

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
AUGUST 23, 2012

APPEARANCES

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

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

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

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

(Appearanced continued on Page 2)

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

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APPEARANCES CONTINUED

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

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(PROCEEDINGS STARTED AT 10:37 AM.)

THE COURT: Good morning. We're here this morning in the case styled *In Re: NuvaRing Products Liability Litigation*, 4:08-MD-1964. Would counsel make their appearances, please?

MS. KRAFT: Kristine Kraft, Your Honor, representing the plaintiffs.

MR. SHKOLNIK: Morning, Your Honor. Hunter Shkolnik on behalf of plaintiffs.

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

MR. BALL: Dan Ball for the defendants.

MR. STRAUSS: Steve Strauss for the defendants.

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

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

THE COURT: Very good. We're here today on a status conference.

So, Mr. Ball, what of the issues that were teed up for the Court today have been resolved?

MR. BALL: Number 2 on plaintiffs' agenda which involves the timing of filing responses to the Daubert briefs, the parties have agreed that both sides' responses to the Daubert briefs will now be filed on October 16, which is 14

1 days later than it would have been. That would make the reply
2 briefs due November 6.

3 THE COURT: All right. I'm going to do a flow of
4 consciousness discussion then. One of the open issues is a
5 schedule for motions for summary judgment.

6 MR. BALL: Yes. We've had discussions about that.

7 THE COURT: But you haven't reached a resolution of
8 that or --

9 MR. BALL: Well, I think we've -- I've had
10 discussions with Mr. Denton, and there's also been similar
11 discussions going on in New Jersey. And in the New Jersey
12 litigation at the suggestion of Judge Martinotti -- and I
13 think the parties have agreed to this, that it made sense to
14 deal with case-specific summary judgment motions first because
15 that might narrow issues and narrow cases and help with the
16 cases.

17 THE COURT: In the words of Judge Martinotti, "I'm
18 not going to reach" -- but in New Jersey it's not Daubert.
19 It's a different word.

20 MR. BALL: Kemp.

21 THE COURT: Kemp. "I'm not going to reach Kemp
22 motions until I resolve the summary judgment motions." Is
23 that a fair Cliff Notes version of his?

24 MR. BALL: Yes. And I've had a similar discussion
25 with Mr. Denton, and I will let Kris speak for him. I think

1 we are on the same page there. We need to deal with the
2 timing issue, but I think we're on the same page that it makes
3 sense to do summary judgment case specific first.

4 THE COURT: Mr. Yoo may not have been in New Jersey,
5 but I heard his voice when Judge Martinotti told me that the
6 defendants said, "Without a doubt, Judge, all of these cases
7 are going to go out on summary judgment."

8 MR. BALL: He was in New Jersey.

9 MR. YOO: That was me, Your Honor.

10 THE COURT: Well, we have got our respective roles
11 defined for us. And so his observation then was that we're
12 going to deal with the summary judgment motions before we get
13 to the Kemp/Daubert motions.

14 So having set a briefing schedule for the Daubert
15 motion begs the question about the briefing schedule for the
16 motions for summary judgment, and that may also beget other
17 questions about bringing the discovery in those cases to
18 closure, which I assume we have, but I'm sure there's always
19 loose ends that need to be dealt with.

20 MR. BALL: We think discovery has been completed in
21 all those cases, number one, and number two --

22 THE COURT: Well, you don't believe that in New
23 Jersey, because there are two experts in New Jersey you're
24 seeking more information about. Well, with "Dooling" or --

25 MR. BALL: Rosing and Lidegaard.

1 THE COURT: Rosing and Lidegaard. You're asking for
2 more discovery on those individuals.

3 MR. BALL: Those are not designated experts. Those
4 are people that have written articles --

5 THE COURT: Right.

6 MR. BALL: -- that the plaintiffs are relying upon.
7 And we're seeking discovery about the compensation and any
8 relationships they have with the plaintiffs on that.

9 THE COURT: That's still discovery, however you want
10 to define it; so it's not over.

11 MR. BALL: The case specific is over, is what I meant
12 to say. So our proposal was that --

13 THE COURT: I didn't mean to make it more
14 complicated, but obviously if we're going to have the same
15 view, world view, that summary judgment needs to be addressed,
16 I mean, let's suppose hypothetically that everybody goes out
17 on statute of limitations issues for some reason or there are
18 other issues that result in summary judgment. I think Judge
19 Martinotti may be right that you don't borrow trouble. Why
20 reach -- and maybe the other parties wouldn't want us to reach
21 the expert issues if their case really wasn't one that was
22 going to withstand scrutiny in the first place.

23 So doing the Daubert -- the point is, doing the
24 Daubert schedule, we need to do the summary judgment motions
25 schedule. Are we in a position to have that discussion?

1 MR. BALL: We have proposed to the plaintiffs a
2 tentative schedule, and this is what we've proposed. We've
3 proposed that we file the case-specific summary judgment
4 motions on the eight cases in the trial pool by October 31;
5 that the plaintiffs file responses by December 15; and that we
6 file our replies by January 7 so that they would be ripe with
7 the court in January.

8 THE COURT: Then you're going to trial in New Jersey
9 in February.

10 MR. BALL: Although there have been discussions among
11 the parties that that may well slip.

12 THE COURT: I was looking forward to 2014 as a
13 NuvaRing-free year, but that's why we're here, to figure out
14 how we get there.

15 Ms. Kraft seems anxious. Mr. Shkolnik is more
16 anxious.

17 MR. SHKOLNIK: Your Honor, I think there's a
18 fundamental difference here with the defendants. As to the
19 motions, we agree that summary judgment issues should be dealt
20 with. We think that the Daubert and summary judgment can be
21 done together.

22 THE COURT: I mean, that's possible. I just know
23 that we don't need to have them totally -- that's why I need
24 the summary judgment schedule. I mean, there's no reason to
25 do them in isolation of each other. There may be overlap.

1 MR. SHKOLNIK: I think some of them this may be -- to
2 look at it as two different completely -- if it's statute of
3 limitations, we understand that's a separate issue.

4 THE COURT: That's a discrete, unique.

5 MR. SHKOLNIK: But if we're talking about the
6 substance of the case and the experts, it's so intertwined,
7 and at this point there seems to be no reason not to file them
8 at the same time.

9 THE COURT: It's a little late for that, isn't it?

10 MR. SHKOLNIK: I think we could probably pick up the
11 schedule and do that.

12 THE COURT: So you're suggesting that the motions
13 should be filed before October 31.

14 MR. SHKOLNIK: I think so, yeah.

15 MR. BALL: You just now requested more days to
16 respond to the Daubert motions that are out there. It seems a
17 little inconsistent here that we're pushing on one, pushing
18 back your obligations and moving up our obligations.

19 THE COURT: Well, let's define that. That's why I'm
20 here. We'll decide, and we'll figure it out.

21 Yes, sir?

22 MR. YOO: Your Honor, the summary judgment motions
23 are due in New Jersey by September 24. That's pursuant to an
24 order Judge Martinotti put in place months ago. So we have
25 been working toward that. The issue of setting a briefing

1 schedule for the summary judgment motions in the MDL has only
2 recently come up. And we think, given everything that's going
3 on, given the amount of time that's been allotted to both
4 sides on the briefing that's already been ordered, we think
5 the October deadline for summary judgment motions in the MDL
6 case is reasonable.

