT: Well, for example, Your Honor, one document that is not on the list is an e-mail that is authored by the head of their regulatory, June Bray, the former head of their regulatory department pertaining to NuvaRing. It's Exhibit 10, and it's an e-mail that she sent to various people within the company on September 26, 2007, and it deals specifically with the VTE, meaning the venous thrombotic events pertaining to NuvaRing.

And there's discussion in the e-mail about setting up a meeting with Dr. Susan Allen, who was formerly employed with the FDA, and who is now identified as defendants' expert witness on regulatory matters.

That document, Your Honor, isn't included on the

proposed stipulation, so they haven't agreed to either the authenticity of that document nor to its foundation as a business record. That is one example.

Another example is what was previously marked as Honeywell Deposition Exhibit 13, which is what's referred to And Issues Team NuvaRing and VTE, Venous Thrombotic Events, dated on December 3, 2008. It's minutes of an internal meeting at Organon discussing again the thrombotic events as they pertain to NuvaRing. It's a business record produced with the ORG number. Likewise, that's not part of the proposed stipulation.

We also have, for example, a document that was discussed by Dr. Ciuca, who was, and is, the medical safety advisor at Organon, and this document was marked in his deposition as Exhibit 1. It's a PowerPoint presentation that deals again with NuvaRing and VTE events and goes through a number of factors pertaining to that topic.

And he testified in his deposition that he was familiar with the PowerPoint, that he reviewed it, and that he was asked by his manager to comment on various aspects of this PowerPoint presentation.

THE COURT: Like, for example, who prepared that PowerPoint?

MS. KRAFT: This document was prepared internally at Organon. He did not prepare it. I don't know, based on this

testimony, who prepared it, but it has the Schering-Plough stamp on it. It's an internal document they produced.

And he testifies about that document starting at page 78 of his deposition. And again, it's marked as Exhibit 1. But at least in this discussion it doesn't indicate who actually prepared that document.

We have another example, Your Honor, a document marked as Honeywell Deposition Exhibit 12, which is identified as one of the periodic safety update reports for NuvaRing, and this is a report that the company provided to the FDA. There's a series of these periodic safety update reports that were marked as exhibits in Honeywell's deposition, and likewise, defendants continue to take the position that they are not business records and not the subject of the stipulation.

So for these reasons, we do consider these positions as taking an outrageous stance. We really have no choice other than to proceed with depositions. We want to get the depositions on the calendar to --

THE COURT: By depositions, you mean to request a 30(b)(6) witness who is familiar enough with the record to lay the foundation or explain why the foundation can't be laid for that record?

MS. KRAFT: That's exactly right, because also as a reminder, this whole process started with our serving the

defendants with requests for admissions as to each of these documents, and at that time the defendants, in large part, denied those requests.

THE COURT: My recollection they were also served in large numbers at a time, not as discrete -- at least 260 records is manageable at this point, would seem to me, than these 10,000 documents, what do you think, right?

MS. KRAFT: Right.

THE COURT: It started with a larger bulk of documents.

MS. KRAFT: Right. We started with a larger bulk. In order to chip away at this through another mechanism other than request for admissions, we decided to select out of our initial request just the deposition exhibits that we've marked. So yes, exactly, we're at a point for this initial stage, and I mean, this is just the initial stage, really, but we'd like to get knocked out these deposition exhibits first and foremost because they are the documents we have selected to question the witnesses about.

And in order for them to have denied these requests for admissions, which each of these documents were the subject of those request for admissions, they had to have taken steps to talk to people within the company and denied these requests on some grounds.

So we need to talk to those witnesses and identify

which witnesses are the appropriate ones to establish, or not, the foundational requirements for these documents. Based on the ones that I've selected out, I can't imagine that there's not someone within the company that could not be in a position to authenticate and lay the proper business records foundation for these documents.

THE COURT: Well, I can give you a hypothetical, and not to go too far, but the PowerPoint presentation may have been prepared by somebody outside the company, a consultant, a third party provider, sent to someone in the company. Just because it's in my file doesn't make it a business record. It has to be prepared by someone at the business in the ordinary course of business, maintained where it should be maintained, and here it is. If I send you a letter, that's not your business record.

MS. KRAFT: Uh-huh.

THE COURT: It's only a business record if you prepared the letter and have a copy of it and sent it to me. My letter is not your business record. But that's what we need to figure out here, what's the basis for any dispute that that's a business record exception to hearsay can be laid in this case for those documents.

MS. KRAFT: Right. And part of this process, too, is to flesh out --

THE COURT: And that may just have to take you to

somebody else, but who knows? I'm borrowing trouble at the moment, I understand that, but, you know, there are explanations perhaps, there must be, for why there are objections to these 260 documents.