7 THE COURT: What about case-specific Daubert motions?
8 Right now we're dealing with generic -- "generic" is the wrong
9 word -- global.

10 MR. BALL: We were having -- our proposal to the
11 plaintiffs that we discussed was having those filed November
12 30, responses January 15, and replies by February 5. Again,
13 this was -- this is done in some degree with our knowledge of
14 the other things that we're having to brief, the other papers
15 that have to be --

16 THE COURT: When are the Kemp-specific Daubert
17 motions -- Kemp-specific motions in New Jersey due?

18 MR. BALL: They're due like next month.

19 THE COURT: So why can't we do case-specific motions
20 on the same track? I mean, by pushing that reply brief off to
21 February, I mean, honestly, you know, when I took the bench
22 today --

23 MR. BALL: We can do that.

24 THE COURT: If Judge Martinotti was taking a case out
25 in February and you all told him it will take a month to try,

1 and I told him he should have told you two weeks, like I did,
2 but --

3 MR. SHKOLNIK: We like two weeks.

4 THE COURT: I mean, as I told you all before in the
5 Vioxx cases, they tried a number of them, and they managed to
6 get them down to about a two-week trial schedule. We'll have
7 to see how the first couple go before we figure out where we
8 can streamline the cases, but we don't want to spend eternity
9 together either.

10 MR. BALL: We can do the case-specific Daubert on the
11 same October 31 schedule as the summary judgment.

12 MR. YOO: Yeah.

13 THE COURT: But my point was, is that if you're going
14 to go to trial in February, I don't expect you to get on a
15 plane and come here and start a case the next week, but it
16 would be within a month, you know, that we start going on a
17 staggered schedule. I assume you all kind of had some
18 thoughts on that.

19 MR. YOO: Your Honor, I think looking at the way
20 things are shaping up both with the briefing schedule, Judge
21 Martinotti's desire to do the summary judgment hearings before
22 Kemp, our belief that Your Honor and Judge Martinotti should
23 still coordinate the Daubert/Kemp issues in a joint
24 proceeding, and further, some communications we've had
25 recently with plaintiffs' counsel about the New Jersey trial

1 date, I think that February date is going to slip. So if it
2 slips by a month or two, that's something that we'll need to
3 consider.

4 From my perspective, I think what's important in
5 setting a schedule here is we get some dates in place for the
6 filing of the summary judgment motions here. We believe those
7 should be heard by Your Honor before we get to the generic
8 Daubert/Kemp issues, and the Daubert/Kemp issues should be
9 coordinated in the two proceedings.

10 So as to case-specific Daubert challenges as Mr. Ball
11 indicated, we'd be able to file those concurrent with the
12 deadline for summary judgment if that deadline is October 31.

13 MS. KRAFT: Thank you. Your Honor, if I may, I think
14 that in the MDL proceedings we need to first set a trial date
15 and then work backwards in terms of setting deadlines for
16 summary judgment and case-specific Daubert motions and --

17 THE COURT: But that doesn't really work, because if
18 I said March, that means that everything would have to be
19 briefed before me before the first of December, and that's not
20 realistic for anybody.

21 MS. KRAFT: Right. We would propose April as a first
22 trial date. We would like to get on the calendar three firm
23 trial dates so that --

24 THE COURT: But do you disagree with Mr. Yoo that
25 that February setting in New Jersey is in peril?

1 MR. SHKOLNIK: Your Honor, we don't think months, if
2 that's the suggestion.

3 THE COURT: No. But you all have obviously talked
4 about how you're going to do this. Are you planning on trying
5 cases simultaneously in Missouri and New Jersey?

6 MR. BALL: We're not.

7 MR. SHKOLNIK: Your Honor, we're not saying
8 simultaneously, but as the Court said, not the following day,
9 but we should be able to stagger these.

10 THE COURT: Let me tell you what I'm going to end up
11 doing today. I'm going to set a trial date in April, but
12 understand that Judge Martinotti and I are not going to work
13 against each other, and if the February date moves, obviously
14 we're going to move, but I want to at least have a place to
15 work from. You know, here's our benchmark, and then here is
16 how if New Jersey moves, obviously Missouri moves, you know,
17 in coordination with whatever is worked out there. We're
18 going to work together. We're not going to work against each
19 other.

20 MR. BALL: May I?

21 THE COURT: But we're going to have a place saver, if
22 you will.

23 MR. BALL: May I speak to the April setting, Your
24 Honor?

25 THE COURT: Yeah.

1 MR. BALL: I've told this -- everybody else in the
2 room knows this. I'm undergoing some treatment now for
3 cancer, and I had to move some trial settings that were
4 scheduled for this year. One of them is a big case set in
5 April that was supposed to be going on now. So I have told
6 that to Mr. Denton. I have respectfully requested that the
7 trial be set, the first trial here be set in June as a result
8 of that because I had to --

9 THE COURT: But you forgot about me.

10 MR. BALL: I did. I did. I was just saying that
11 that's what I suggested, was going to suggest to you, and that
12 was the reason why April wouldn't work, in addition to the
13 fact that we believe that there is a high likelihood that the
14 New Jersey case will be moved to March, which would, you know,
15 butting them right up against each other.

16 THE COURT: My instinct -- I mean, you know my
17 mantra: Don't treat this case any different than you would
18 any other case -- is to set it in April and let's see where we
19 are. I mean, that creates anxiety on your part in some piece,
20 but on the other hand, if we don't set and we don't move from
21 there, then we'll talk about June. Then suddenly it will be
22 August or September. I just need a place holder here. And if
23 your case goes to trial -- who is it in front of?

24 MR. BALL: It's in Jefferson City, in state court.

25 THE COURT: Well, I set ten civil cases at a time on

1 the same docket. If I was afraid to do that, I would never
2 get anything done; so we will just have to see. You're
3 assuming that that case will actually go in April. A lot
4 could change. Obviously, if at some point somebody's not
5 available, we'll have to deal with it, but the MDL is too big
6 to -- if I worked around everybody's schedule, I wouldn't get
7 anything done, you know. And April is a long, long way away.
8 It's more than half a year. We'll figure it out.

9 MR. BALL: I've said my piece.

10 THE COURT: Yeah. I just have to start somewhere,
11 and we'll go --

12 MR. BALL: Would you do May?

13 MR. SHKOLNIK: We understand Mr. Ball's situation.
14 If we keep the April, at least we slip the month in New Jersey
15 we have the May. So we should be --

16 THE COURT: I'm going to have to clear out, I
17 understand, at least three to four weeks at a time, right?

18 MR. YOO: We think if the trial date in New Jersey
19 slips to March, and it looks like it probably will --

20 THE COURT: Then we're going to slip here for sure.

21 MR. YOO: But in terms of a place holder -- and I
22 appreciate Your Honor's desire to set a place holder date --
23 if we can set it in May or June, that would make a lot of
24 things more manageable for us.

25 MR. SHKOLNIK: We don't think June is reasonable at

1 all.

2 THE COURT: June is a train wreck for me, I'll just
3 be honest. May, I will do a place holder in May, and we'll
4 see where we are.

5 MS. KRAFT: We can do the first week of May or second
6 week of May.

7 THE COURT: My other problem is, I assume Martinotti
8 doesn't have this problem, but there are people who haven't
9 committed crimes yet that will get indicted that will have a
10 Speedy Trial Act issue. I always -- I take my -- the first
11 week of the month is my criminal week, and I set all my
12 criminal cases; so I just kind of compartmentalize them there.
13 And then the last three weeks I leave open for civil.

14 That's the only issue I have, is if I run up against
15 a Speedy Trial Act issue with a criminal case, I obviously got
16 to deal with the criminal case, not that we can't manage it.
17 I mean, the chances -- the U.S. Attorney doesn't tend to
18 indict people that -- they have a pretty good case against --

19 MR. BALL: Understand.

20 THE COURT: Although I just finished a week-long
21 cocaine trial here this week. It's nice to talk to people who
22 speak in English.

23 MS. KRAFT: If I may, while we're on trial settings?

24 THE COURT: Yeah.

25 MS. KRAFT: We believe it's very important to set an

1 additional two trial settings, particularly given even the
2 discussion we're having right now about difficulty in
3 scheduling and given the length of the trials.

4 THE COURT: Were you thinking that this was a
5 four-month cycle? You know, when I set a case, say, May, that
6 then I do another one in four months because in two months
7 you're going to be back in New Jersey? Had you thought about
8 the hopscotch effect, or how were you contemplating it?

9 MS. KRAFT: We would propose every other month in the
10 MDL, and would like to see the MDL -- with the first trial
11 setting we had had state courts kind of around, you know, the
12 country that are looking at when these trial settings are
13 going to be set or we feel that they will be looking at when
14 these trials are going to be set here and to sort of build
15 around that. So we would propose if we are going --

16 THE COURT: What other states are in play other than
17 Judge Martinotti's case?

18 MR. YOO: There's --

19 MR. STRAUSS: Your Honor, the real state in play is
20 Illinois, Cook County, before Judge Flanagan.

21 MR. BALL: One case.

22 MR. STRAUSS: And that case is likely to be, based on
23 the earlier discussions, would be a late summer window. So
24 there can't be another case here in four months after May
25 because that likely --

1 THE COURT: Then it will be three. That's okay. I
2 mean --

3 MR. YOO: Your Honor --

4 MR. SHKOLNIK: I think that Mr. Denton has a
5 different view on what's going to happen in Chicago, and I
6 think the judge in Chicago will have a different view, but I
7 don't want to talk for the judge or Mr. Denton on that one.

8 THE COURT: Well, you know, again it creates problems
9 for you guys because I set these dates, but you've dealt with
10 me enough to know that I am not going to force you to try two
11 cases at the same time. And I have to figure out a way to
12 work with these state judges because I assume you're going to
13 use the same experts, it's largely going to be the same trial
14 counsel, and I'm not going to create problems that can't be
15 managed.

16 MR. YOO: Your Honor, I think as Your Honor observed,
17 May is many months from now. We'll have many opportunities to
18 talk about further trial settings. We've got the summary
19 judgment motions that need to be heard, the Daubert challenges
20 that need to be dealt with. I think Judge Martinotti hasn't
21 set a second trial yet. I think setting a second trial there
22 and a second trial here is something that will require some
23 coordination.

24 But my point is, there are a lot of things that are
25 going to need to happen in the interim, and we've got time to

1 deal with that; so I don't think that we should go through
2 sort of an artificial exercise of laying out a bunch of place
3 holders which then all may need to get moved.

4 THE COURT: I think the logical thing to do is, I
5 will set the first case here for May 6. Give me some time to
6 talk to Judge Martinotti and see if we can't include -- you
7 let me know if there's anybody else we should be talking to,
8 you know, and then let's get them so we can coordinate a trial
9 schedule.

10 MR. BALL: So can we represent --

11 THE COURT: But next time we get together start
12 plotting out so that -- you know, if you don't, it won't
13 happen, which would be Ms. Kraft's point. And I agree with
14 that, and everybody needs to be on notice.

15 MS. KRAFT: Right. The longer we wait, the longer or
16 the more opportunity there is going to be for conflicts, so we
17 would really --

18 THE COURT: My job is to try to manage those
19 conflicts, though.

20 MS. KRAFT: Yeah.

21 MR. SHKOLNIK: Your Honor, we just -- just so you
22 understand our perspective here, it's with the MDL taking the
23 affirmative lead and saying these are going to be the trials,
24 the states will slip into those months in between; so if we
25 did --

1 THE COURT: Well, let me talk to the states.

2 MR. SHKOLNIK: I understand.

3 THE COURT: The Tenth Amendment, you know. Those
4 powers not specifically given to the federal government remain
5 with the states.

6 MR. SHKOLNIK: I don't see too many New Jersey trials
7 going into next summer. I don't think they have the same kind
8 of resources. We're prepared to just stack the cases.

9 THE COURT: Let me talk to Judge Martinotti, not let
10 me presume anything, not let me tell him anything. Let me
11 talk to him and we'll go from there. But you've got May, and
12 you know, in the next few months we'll do this. It's not like
13 I'm going to wait until January or February to talk about it.
14 Our next status conference one of the topics will be the
15 serial trial settings that follow.

16 MR. BALL: Okay.

17 MR. YOO: Thank you, Your Honor.

18 THE COURT: Yes, ma'am.

19 MS. KRAFT: I wonder --

20 THE COURT: Let's step up to the podium.

21 MS. KRAFT: We kind of got off track a little bit.

22 We were talking about the deadlines for summary judgment
23 motions and case-specific Daubert briefing. What we would
24 propose then is to come up with a mechanism by which we
25 identify the first three cases to be set for trial in the MDL

1 and brief those cases as opposed to at this particular point
2 in time, you know, all --

3 THE COURT: Have you all discussed which -- that idea
4 amongst yourselves?

5 MR. BALL: I had not. This is the first I had heard
6 of that.

7 MS. KRAFT: Yeah. We just simply put it on our
8 agenda to select three cases and to go through the process.

9 MR. BALL: But I didn't know we were going to limit
10 the summary judgment --

11 MR. YOO: Yeah. We've had no such discussion, and we
12 certainly have no such agreement. In New Jersey we were
13 filing summary judgment motions in all of the bellwether
14 cases. One of the objectives there is to see which case
15 survives. And so to limit it to three preselected --

16 THE COURT: Because none will survive.

17 MR. YOO: None will survive. But to limit it to the
18 three preselected cases, we don't think that that serves the
19 case management objectives here. We think that we should
20 proceed with an opportunity to file summary judgment in all
21 eight cases, and those case-specific issues should be dealt
22 with and resolved, and then we see what are the remaining
23 issues, if any, for the rest of the bellwether pool.

24 THE COURT: Ms. Kraft, what are you thinking? Why
25 did you make that recommendation?

1 MR. SHKOLNIK: Your Honor, I think one of the issues
2 here is we don't have any agreement by the defendants to waive
3 Lexecon on all the cases. It appears that they are trying to
4 make the motions across the board -- or nine cases, eight or
5 nine cases, eight cases. They want to make the motions across
6 the board, then they'll decide which ones they'll waive
7 Lexecon on, and then they'll pick the trial.

8 Let's have them -- right now I understand there's
9 only Lexecon issue -- there are no Lexecon issues in some.
10 Defendants and plaintiffs picked a couple of cases together.