MS. KRAFT: Right. And part of this process is to flesh out whether the defendants are going to make any objections to the foundational requirements at the time of trial, whether they could conceivably do that or not.

THE COURT: You've just told me they won't stipulate to these 260 documents, though.

MS. KRAFT: Correct.

THE COURT: Whether that failure is outrageous or not.

MS. KRAFT: I'm sorry?

THE COURT: You suggested their failure to stipulate was outrageous.

MS. KRAFT: Yes, I did. It seems to me that it is.

THE COURT: I'm just trying to take the word out of the conversation, to be honest, and figure out where we are. I'm not outraged yet. I may be when Ms. Geist gets up, but I'm not outraged.

MR. DENTON: I am. Comes out of their -- their people write it.

THE COURT: Okay. We understand. We're trying to bring some ability to work through this without being

outraged.

MS. KRAFT: Right. So at this point we'd like to get firm deposition dates on the calendar and move the process forward.

THE COURT: Or figure out the most efficient way to get it done under Rule 1 as opposed to depositions.

MS. GEIST: Your Honor, thank you. Melissa Geist.

THE COURT: So how far afield was I? Are any of these 260 documents prepared by somebody outside the company, since that your objection really isn't that it isn't what it is, but we didn't prepare it?

MS. GEIST: Yes, indeed, Your Honor. And let me see if I can deflect some of that outrageous behavior that we're being accused of, tongue and cheek of course.

THE COURT: We're all getting along.

MS. GEIST: Your Honor, first of all, I just want to make sure we're on the same page because what I heard from Ms. Kraft caused me to believe that we may have a misunderstanding.

As to authenticity, we have agreed and provided plaintiffs' counsel with a separate stipulation where we have agreed that all of the documents produced by defendants -- and we know they were produced by us because they have certain Bates numbers at the bottom, either ORG in all caps for Organon, or NDA for the NDA, or similar-type Bates numbers --

all of those documents that have come from our files we have agreed that they are authentic and true copies of the company's files. So there is no issue with respect to authenticity. We've already agreed to a separate stipulation. And I believe except for a few documents that probably slipped in on plaintiffs' list inadvertently, because they weren't our documents, we have agreed. So that's not an issue.

The separate issue, Your Honor, is, frankly, I think we've made good progress. The defendants have agreed that 200 of the close to 500 documents sent to us from plaintiffs are within the business records exception, so there are 200 documents to which we agree.

For the remaining documents, Your Honor, we do have reasons. I mean, we did go through each and every document to consider whether the document meets every aspect of the business records exception to the hearsay rule. And as Your Honor pointed out, sometimes documents end up in a company person's file, whether it's an individual custodial file or a centralized file, where it is not clear when it is shown to that person who the author is of the document and where it came from.

And Dr. Ciuca's example, while I don't have the document in front of me, and I will readily admit I haven't memorized all of them, certainly there were documents where the witness who was asked questions about the document

couldn't give any information, so we don't know whether the document was created by a person with knowledge of the events set forth in the document, and that's required by the rules.

With respect to e-mails, Your Honor, some of the e-mails went on for pages and pages, and there are multiple e-mails within e-mails, and sometimes it was extremely difficult to identify whether the e-mail constituted a business record.

As for the remaining 260 or so documents, Your Honor, what I would suggest is that we meet and confer with plaintiffs' counsel, see if there's any additional documents we can resolve.

Frankly, Your Honor, I am optimistic that some of the documents, including two that were raised by Ms. Kraft, will be areas where we will be able to resolve. She mentioned in particular a PSUR and a meeting minutes. I know for a fact, Your Honor, that the only hesitation as to some of those documents is we are clarifying and ensuring that those were the final versions of those documents so that they are reliable. So there will be additional documents we'll be able to agree meet the business records exception, but for some, Your Honor, we won't be able to.

And let me just indicate to the Court why depositions are not going to be the way to handle this issue. Your Honor, if it were an issue of authenticity, in other words,

Defendants, give us somebody who can authenticate those documents, well, first of all, it's a nonissue, we've already agreed.

I could give plaintiffs a records custodian who could say, yes, these came from the company's files. I cannot give plaintiffs an individual who could look at an e-mail or a PowerPoint created ten years ago and testify whether or not the person or people, multiple people who were on that e-mail chain, were people with knowledge of the events discussed in the e-mail chain, and that's one of the most important criteria of the business records exception.

So, Your Honor, it's not going to be possible to even produce five individuals who can provide that testimony.

THE COURT: Ms. Kraft, Ms. Geist, don't go far.

MS. GEIST: I won't, Your Honor.

MS. KRAFT: Our position is exactly the opposite. We do need to take depositions of people to get through these documents. The rule requires that with respect to each document that we included in our request for admissions and that we are now discussing that they identify whether or not there is a person knowledgeable about the document.