11 THE COURT: You picked Guthrie and Prather. You both
12 picked those.

13 MR. SHKOLNIK: So why aren't we just focusing on
14 those, unless defendants now are saying they're waiving
15 Lexecon across the board and they're not going to selectively
16 decide which ones they'll waive after summary judgment
17 motions, maybe knock out a couple. It really puts us in a
18 really --

19 THE COURT: You know what's not really helpful,
20 thinking globally, not about either party here, when you look
21 at the eight -- the two that you both picked are the only two
22 of the eight that are not initially filed in New Jersey.
23 We're going to get a look at what a New Jersey jury does with
24 one of these cases, more than one look perhaps. The Prather
25 case initiated here, it's the easiest one obviously. The

1 other, the Guthrie case, was Alabama.

2 MR. BALL: Colorado. She lives in Alabama now, but
3 it all happened in Colorado.

4 THE COURT: So the cause of action came out of
5 District of Colorado?

6 MR. BALL: I don't know where --

7 MR. SHKOLNIK: No. I think it was filed --

8 MR. BALL: I don't know where it was initially filed.

9 THE COURT: But all the others I have on my list came
10 out of New Jersey, you know; so when I think about the value
11 of the bellwether trials, you know, trying a New Jersey case
12 here isn't as helpful as trying a Missouri case, a
13 Colorado/Alabama case, you know, where we're getting a look at
14 what the outcomes are in these cases to give you any help in
15 deciding how to go forward. But that train already left the
16 station, though.

17 MR. SHKOLNIK: From our standpoint, Your Honor, it's
18 just hard unless the defendants are going to waive Lexecon on
19 all the eight cases. Otherwise, we should focus on the ones
20 we are going to try, where there's going to either be a waiver
21 or it's an original jurisdiction here, and we're not sitting
22 back and waiting for the outcome of summary judgment and the
23 defendant picks the cases that they want to try.

24 MR. BALL: The thing about this, Your Honor, just for
25 a second, if we do it that way, let's just assume we pick

1 three cases. We file summary judgment. Let's assume we win
2 those. Then we have to start all over on three more cases or
3 five cases or whatever it is on summary judgment.

4 Our goal was to get all that sorted out because we
5 think we have really -- you know, I'm sure everybody says
6 this, but we think we have very strong summary judgment
7 motions, and we might as well get that sorted out and see
8 which of these eight, if any, are going to try.

9 THE COURT: When you think about your summary
10 judgment motions, let's think about bellwether, do they fall
11 in certain categories?

12 MR. BALL: Causation is a big deal in all of them.

13 THE COURT: So do you need to make that point in
14 eight cases, I mean, to get a sense of how the court's going
15 to rule? I mean, that would be the point. If that causation
16 issue falls apart based on the facts of a case, why aren't we
17 looking at cases that give us a signal? Because we're not
18 going to do 900 summary judgment motions here. So why would
19 we do eight if they're all the same?

20 MS. KRAFT: Right.

21 THE COURT: Do you follow me? I'm just trying to
22 figure out my time, your resources, my resources.

23 MR. BALL: Understand. I was trying to address the
24 issue.

25 THE COURT: Because I'm not going to, if the theme --

1 and I don't know enough because you guys live with this
2 obviously a lot more than I do, but if the template for that
3 summary motion judgment on causation is consistent in eight
4 cases, you don't need to do it eight times to understand what
5 I'm going to do with the first one. But they may not be
6 sufficiently consistent for you to say that. I don't know.

7 MR. YOO: I think our general arguments are going to
8 be consistent: Warnings, causation.

9 THE COURT: You're going to have specific facts.

10 MR. YOO: But the testimony is going to be a little
11 bit different, and the applicable law may be a little bit
12 different from case to case; so I don't think it's as easy as
13 getting one or two rulings and then --

14 THE COURT: But why don't we pick four?

15 MR. YOO: Well, I think --

16 THE COURT: Because all of them -- you've got --
17 they're from three different states. It is the Middle
18 District of Alabama, it's the Eastern District of Missouri,
19 and then the District of New Jersey. You know, why don't we
20 pick two New Jersey cases and the Alabama case and the
21 Missouri case and let's do those, and then you'll get an
22 understanding of where these are going?

23 MS. KRAFT: Right.

24 THE COURT: Somebody will take a lot from whatever I
25 say.

1 MR. YOO: Our preference, Your Honor, would be to
2 have -- we're not talking about filing thirty motions. We're
3 talking about eight. We think that's manageable.

4 THE COURT: How many are you doing in New Jersey?

5 MR. YOO: We are filing ten motions in New Jersey.

6 MR. BALL: All ten trial pool cases.

7 MR. YOO: All ten trial pool cases. So those are all
8 going to be considered by Judge Martinotti around the same
9 time.

10 THE COURT: But will one decision beget the other
11 nine?

12 MR. YOO: Not necessarily. I can't say that across
13 the board. I think there will be some overlap, but our goal
14 is, and consistent with Judge Martinotti's view, is: I want
15 to see which cases survive, and so I want to take up your
16 case-specific dispositive challenges first, and then if I need
17 to get to Kemp, I'll get to Kemp. We think that rationale
18 should apply here as well.

19 THE COURT: If we can do four, why can't we do eight?

20 MR. SHKOLNIK: Your Honor, let me just respond to
21 what counsel just said. There is a fundamental difference
22 between here and New Jersey. Judge Martinotti will try every
23 case without a waiver of a Lexecon-type issue. Those cases
24 are there for every -- for all purposes. They're not going
25 anywhere.

1 THE COURT: Right. You're going to kill Judge
2 Martinotti.

3 MR. SHKOLNIK: Well, he's already -- the ten is after
4 the last -- I don't know if you read the transcript, he's --
5 yeah, he's got quite a bit on his plate, to put it mildly.

6 But the difference here is, the defendants -- it's
7 the point I was trying to make. If you want to do more
8 motions, waive Lexecon. Tell us you're doing that. In New
9 Jersey we don't have that problem. Whatever is left, the
10 judge will try whatever is left.

11 Here they would like to see what's left on the table,
12 if anything, or if everything, and then say, all right, we'll
13 waive it in the two cases.

14 THE COURT: Have you waived Lexecon for the trial
15 pool cases?

16 MR. YOO: Your Honor, I'm not really following Mr.
17 Shkolnik's argument. I don't see what one has to do with the
18 other, but I will say this for the record. There is an order,
19 a stipulation of the parties already in place before Your
20 Honor that says -- I'm paraphrasing -- but that says the
21 Prather case and two others will be tried here and the parties
22 have agreed to waive Lexecon. So essentially in the first
23 three trials before Your Honor Lexecon is waived.

24 THE COURT: We just don't know which those other two
25 cases.

1 MR. YOO: We don't know. But the defendants, as they
2 would be provided in any single case, need to have an
3 opportunity to make their dispositive challenge. And if, and
4 only if, the case survives our legal challenge based on the
5 undisputed facts in the case should there be a trial. So we
6 think that should be done across all eight cases, and then the
7 cases, if any, that deserve a trial will then be identified
8 through that process. And the first three trials will occur
9 here.

10 MR. SHKOLNIK: Your Honor, counsel still has not
11 said -- we're still in the same -- they get to pick what two
12 cases they decide to waive Lexecon on. Tell us the cases
13 today that across the board that anyone that's left.

14 THE COURT: Are you prepared to waive Lexecon on all
15 eight?

16 MR. YOO: Your Honor, we've waived Lexecon as to the
17 first three trials.

18 THE COURT: I understand what you said, but let's
19 suppose that they all withstand a motion for summary judgment.
20 What's the process by which we pick the other two beyond
21 Prather?

22 MR. BALL: We haven't decided that yet.

23 MS. KRAFT: Right. And that's what we wanted to
24 propose and go through today, which is that we come up with a
25 selection process for the first three cases, we select one

1 case, the defendant selects one case. And then to the extent
2 that these dual picked cases of Prather and Guthrie are left
3 over, then, you know, one of those cases go.

4 THE COURT: Well, Prather is the only one in which I
5 have jurisdiction.

6 MS. KRAFT: Right. And they've agreed to waive
7 Lexecon as to two others but --

8 THE COURT: Right. We don't know which two. That's
9 why I just asked: Were they willing to waive it? Depending
10 on what the outcome is, were they prepared to try any one of
11 these eight cases, or are you going to hold in your back
12 pocket this pocket veto that, well, they all survive, but we
13 really don't want to try that one, that one, or that one; so
14 here are the two we're willing to waive on?

15 MR. YOO: Your Honor, we've already waived Lexecon as
16 to the first three trials.

17 THE COURT: I understand. But which of the --

18 MR. YOO: Right.

19 THE COURT: Three trials. But we have eight cases.

20 MR. YOO: Right. So the selection of what is an
21 appropriate bellwether, we believe, is a separate discussion
22 that should consider fairness to both sides,
23 representativeness, what are the dispositive issues in that
24 case, et cetera.

25 THE COURT: But what I heard from Ms. Kraft was,

1 Prather is going to be one of them because it's one we know I
2 can try no matter what. There's another 14 out there that are
3 EDMO cases, but they're not in this pool. And after summary
4 judgment, the dust settles, whatever is still there, they pick
5 one and you pick one, but you don't have the veto over their
6 pick by refusing to waive Lexecon. That's kind of where we
7 are.

8 That's what she's saying out loud, if I -- of these
9 eight. We're not asking as to any other group, but out of
10 these eight, you won't use the failure to waive Lexecon as a
11 veto over their selection.

12 MR. BALL: We have committed to waive Lexecon on the
13 two cases, whatever the next two are, by the case selection
14 process.

15 THE COURT: And if they pick -- whichever one of
16 these eight they pick, you're not going to -- because right
17 now you have a veto power over them.

18 MR. SHKOLNIK: That's the problem.

19 MS. KRAFT: That's exactly --

20 THE COURT: But if you're prepared to say you're not
21 going to do it that way.

22 MR. YOO: I think if I'm understanding correctly,
23 we're not going to do it that way.

24 THE COURT: Prather is going to be one.

25 MR. YOO: Prather should be --

1 THE COURT: You'll pick one, and they'll pick one,
2 but you're not going to use the failure to waive Lexecon as a
3 veto over their selection.

4 MR. YOO: That's correct.

5 THE COURT: Out of these eight.

6 MR. YOO: That's correct.

7 THE COURT: So we're in agreement.

8 MR. SHKOLNIK: That's a big agreement that just came
9 out of that.

10 THE COURT: But they're not conceding that the other
11 five they'll waive on, because they've only agreed to waive it
12 as to -- well, you don't need to waive it as to one of the
13 three.

14 MR. SHKOLNIK: Our concern was if we pick our trial
15 case, that all of a sudden, like you're saying, a pocket veto
16 saying, well --

17 THE COURT: But they've said no. But they've said
18 no. They'll waive as to the first three, but they're not
19 going to use it as a shield amongst any one you pick.

20 MR. YOO: Right. So therefore, Your Honor, we think
21 that summary judgment should be allowed to be filed in all
22 eight.

23 THE COURT: I think that's where we are. I know it's
24 onerous, I know it's difficult, but nothing about this has
25 been easy; so we are going to brief all eight.

1 MS. KRAFT: Could I just make one point, because I've
2 been trying to talk?

3 THE COURT: Yes, ma'am.

4 MS. KRAFT: With respect to the eight, though, I
5 mean --

6 THE COURT: You're such a weak person, that you're
7 failure to talk is just so obvious.

8 MS. KRAFT: I'm just not interrupting people.

9 THE COURT: Apparently, that's the point.

10 MS. KRAFT: I think "Ms. Kraft" has been "Hunter" on
11 the record about three times now, no offense.

12 All right. With respect to the summary judgment --

13 THE COURT: Bless your little heart, as they would
14 say in the South.

15 MS. KRAFT: I want to go back to briefing the first
16 three cases that are selected for trial, and these other cases
17 can, in fact, be dealt with on a rolling basis, for example,
18 with respect to filing summary judgment motions in the
19 case-specific Dauberts.

20 THE COURT: You're assuming an outcome in your favor
21 which we can't necessarily assume.

22 MS. KRAFT: No. I'm not assuming that, because we
23 can come up with a rolling basis for filing the other summary
24 judgment motions and case-specific Daubert challenges and not
25 wait until, you know, May when the first trial occurs. And

1 this will also help the Court because it could potentially
2 slow down the system here because you're going to have a large
3 number of briefs.

4 THE COURT: You'd feel better if you did four in
5 October 31 and four the end of November?

6 MS. KRAFT: I'm proposing some sort of stair step to
7 this process, yes. I mean that -- but I would propose more
8 like October 1 or October 14 for summary judgment.

9 THE COURT: I'm not going to -- we're kind of headed
10 to the end of October because you have nine due the end of
11 September in New Jersey. If you can do nine, if you can do
12 the nine the end of September in New Jersey and be ready to do
13 four here the middle of October, then you can do all eight the
14 end of October. So you got to tell me -- do you follow me?

15 As a practical response to that argument, if you're
16 prepared to do nine summary judgment motions in New Jersey and
17 you're ready to turn around and do several here in the middle
18 of October, you can do all of it by the end of October.

19 So if you want to stair step them, I'm going to give
20 everybody a month off of briefing before you have to file them
21 here. The only issue is whether you can do all eight here
22 after having done nine in New Jersey or you want four October
23 31 and four the end of November.

24 MR. YOO: The October 31 day we propose is for us to
25 get our motions filed. Plaintiffs under our proposal would

1 have till middle of December to file oppositions. I would
2 remind everyone that the bellwether cases are represented by
3 different plaintiff firms, and so it's not like Ms. Kraft has
4 to write eight oppositions herself.

5 Plus, I find this request inconsistent with their
6 desire to get a trial date set, multiple trials set and move
7 this along, to do this wait and see and maybe have to start
8 all over process.

9 And as a final point, I go back to our view that to
10 the extent possible, there should be coordination between Your
11 Honor and Judge Martinotti. So if Judge Martinotti wants to
12 see what cases survive and see which of the Kemp motions are
13 actually ripe and relevant, I think Your Honor should be in
14 the same position and not be wondering, well, we decided
15 summary judgment on four, but I don't know as to the other
16 four whether these Daubert issues are going to be dispositive
17 of those cases or not. I think we should, to the extent
18 possible, move in lock step in that regard.