And in order for them to have denied these requests for production of admissions that we served previously, they had to have gone through some sort of good faith attempt to figure out whether or not there was a person within the

company who has knowledge of this document.

THE COURT: Let's take her --

MS. KRAFT: So we're at a point where we need to take the depositions because we've met and conferred now for, I mean, probably close to ten months on this.

THE COURT: Take the example of the e-mail string. That's a difficult situation. And I think part of it, although it may be painful, your first example was an e-mail from the head of the regulatory department. I haven't seen that, I haven't analyzed it, but if there's an e-mail string along with it that it went to this person who then said something else about it and sent it to this person, you may not want all the string, I don't know. You may want the main e-mail. That may be a manageable stipulation.

But to take an e-mail string that went through five or six offices with different people, that's a much more difficult business record issue. So is there a way to work through the e-mail strings to satisfy both of your needs? Have you done that?

MS. KRAFT: No. In my view, it's a case-by-case basis on --

THE COURT: Correct. That's why it's so painful.

MS. KRAFT: In that particular situation, the head of regulatory is part and parcel of this e-mail string.

THE COURT: Understood. But what the -- I don't

know, but if you look at the string, you may not care about the sixth, seventh, or eighth participant. I don't know what you're looking for out of that e-mail string or where it went and how it came back. It may be I'm borrowing trouble. Maybe they're all employees and maybe they all did it in the ordinary course of business and they all had knowledge about that which they were writing about, but we've got quintuple hearsay built into something here, and you need a business record exception for each iteration for me to make it admissible. And that's painful to go through, but is there a way to go through those and bring that to closure?

MS. KRAFT: Well, I guess --

THE COURT: And you may not care about the sixth exchange of it. You may be just really looking for what that head of regulatory said, and then that's a closed shop.

MS. KRAFT: My response to that is, I mean, we marked -- again, we're talking about a limited universe of documents. We've marked these exhibits at depositions and, you know, certainly used the primary, maybe the entire document, I don't know, but I think this would result in shifting the burden in the wrong direction, to us, to basically try to identify in advance whether we want to only use the first two exchanges of this e-mail potentially at the time of trial versus the entire e-mail, the bottom -- the e-mail string.

The bottom line is, again, the large majority, if not every document, certainly most documents, come from the defendants' files.

THE COURT: Just because it's in somebody's file doesn't make it a business record.

MS. KRAFT: True. But we're talking about in this example an e-mail string going back and forth among employees or former employees of the company. And to shift the burden to us to parcel out just a portion of that e-mail string that we want --

THE COURT: I was just suggesting one way by which you can get them to concede that it's a business record as opposed to coming back and trying to lay a foundation of all the different participants in the e-mail, when they weighed in whether they had -- their participation was, in fact, a business record. I mean, it's a unique problem with e-mail strings.

MS. KRAFT: Well, and I also think part of this exercise should be or should include defendants taking a position on whether or not they're going to object on foundation. They are preserving, of course, their objections on relevancy and things like that, so even if they --

THE COURT: That they're preserving their evidentiary substance, whether this is something that should even come into evidence or not.

MS. KRAFT: Right.

THE COURT: But you're trying to get past the hearsay issues before we even get to that question.

MS. KRAFT: Exactly.

THE COURT: So we're down to 260 documents. They may be multiple pages.

MS. GEIST: Right. Your Honor, we're down to 216. I understand from Ms. Kraft that maybe this is, you know, the first wave perhaps, but at least now we have worked towards resolving this issue. We have 200 out of the way.

I gave the example of the meeting minutes and the PSURs, for example, and there were a couple other categories of documents where once we determine that they are final, then they will also go into the stipulation. But the e-mails, Your Honor, for the points the Court noted, and other documents, are difficult.

Some of these e-mail strings go on for six, seven pages, they involve multiple people at the company, some of whom were uninformed about the issues being discussed in the e-mail. Some of the e-mails started from outside parties, outside the company. Some of the documents -- I mean, the PowerPoint shown to Dr. Ciuca, he could not identify who the author was of that PowerPoint. So I don't know, you know.

And he, as head of drug safety for the company, he could not identify at his deposition who the author was of

that PowerPoint and whether or not it was therefore reliable as a business record.

THE COURT: On the other hand, let's be honest. If he used that PowerPoint in a presentation, I wouldn't restrict the plaintiff from using the PowerPoint in cross-examination of him even if he didn't know who the author of it was, because by using it at the company and showing it to others, I may have to give a limiting instruction if necessary, but it wouldn't be kept out of evidence just because we don't know who put it together if he adopted it by using it in a presentation.

MS. GEIST: Completely agree, Your Honor.