19 MS. KRAFT: I mean, I don't think we're talking about
20 a big difference in timing, and it's not going to affect the
21 trial settings, you know, in May and whatever the Court
22 decides thereafter. We have one firm here in the MDL that
23 represents six of the plaintiffs, and that same firm
24 represents almost all ten -- or I'm not sure. Mr. Shkolnik
25 can --

1 MR. SHKOLNIK: Most.

2 MS. KRAFT: But the majority of them. And it's just
3 simply just a bit of a stair step which I would think may help
4 the Court as well in addressing the motions, but I've made my
5 argument.

6 THE COURT: I'm going to go ahead and stick with all
7 eight by October 31. Responses due December 15. Reply briefs
8 due January 7. After having done the exercise in New Jersey,
9 actually we'll benefit a little bit from that. You're not
10 going to be surprised by the arguments. You'll be in a
11 position to deal with this a lot better than if we were first
12 out of the gate. So I'm not too concerned about the burden.
13 All right.

14 MS. KRAFT: Thank you.

15 MR. SHKOLNIK: Thank you.

16 MR. BALL: Your Honor, on the case in Cook County
17 which is being handled now by Judge Flanagan --

18 THE COURT: One case. Really. I mean, we're going
19 to let that drive all this?

20 MR. BALL: Yeah. Can we ask her to -- could we ask
21 her to expect a call from you or be in contact with you?

22 THE COURT: If you give me her information, I'm happy
23 to call her.

24 MR. STRAUSS: Because earlier you said if there's
25 anyone else for me to coordinate with or for us to coordinate

1 with, I will just tell you if you -- when you are speaking
2 with Judge Martinotti, we are going before Judge Flanagan on
3 September 6. So if she had some knowledge of the game plan,
4 that would at least let her know what the playing field is.

5 THE COURT: Well, I assume you've been giving her our
6 scheduling orders.

7 MR. STRAUSS: We have been updating her on everything
8 that goes on here and in New Jersey.

9 THE COURT: Well, give me her contact information,
10 and I'm happy to talk to her.

11 MR. STRAUSS: All right. Thank you.

12 THE COURT: I assume there's no objection to that on
13 behalf of the plaintiffs.

14 MR. SHKOLNIK: No, Your Honor.

15 MS. KRAFT: No, Your Honor.

16 THE COURT: I would never call another judge in
17 another case without everybody agreeing, you understand that.

18 So we have the global Daubert motions, the
19 case-specific Daubert motions, the summary judgment motions.
20 Now, Judge Martinotti seemed to have formed the opinion, to
21 double-back a little bit, that you all told him that the
22 issues as to the authors of the articles upon which the
23 plaintiffs relied -- and their names escape me at the moment.

24 MR. BALL: Lidegaard and Rosing.

25 THE COURT: That he formed the opinion that someone

1 represented to him that those same motions were in front of
2 me, but I couldn't find anything to that effect.

3 MR. YOO: Your Honor, we did not file that motion in
4 this court. That dispute involves a rather unique set of
5 circumstances.

6 THE COURT: These are folks who are experts in the
7 Yaz litigation who also are --

8 MR. YOO: Folks in the Yaz litigation. And we know
9 there's a financial relationship between those at researchers
10 and the plaintiffs' firms that have -- in the NuvaRing
11 litigation that also have Yaz cases.

12 THE COURT: But there's nothing for me to reach here
13 because you haven't asked for --

14 MR. YOO: There's nothing for Your Honor. It also
15 relates to a specific representation that New Jersey counsel
16 made before Judge Martinotti in a prior hearing. Judge
17 Martinotti issued an order saying: I want you to put that
18 representation in writing. And so the motion was a motion to
19 compel that further act to occur; so it was a New
20 Jersey-specific issue on the procedural --

21 THE COURT: Judge Martinotti had formed the opinion
22 that it was an issue that overlapped both he and I.

23 MR. BALL: There may come a time when, Your Honor,
24 when that issue comes up again, but right now it's only
25 pending in New Jersey.

1 THE COURT: All right. Because I thought that would
2 help us a little bit.

3 MR. SHKOLNIK: Your Honor, I think the issue is the
4 similar demands that were made in New Jersey that were the
5 subject of the motion were also made in the MDL, but no motion
6 was made on those responses here. I think, if I'm not
7 mistaken, that's what occurred.

8 THE COURT: It's possible it will be filed here, but
9 it hasn't.

10 MR. SHKOLNIK: Yeah. It hasn't gotten to you.

11 MR. YOO: There's no motion.

12 THE COURT: That's the other mantra. You don't
13 borrow trouble. I have no trouble to borrow. Poor Judge
14 Martinotti has it. We still have this Mr. Suissa. Is that a
15 he or a she?

16 MR. YOO: It's a he. Dr. Samy Suissa.

17 THE COURT: Dr. Samy Suissa. Well, that's the way
18 Harry Carey would have pronounced it. Plaintiffs have a
19 motion to compel production of documents.

20 MS. KRAFT: Yes, Your Honor.

21 THE COURT: It's really about -- tell me what it's
22 about. Let me hear the argument. I have a little bit of an
23 opinion, but let me hear where you are.

24 MS. KRAFT: Dr. Suissa is a retained expert witness
25 by defendants on epidemiology. He has a long history with

1 Organon going back decades. He has done studies that Organon
2 has funded over the course of the years and has done a
3 reanalysis of a particular transnational study in
4 approximately 1998 where the study originally concluded that
5 third-generation progestin products similar to that used in
6 NuvaRing did, in fact, have a higher risk for venous
7 thrombotic events in comparison to second-generation products.
8 He then -- he participated in that study. He then received
9 funding from Organon and did a reanalysis of that data and
10 found that there was no risk.

11 He participated in a later study in 2000 that
12 likewise found there was no difference in risk between the
13 third- and second-generation products.

14 Aside from his affiliation in terms of receiving
15 funding and sort of a long history with Organon, he also has
16 had affiliations with other pharmaceutical companies. At the
17 time of his deposition as a retained expert witness in this
18 case on epidemiology-related issues, we, in fact, served him
19 with a subpoena duces tecum for the production of documents.
20 We are no longer requesting his actual deposition, that he
21 appear in person for a deposition, but we are, in fact, asking
22 for a series of documents that he produce from his file that
23 are, in fact, directly relevant to the issues in this case,
24 his potential bias or inconsistent statements, you know,
25 whatever there may be in this discovery that would be relevant

1 to us in the discovery phase to review.

2 And the nature of the request really can be broken
3 down into a couple of different topics. There are a
4 significant number of requests that relate directly to
5 NuvaRing and Organon, you know, such as meeting minutes,
6 e-mails, or other communications that he may have had with
7 Organon over the course of these years about NuvaRing, as well
8 as other hormonal contraceptives, you know, documents relating
9 to any payments or studies that he's done and perhaps didn't
10 complete over the course of the years in connection with his
11 dealings with Organon-related companies.

12 He's also known to have given, you know, a series of
13 presentations on hormonal contraceptives around the country.
14 We're seeking those types of presentations, PowerPoints,
15 things like that, all relevant to the issues in this case.

16 We're also seeking other categories of documents,
17 including communications that he's had with ZEG and
18 representatives of ZEG, which is the organization that is
19 conducting the TASC study, which is the epidemiology study
20 that Organon is conducting and has completed and will soon
21 publish the results that pertain directly to NuvaRing.

22 So similarly as a retained expert in this case, it's
23 our position that we're entitled to obtain discovery of those
24 documents. In contrast, the defendants are taking a very
25 narrow approach to the discovery and taking the position that

1 they're only obligated to disclose the categories of documents
2 that fall under Rule 26 with respect to expert disclosures.
3 Discovery isn't limited to only those particular types of
4 topics.

5 And similarly, I mean, you've received a copy of the
6 request for documents. We're also asking that he produce
7 other documents with other pharmaceutical companies regarding,
8 you know, his work or discussions that he's had about hormonal
9 contraceptives, documents that he's authored in that regard.

10 The defendants have presented an argument pertaining
11 to confidentiality and privilege. If that's the case, they
12 haven't provided a privilege log, which can, in fact, be a
13 waiver of asserting privilege here. But aside from that,
14 there's no way for us to really assess their claim of either
15 privilege or confidentiality in that regard without at least
16 requiring them to come forward and identify what they claim is
17 confidential.

18 So for these reasons, it's a properly served
19 subpoena. He is a Canadian citizen, but he was served in the
20 United States in the District of New York pursuant to a
21 properly issued subpoena. There is authority for that, that
22 he was properly served. And so we are simply requesting that
23 he respond to the subpoena for production of documents.

24 THE COURT: First of all, what time period are you
25 dealing with here? Any time I read a request that says "any

1 and all e-mails" or "any and all minutes," I mean, I just --
2 you already feel a sinking feeling that it's a little too
3 much.

4 MS. KRAFT: Well, we are asking for the period -- it
5 says "unless otherwise indicated, the documents pertain to the
6 period of 2001 to the present."

7 THE COURT: So ten years. All e-mails, all minutes,
8 all correspondence.

9 MS. KRAFT: Yeah. I mean, unless -- and I mean
10 again --

11 THE COURT: I'm just trying to figure out what
12 exactly you're looking for so I can help you, but I'm hard put
13 to tell them to get -- I mean, every e-mail for ten years,
14 that's pretty oppressive to an individual.

15 MS. KRAFT: In each instance the topic, you know,
16 pertaining to the e-mail, for example, is defined by
17 communications with Organon-affiliated companies about
18 hormonal contraceptives; so it is an isolated topic in each
19 instance.

20 But the time period, I mean unless otherwise stated
21 by the nature of the request, which can incorporate some of
22 these earlier studies that Dr. Suissa was involved in, which
23 again date back to the late 1990s, absent that, the request is
24 from 2001 through the present; so that is generally the time
25 frame that we're dealing with.

1 MR. YOO: Your Honor, this is a totally unjustified
2 request, and it's nothing more than a pure attempt to harass
3 one of our expert witnesses. Rule 26 governs. Furthermore,
4 there's a stipulated order from Your Honor that says Rule 26
5 governs and here is what can and cannot be requested of a
6 designated expert.

7 Dr. Suissa produced his files in this case pursuant
8 to plaintiffs' document request for his deposition, submitted
9 to a full day of deposition. The plaintiffs have not moved to
10 compel based on their document request. Instead, at the
11 conclusion of the deposition they handed him with a subpoena
12 asking for essentially any and all documents, e-mails,
13 PowerPoints, presentation notes, anything you've ever done
14 related to hormone contraceptives unrelated to NuvaRing for
15 anyone.

16 In the first instance, as a matter of principle, that
17 completely contravenes Rule 26 and the stipulated order of
18 this Court, and plaintiffs have no justification for it. Dr.
19 Suissa was involved in a couple of peer-review studies
20 published in '97 and 2000, I believe. It might have been '98.
21 He testified clearly: I don't have any documents related to
22 those studies from 15 years ago. He said that on the record,
23 and we have presented that evidence in our opposition.

24 He says: I don't keep things related to studies
25 beyond five years. That's always been the university policy,

1 and so I can tell you affirmatively I don't have anything
2 related to those studies.

3 And those studies have been in the peer-review
4 literature for over a decade. The plaintiffs' experts have
5 them. They've opined on them. Those documents, to the extent
6 they should be ordered produced, they don't exist; so that's a
7 done issue.

8 The plaintiffs' subpoena is indicative of maybe what
9 they're really after. Several of the specific requests say:
10 Give us all documents related to your consultation with Bayer
11 relating to their hormone contraceptives. He was not a
12 designated expert in Bayer. Apparently, he has some kind of a
13 consulting relationship with Bayer. He testified very clearly
14 that has nothing to do with NuvaRing; I'm bound by a
15 confidentiality agreement with regard to their proprietary
16 information; I'm not going to talk about anything related to
17 my consultation with a totally different company relating to a
18 totally different product.

19 If Ms. Kraft's office wants to do an end run around
20 the Bayer procedures and seek Bayer documents, that's
21 completely improper. They can seek Bayer documents from Bayer
22 through the Bayer litigation. It has nothing to do with
23 NuvaRing.

24 So as to the only documents that are arguably
25 relevant to NuvaRing, Dr. Suissa's reanalyses done in the

1 '90s, he's already testified those documents do not exist. As
2 to his litigation files that need to be produced pursuant to
3 this Court's order in Rule 26, they have been produced.

4 So in terms of PowerPoints and notes and anything
5 else relating to any hormone contraceptives for any work
6 you've ever done in that general subject matter area, that's
7 completely improper. There's no legal basis for it. And if
8 that kind of discovery is permitted as to Dr. Suissa, then
9 plaintiffs need to prepare for similar discovery as to any of
10 their experts. And this isn't a threat. It's just --

11 THE COURT: Well, it is a threat.

12 MR. YOO: Well, it reflects what -- the lack of
13 mutuality here. They are proposing to do something as to Dr.
14 Suissa that they would never agree to do with respect to their
15 other experts -- Parisian, Buncher, Levine. If we asked for
16 all of their notes, peer-review materials, editorials that
17 they've done, consultations they've done with regard to other
18 hormone contraceptives, they would never allow it. And yet
19 that's exactly what they're asking this Court to order as to
20 Dr. Suissa, and they completely ignore the rules that have
21 been in place from day one of expert discovery.

22 THE COURT: Ms. Kraft.

23 MR. SHKOLNIK: Your Honor, I just want to add one
24 point, and then I'll give it over to Ms. Kraft. Number one,
25 it's kind of interesting. The point the Court just asked

1 about before we went into this motion deals with a motion in
2 New Jersey related to discovery requests served on counsel in
3 New Jersey and here in the MDL for any communications with a
4 Dr. Rosing, who aren't even our experts in the case,
5 specifically asking us to produce anything we may have in our
6 possession, meaning the lawyers, that we obtained in the
7 Bayer -- in the Yaz litigation. It's kind of ironic now that
8 that counsel --

9 THE COURT: Well, that's why I asked about it because
10 I thought we could resolve this globally. Whatever it was
11 they were seeking about Yaz and you were seeking about Bayer,
12 let's figure out a way to do this with some common sense.