THE COURT: But I understand that you wouldn't be prepared to concede it's a business record, but that doesn't mean it still wouldn't come into evidence because of the manner in which he used it.

Maybe we're talking past each other, but there's got to be a way to close the gap here without making this burdensome on both parties.

MS. GEIST: I agree, Your Honor. And if the head of drug safety during his deposition couldn't identify, for example, the PowerPoint, to keep using the same example, I'm not quite sure who I'm supposed to get from the company to sit down at a deposition and talk about this PowerPoint.

The e-mails, you know, again, Your Honor, are more

difficult. If plaintiffs -- I mean, we're only talking about 260 documents now. We've narrowed it down. I think ultimately it will be, you know, closer to 200. If the plaintiffs would assist us in helping to resolve this issue to the extent we can resolve it further in narrowing down what documents, what part of a six-, seven-page e-mail they want to use, then I think we'll be able to progress further.

But right now, Your Honor, we did engage in a very comprehensive, good faith review of each and every document. It took an enormous amount of time. And I think we're moving forward, but, Your Honor, we simply -- any witness from the company cannot give them testimony that we now cannot give them. If the record to us after our review and discussions with folks at the company does not constitute a business record, there is no witness that I can put up at a deposition to say otherwise.

MS. KRAFT: Your Honor, if I may?

THE COURT: Certainly.

MS. KRAFT: Going back to this PowerPoint example, I mean, certainly defendants' obligation extends much broader than just simply looking at Dr. Ciuca's deposition and whether or not he had knowledge about who prepared the PowerPoint. It came again from their files. It has their company logo on the PowerPoint. They are obligated to figure out who within the company authored this. Or maybe no one did, but they are

obligated to figure that out so that they could have denied in their answers to requests for admissions that this isn't a business record, because that's the position they're taking.

You know, it's not -- they can't be limited to only looking at how it was examined in the deposition. And secondly, this position of having us parcel out which particular, you know, e-mail --

THE COURT: I only suggested that because there may be parts of the e-mail that are important to you and they're denying it as a business record not because of that portion, but because some extraneous string within the string. I was just suggesting it as a way to resolve the impasse, because I'm sure you are more interested in what the head of the regulatory department said, not what somebody down the string said about what they said.

MS. GEIST: I think that's right, Your Honor. And let me just add something to give some context here to what we're talking about. I mean, we've been -- Ms. Kraft and I have been up here for a few years now talking about issues relating to discovery and document production. Over the years, Your Honor, there have been millions of pages produced we've pulled from different people's files, so there are a whole host of information and documents that have come out of those files -- e-mails, PowerPoints, documents.

And sometimes, Your Honor, at the deposition when

they were put in front of the witness, the witness didn't have any idea where the document came from, why they had the document, but it ended up in their file, and that is a consequence and result of the way document production occurs today. It's massive and people end up with a lot of information in their files and they can't even identify it even though it would seem reasonable that they could.

So, Your Honor, I mean, I suggest we do as the Court is indicating and instructing. I'm happy to engage in further dialogue with the plaintiffs and we go through and see, for example, if in that e-mail if it's simply the top e-mail, the June Bray correspondence, then that perhaps is something we can resolve.

MS. KRAFT: Your Honor, again, a couple of points on that. It's really shifting the burden to us, which is very, very burdensome to go through each and every e-mail and sort out particular aspects of it. Secondly --

THE COURT: Well, the risk there is, though, then they don't stipulate that it's a business record and we go through a lot more burdensome effort to go take a deposition that may or may not be helpful. I'm trying to figure out the most efficient, effective way to get this done.

You don't have to do it if you don't want to, but then I may not -- we may not do anything else about it. You just figure out a way to put on your evidence at trial as to

that. Use it with that witness and there may be parts of it that come in because that witness can lay a foundation or not. But I'm just trying to figure out an efficient way to get where you want to go.

MS. KRAFT: A second point about sorting out portions of the e-mail, I mean, that's now really to their advantage because not only has the burden shifted to us, but now we're telegraphing to the defense what aspects of the e-mail are important.

THE COURT: I have no doubt any reasonable attorney who read the e-mail would know which part of that e-mail you're interested in.

MS. KRAFT: And, you know, also Ms. Geist gave examples of, you know, talking about an e-mail and talking to people within the company about whether they had the knowledge that falls within the body of the e-mail, et cetera, and they didn't, so that's the type of legwork that, if they had done, we're entitled to test the knowledge of those witnesses.

THE COURT: Right. Here's what we're going to do. You're going to work on this together. What you can't agree on, you're going to file on May 7, the list, and provide me with the copies of the records you can't agree on.

This puts a burden on both of you because if there is inappropriate withholding of the stipulation here, that in fact, you know, we're getting in -- we're playing games with

this, we're going to get together the week of May 14, subject to what we figure out, and as painful as it may be, I will go through them with you one by one, and that way we know we'll get this done.

MS. GEIST: Thank you, Your Honor.

MS. KRAFT: Thank you.

THE COURT: And if we can't, then we'll figure out the relief for the plaintiff in order to find out a way to get a foundation laid if it's appropriate. But we'll do it in open court, we'll air it, we'll go through it, and we're going to figure it out so we can bring closure to the document issues.

MS. KRAFT: All right. Thank you.

MS. GEIST: Thank you, Your Honor.

THE COURT: So by May 7 file with me the list, and then provide my chambers with a copy of whatever it is.

All right. Deposition testimony fees regarding defense expert witnesses Robert Langer and Leslie Benet.

MR. DENTON: Judge, the parties agreed early on in the litigation, when they requested the deposition of the opposing party's expert, that we would compensate them for their time. Defendants have done that with plaintiffs' experts. We have done that with defense experts except now the fees are getting out of sight.

Dr. Langer sent us a bill. He's their biomedical

engineering-type person to talk about the design of the NuvaRing. $1,500 an hour for eight hours.

More recently, Dr. Benet, a pharmacologist in San Francisco, we received an e-mail last week that really prompted this. We also got Dr. Langer's invoice about the same day. Dr. Benet, who on his fee disclosures suggests that he charges $650 an hour for his time, counsel sent us an e-mail: Well, if you're going to take his deposition, it's $1,300 an hour. So his rate is double for his time when we're asking him questions in a deposition but not when he's working with defense counsel.

All of plaintiffs' experts in the MDL have not charged more than $650 an hour. Most are in the four- and five-hundred-dollar range. That's true with many of the defense experts. These two are, in our mind, not to use the word "outrageous," but unreasonable.

The response back was, Well, you had an expert, a cardiologist, in the Green case, the state court case, who charged $10,000 for a day when he had to cancel his cardiac surgery. Therefore, these are reasonable.

My response is, take it up with the court in Green, and I think $10,000 a day is unreasonable for anybody, and they can seek their relief there.

But these rates at $1,500 an hour and $1,300 an hour, particularly when the regular rate of the one expert is $650

an hour, in our judgment there's got to be an end to this. These experts should not be able to charge these kinds of outrageous fees, and we'd ask the Court to put an end to it and make plaintiffs pay a reasonable charge for Dr. Langer and Dr. Benet. Thank you.

MS. GEIST: Your Honor, Dr. Langer's report, the expert that Mr. Denton just made, was provided to plaintiffs' counsel in December 2011 with the fee of $1,500 clearly disclosed in that report. Plaintiffs' counsel had that report for many months, never raised an issue with it whatsoever, went and took Dr. Langer's deposition. He's already been deposed, and now we suddenly have an issue with the fee.

I did raise in response to Mr. Denton's inquiry about this, again, this may be in the Green case, Your Honor, but we're dealing with the same plaintiffs' counsel, same experts. Dr. Marmur charged close to $1,500 an hour. I think it was exactly $1,428. We've already paid that invoice. We paid that and didn't raise an issue.

So, Your Honor, there are a couple of experts on either side whose hourly rate is upward of the others, but generally it's balanced out. And if plaintiffs' counsel wanted to raise an issue with respect to Dr. Langer, they should have done it back in December 2011, but now his invoice is hanging out there not yet paid. We've already compensated their expert who was retained by Mr. Denton's office, I

believe. His invoice has already been paid, but ours is not.

THE COURT: Well, I want briefing on this because I'm a little hard put to believe that Dr. Langer makes $2.8 million a year, which is what $1,500 an hour would come out to, and if that's -- you know, I'll take it as it comes. But it goes both ways. I'm not going to have one set of rules for the plaintiffs and one set of rules for the defendants, but there is a point at which -- maybe it's justified. Maybe he makes that much money on a general basis, but --

MS. GEIST: Your Honor, if I could just make one more comment.

THE COURT: Sure.

MS. GEIST: The point is truly, and I didn't say this initially, is the parties agreed to pay each other's fees. There was never an agreement as to a cap, as to a limit, as to an amount. It's not in our agreement. We agreed: You pay our expert's time during deposition, we pay yours.

And again, Your Honor, we've already paid. Mr. Denton is saying it's outrageous. Well, we already paid their expert's outrageous fee. Our expert's invoice -- he's already done with his deposition. That's still outstanding. At a minimum, Your Honor, if you want to balance off the two and then deal with one other expert, that's another story, but why should our expert not be paid when we've already paid theirs?

THE COURT: I'm not saying nobody is not going to be

paid, but I'm going to -- I'll take this -- but I don't have a motion in front of me to my knowledge.

MR. DENTON: We'll be happy to file a motion, Judge.

THE COURT: File a motion. You'll get a chance to respond, and we'll figure out where we are.

MR. DENTON: Okay. Thank you, Judge.

THE COURT: But there is an element of reasonableness to everything. All right.

Let's move on to the defendants' agenda. Pending discovery motions. Defendants will be prepared to argue defendants' motion to enforce the December 20 order, which was filed on July 1, motion previously scheduled for argument on January 25, and adjourn per agreement of the parties.

So I think what we're getting to is contention interrogatories in the bellwether cases.

MS. GEIST: Thank you, Your Honor. Your Honor, you indicated earlier that at this point in the litigation there's really no secrets as between the parties.

THE COURT: I may be wrong, I guess.

MS. GEIST: Your Honor, I think you're absolutely correct. At this point, any reasonable attorney understands the claims and issues in the litigation. What is missing, Your Honor, is any facts tied to any particular plaintiff. We're taking about plaintiffs in the bellwether pool, Your Honor, and we've raised this issue almost three years ago with

the Court back in November 2009.

In particular, Your Honor, the defendants' concern was that the allegations raised by the plaintiff lack specificity in terms of fraud and manufacturing defect, so this is an issue that's been kicking around for the last two or three years.

Back at that time, Your Honor, you agreed with the defendants that we need to know exactly what we're talking about in terms of each plaintiff, whether it's Ms. Prather, Mrs. Mitchell-McGuire, any of the plaintiffs in the bellwether pool. Fact requires particularized pleadings.

In response to the discovery that we propounded -- and we're only talking about 15 contention interrogatories -- we got generalized responses, nothing particular, and therefore, the Court granted our motion to compel more specific answers so we knew what we were talking about in terms of each individual plaintiff.

And the reason why it's important, Your Honor, as the Court noted, is when we talk about the individual cases, we need to know what issues and claims are still alive for a particular plaintiff. So I think Your Honor mentioned the plaintiff from Muskogee, a plaintiff from Oklahoma.

THE COURT: No. There's a judge in Muskogee who's going to solve all my problems when Mr. Yoo goes into his "Ms. Kraft's outrageous stance," but all right.

MS. GEIST: But, Your Honor, the point, I think, is the same, right? There's a plaintiff from Oklahoma, there's a plaintiff from a different state, there's a plaintiff from Missouri. What did that particular plaintiff see? What was she told? What was the fraud that was supposedly committed by the defendants as to that particular plaintiff?

Originally, Your Honor, the response from the plaintiffs was, We need discovery. Mr. Denton got up here back in 2009 and said, Your Honor, you know, we need to flesh these out in these individual cases. We need discovery in order to do that. So we went down and we conducted discovery. Conducted discovery until it closed in July 2011.

In response to our issue that we still didn't have particularized facts for each plaintiff, the response from the plaintiffs, as Your Honor probably remembers, was that we needed to look to expert reports. The expert reports for each case would give the defendants the information about each particular plaintiff.

Your Honor, we're here in April 2012, and we still don't know what are the facts that are tied to the plaintiff in Oklahoma, the plaintiff in Missouri, and other different states.

And, Your Honor, let me give you an example because one of the most egregious examples comes from the fraud allegations. You know, we asked for facts. Give us the facts

that support your contention that you were basically defrauded, your injury was caused by fraud committed by defendants.

Your Honor, in each and every response we were given the same few sentences in response to that discovery. They are identical. If Mr. Denton's firm represents a few of the plaintiffs in the bellwether cases, each and every response is identical. There is no difference. How can that possibly be as between Ms. Prather, Mrs. Mitchell-McGuire, any of the other cases? You cannot possibly have the identical responses when it comes to fraud.

All we have are statements such as these, and I will read exactly from one of the responses, and this is in the Allen case: Defendants' concealment of information and misstating of information about their products of VTE risk induced plaintiff and her prescriber to use defendants' product. While discovery is still underway, it is evident from documents produced that defendants have more reports of VTE events in which they acknowledged, had studies about VTE which were not made public, et cetera, et cetera.

It's the same for each plaintiff, Your Honor, in all of the bellwether cases. It may differ a little bit depending on whether it is the Rheingold firm or the Denton firm or the Blau Brown firm providing the response, but they are identical as between those firms' clients.

And, Your Honor, our point back in 2009 has to be reiterated today. We are entitled -- and I know discovery has closed, so this is sort of an old issue that's been kicking around -- but as we're preparing now, you know, for the first trials, I think it is perfectly appropriate and reasonable for the defendants to know from Mrs. Prather: Are these claims alive in her case or not, or Mrs. Mitchell-McGuire; which issues are alive in her case or not; and what is the evidence that she is going to come forward and point to in support of her claims?

And, Your Honor, Mr. Yoo just reminded me, of course, but I will just reiterate it again, we did -- this whole issue began when the defendants moved to compel responses. In December 2010 Your Honor granted our motion to compel responses, and what we got back was the generalized responses that I just read to the Court.

So we are actually not moving -- we are not seeking an order compelling plaintiffs to give us better responses to contention rogs. We're actually seeking an order enforcing Your Honor's prior order granting our motion to compel.

MS. KRAFT: Your Honor, in response to that order which was issued in December 2010, we did in fact provide responses and they were provided to defense counsel in March of 2011. Their motion was filed in July 2011 and it is being heard today.

Also, I want to let the Court know that when this discovery was initially served, it was served in the large pool of trial cases at that time which included twenty-some cases. Now that trial pool, I think, is seven cases. So we've only conducted discovery, case-specific discovery, by way of plaintiff -- well, plaintiff depositions were conducted in all the cases, but depositions of expert witnesses for each of these individual cases have not been conducted, so we're really talking about a very small group of cases that are at issue, which I think are seven at this time.

The responses that we provided, we believe, are adequate. The responses are in fact the same with respect to many of the questions because the questions are generic in nature. The Questions 4 through 8 of this discovery ask: Tell us what facts support the claim that the NuvaRing label is inadequate. Tell us the facts that support the claim of your manufacturing defect claim or the design defect claim.

Those questions, in and of themselves, necessarily seek answers that are generic to each of the cases because the theories of liability in each of these cases are the same, and so the facts that support our claim that the label does not adequately warn about the VTE risk applies to each and every case.

We set forth, for example, in response to Question 4, six specific supporting facts and details pertaining to that

particular theory. With respect to, for example, Interrogatory No. 7, which asks for all facts that support your claim that the NuvaRing was defectively designed, again the design of the product applies across the board to all cases. The answer goes through four to five specific sets of facts that pertain to the basis for that theory.

Ms. Geist talked about the fraud claim, and that pertains to Question 12. Similarly, the answer for that question contains the foundation that establishes the fraud in these cases. The concealment of information, the fact that the warnings about the VTE risk were downplayed, that applies in each case, and therefore, that same answer was supplied.

What we really have here, you know, as you know, are contention interrogatories, and while they're allowed, there are limits to providing contention interrogatories when they're overly broad in nature. And what the defendants are really seeking is answers from the attorneys to provide a narrative of what our theories of liability are down to our legal analysis, our opinion, work product.

And what we've provided in response to these interrogatory answers we believe are in fact adequate and satisfies the requirements of providing the defendants with notice regarding our claims and complies with federal rules.

THE COURT: Well, let's look at, like, 11. And, I have to say, there is always a problem with the use of the

word "all" because we're not going to play the "gotcha" game: Well, you didn't tell me about that.

You do have an obligation to tell them, as a general proposition, what your theory of the case is, what you're relying on when you make that allegation. It says: Set forth all facts that support your contention that your alleged injury was caused by a failure to warn of risk of using NuvaRing.

Defendants' labeling did not warn of the type and seriousness of the injuries, nor give adequate cautions and contraindications which would have prevented plaintiffs from being exposed to defendants' product, and failed to update its labeling periodically.

I have to tell you, I don't know anything after I read that answer. I mean, what about the label is inadequate? What were the injuries? Just what were the injuries that were suffered, the type and seriousness of them, and what wasn't warned about that?

I mean, let's go to the basics. Your client suffered an injury. This is the injury I suffered. This label was inadequate to warn me about the potentiality of that injury. Because why? What about that label didn't warn me about that result? I mean, that's what they're asking. And your answer is, Well, it wasn't adequate. They're entitled to know why you think it wasn't adequate.

What was the injury, what was the warning, and why did the warning not warn you of that injury? That's what they're asking you.

And we're down to we're going to try these cases. I understand we can't answer that globally for 800 people, but with this person, getting ready for this trial, I have this injury suffered from this product, and I have a failure to warn. So what's the failure to warn in this case? Not just a conclusion that the warning is not adequate.

That's what we're trying to get to. It's not a gotcha game, though. We're not going to preclude the testimony, but as a general proposition, why is the warning inadequate? That it's inadequate is a conclusion. It's not a fact. That's what we're trying to get. That's my question.

MS. KRAFT: Well, in our opposition to their motion, I believe the answer to Interrogatory 11 was one that we did propose to supplement after discovery.

THE COURT: So now is the time.

MS. KRAFT: So that --

THE COURT: So do I need to give you the same two weeks to supplement as to these seven plaintiffs that we're talking about going to trial on in the first quarter of next year, certainly the first four or five months of next year, an opportunity to clean these up? And then we'll see where we are when we get together the week of May 14? I think that's

what we should do, and then we'll see what we have.

MS. KRAFT: Okay.

THE COURT: But what I would again suggest, so that we're not starting from scratch, is that you serve those responses by -- can you do them by May 4 so we have ten days to see them before we get together the week of the 14th, or is that too quick? This is not an easy thing to do. I'm not trying to push you too hard. That's why I'm asking the question.

Mr. Denton?

MR. DENTON: And the problem, Judge, is six of those seven or maybe seven or those seven of them are not ours.

THE COURT: Not yours.

MR. DENTON: Not ours. So I mean, we'll do what we got to do. We'll do obviously what the Court orders, but we have other law firms --

THE COURT: You got a lot of work to do.

MR. DENTON: Right.

THE COURT: Can you do the best you can and let me know on May 14 where you are in getting those responses served?

MR. YOO: Mr. Yoo, I want to follow along in the spirit of getting along, but I don't understand the last point that was just made. If Mr. Denton is not responsible for those other cases, he's not responsible for those other cases.

If other plaintiffs' counsel are responsible for those cases, then they need to abide by the Court's order.

THE COURT: No, no. Nobody's getting off the hook here. He's just saying that logistically it's not like he can say "I'll have it for you next week." He's got to talk to some other folks.

MR. YOO: Mr. Denton should get his clients' responses in by then and all the other plaintiffs' counsel will get notice of this order --

THE COURT: That's our goal. If there's a reason we can't, he's going to let me know by May 4 why not, and I'll see if it's sufficient or not.

MR. YOO: I think in order to get closure by the next status conference, everyone should get whatever appropriate responses they're going to --

THE COURT: We're in agreement. I'm just acknowledging that Mr. Denton may logistically have more barriers than we appreciate at the moment, but May 4 is the date that I want supplemental responses to the contention interrogatories, and we'll see what we have.

MR. YOO: Thank you, Your Honor.

MS. KRAFT: Right. And we also have other discovery to respond to served by the defendants --

THE COURT: I understand. So that's why -- I understand this is a very short time frame, but we'll --

Chris, what do you want?

(AN OFF-THE-RECORD DISCUSSION WAS HELD.)

THE COURT: He's raising the request for -- my law clerk suggested requests for admissions that are corollary to that. We have Ms. Geist.

MS. GEIST: Your Honor, the parties had resolved those requests.

THE COURT: Okay. The requests for admissions are off the table.

MS. GEIST: And I apologize if that wasn't clear from the papers.

THE COURT: Okay. Better to know that on the record than to have any confusion about it on May, the week of May 14. And we'll see where we are, but we're going to keep moving.

MS. KRAFT: And just to be clear, this order pertains to the narrowed-down list of --

THE COURT: Right. To the bellwether cases that are in the hopper now. We're not talking about a global reach. We're talking about the cases that we are preparing for trial.

MS. GEIST: That's agreeable to us, Your Honor.

MR. DENTON: You're talking about the seven cases in the trial docket.

THE COURT: Correct.

MS. GEIST: I think there's eight.

THE COURT: Whatever it is, it's an objective fact.

MS. GEIST: Thank you, Your Honor.

THE COURT: All right. Thanks. Defendants' compliance with court order regarding supplementation of expert disclosures. Have we been over that, or is that something different?

MS. GEIST: It's the same, Your Honor.

THE COURT: Now we're going back into the sealed arena.

(A PORTION OF THE HEARING WAS ORDERED SEALED, AND THE FOLLOWING PROCEEDINGS CONTINUED AS FOLLOWS:)

THE COURT: So the next time we get together, what are folks' availability the week of May 14?

MR. BALL: We were thinking May 15.

MR. YOO: May 15. That's a Tuesday.

THE COURT: It is a Tuesday.

MR. YOO: I'm sorry, I'm sorry.

THE COURT: The 15th or the 16th work for me, and I will block the whole day so, if we have to, we will go through these documents one by one. So Melissa kind of needs to be here.

MR. DENTON: Might go quicker without her.

MS. GEIST: I'm not sure how to take that, Roger.

THE COURT: I don't know. Do you want to do it with Mr. Yoo?

MS. GEIST: Your Honor, I'll reach out to counsel in the case where we have depositions and try to move it. I'm sure I can.

THE COURT: Okay. If you want me to call them, I will.

MS. GEIST: Thank you, Judge. They are very nice.

THE COURT: All right. Ten o'clock on May 15?

MS. GEIST: Yes, Your Honor.

THE COURT: Anything further?

MR. BALL: No.

MR. DENTON: No thanks.

THE COURT: All right.

(PROCEEDINGS CONCLUDED AT 11:45 AM.)

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 47 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 17th day of April, 2012.

_____

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