13 MR. SHKOLNIK: Well, first of all, here we're not
14 dealing with a service of a notice of discovery on a lawyer
15 for their files, which is, I think, a clear difference. Here
16 we're dealing with a witness who has lectured extensively,
17 recently appeared before the FDA on a hearing focused on
18 third-generation products. He was being paid for by Bayer at
19 that conference at the FDA. Any of those notes as part of
20 preparing for FDA proceedings have nothing to do with
21 protected communications. This is this expert's opinions on a
22 topic that's the center of this case, the safety of second-
23 versus third-generation products.

24 So Dr. Suissa has lectured on this, on this very
25 topic. Dr. Suissa appeared before FDA as a consultant on this

1 very topic. And statements of a expert witness on issues that
2 they are giving opinions on in the case are germane. Whether
3 or not he doesn't have something from the '90s may be one
4 thing, but whether -- it's completely different from whether
5 or not he has any information in his possession over the
6 conversations and presentations he's made no more than eight
7 months ago in December, in Washington, D.C.

8 These are very -- this goes to the heart of his
9 opinions, the safety of second- versus third-generation
10 hormonal contraceptives.

11 I know defendants are taking the position, well,
12 everything that Bayer did with this witness must be protected.
13 That's fine. Then don't put a witness up who's given
14 statements in public proceedings and has prepared PowerPoints
15 or presentations or assessments on the very topics that you
16 want him to testify here and then say, oh, no, we're not going
17 to make him produce that from his files.

18 And if there is such things or such documents that he
19 has that are privilege and protected, the law is clear.
20 Privilege log. That's something they should have done here.
21 Failure to do that is a waiver.

22 THE COURT: We're not going to make -- you
23 understand -- I understand the argument, but we're not going
24 to reach this on a failure to make a privilege log as a waiver
25 question.

1 MR. YOO: Your Honor, what Mr. Shkolnik just said is
2 completely untrue. Dr. Suissa did not present at the FDA
3 advisory committee. He testified that he attended, sat in the
4 audience, and observed. He gave no presentation to the FDA,
5 number one. Number two, it's incorrect to say that that
6 hearing had anything to do with second versus third
7 generation. That hearing had everything to do with Yaz, a
8 fourth-generation product. It had nothing to do with
9 NuvaRing.

10 And this idea of a privilege log, they're not my
11 documents. They're proprietary information described as such,
12 I guess, by Bayer. I don't know anything about that. But the
13 witness cannot be forced to breach his confidentiality
14 contract with a third party. So I have a problem with just
15 about everything Mr. Shkolnik just said.

16 THE COURT: At a minimum, I think I'd have to have
17 his counsel here.

18 MR. SHKOLNIK: Exactly, Your Honor. But that's the
19 problem with Merck's counsel making the argument for this
20 witness who's not done what's appropriate here and contested
21 the subpoena and put forward a privilege log if there is any
22 documents relevant. That's exactly it.

23 MR. YOO: This is completely opposite of what the
24 stipulated order and Rule 26 provided at the outset of expert
25 discovery.

1 MS. KRAFT: Your Honor, if I may, in certain respects
2 I think we are losing track of the focus of one of the primary
3 focuses of this subpoena, and that relates to NuvaRing and
4 Organon. The overwhelmingly majority of the requests goes to
5 that topic. And again, Dr. Suissa is somewhat of a unique
6 witness here because he has been this long-time consultant
7 over the decades focusing on second- and third-generation
8 products. You know, in that regard I just don't know how one
9 can argue it's not relevant to have this information.

10 You know, compensation that Organon has paid to him
11 perhaps over the years, we're entitled to know that, whether
12 it relates to NuvaRing or other hormonal contraceptives.

13 Agreements that perhaps he has had with respect to
14 Organon regarding publications of studies, you know, the
15 PowerPoints and summaries of presentations he's given over the
16 course of the years regarding NuvaRing and other hormonal
17 contraceptives, I mean, these are all things that directly
18 relate to NuvaRing, not to mention the documents pertaining to
19 TASC, which again is the epidemiology study that will be
20 published this year.

21 I mean, if they have retained in this case an expert
22 witness who has had, you know, communications or input or
23 whatever it might be pertaining to TASC or the representatives
24 of TASC, we're entitled to know whether those documents exist.

25 And there's been a lot of focus on these documents

1 regarding Bayer. There's two requests that even address that
2 topic, and it's Request Nos. 3 and 7. Number 7 asks for
3 information regarding employment by Bayer, and No. 3 -- this
4 is a paraphrase, but No. 3 asks for meeting minutes and
5 e-mails regarding communications with Bayer.

6 And certainly at a minimum the documents he authored
7 that would fall under that category that, you know, relate to
8 hormonal contraceptives would be relevant. The other sort of
9 general category of documents would be money or perks that has
10 been paid to him by any pharmaceutical company, and that's
11 Request Nos. 24 and 25.

12 So, I mean, these document requests are really
13 directly relevant to the issues here, and I think we're
14 entitled to see whether or not they exist. Certainly his
15 background that he's had in hormonal contraceptives over the
16 years is a basis on which they're going to claim he's
17 qualified and has knowledge and experience, you know, in this
18 area; so it directly relates to that issue as well, which is,
19 you know, referenced in Rule 26.

20 MR. YOO: Your Honor, I have a big problem with these
21 kinds of efforts to just ignore the rules that have been put
22 in place. We have rules for precisely this kind of reason.
23 We have not only Rule 26, but the parties' interpretation and
24 stipulation regarding Rule 26, and the Court ordered the
25 parties to conduct themselves as such. This goes completely

1 outside of that agreement.

2 And, you know, by Ms. Kraft's rationale then, we'll
3 need to redo expert discovery as to a bunch of experts,
4 including Dr. Buncher who testified for Ms. Kraft against
5 Ortho-Evra. That involved a hormone contraceptive. Are they
6 going to produce all of his files and notes and communications
7 and everything else?

8 What about Dr. Parisian, who shows up in multiple
9 litigations including on other hormone contraceptives? Why
10 have they singled out Dr. Suissa? They don't have any
11 justification for doing that.

12 As to documents relating to NuvaRing, Dr. Suissa's
13 testimony is clear. He said: I wasn't involved with TASC. I
14 wasn't involved with the EURAS addendum. I don't communicate
15 with ZEG. Here are my documents related to my work on the
16 NuvaRing matter. I'm producing them to you.

17 He sat through a full day of deposition regarding
18 NuvaRing issues. And then now he's handed a separate subpoena
19 that says: Give us everything related to any work on hormone
20 contraceptives for any pharmaceutical companies. This is
21 completely improper.

22 THE COURT: How far back did you produce compensation
23 records between Organon or a successor and Dr. Suissa? How
24 much information do they have about compensation?

25 MR. YOO: Well, they've received information about

1 his compensation for work on NuvaRing, okay? So they have
2 that information.

3 MR. BALL: Everything.

4 MR. YOO: Everything.

5 THE COURT: But not Organon, but NuvaRing only?

6 MR. YOO: He testified: I have sat on a scientific
7 advisory board from time to time when requested by different
8 companies, including Organon at times, but it had nothing to
9 do with NuvaRing, had nothing to do with hormone
10 contraceptives.

11 THE COURT: But Organon's putting him on as an
12 expert, and did they ask him how much he's been compensated by
13 Organon for a discrete period of time, and he refused to
14 answer that question or referred to other documents?

15 MR. YOO: No. I don't think -- I don't know that
16 they asked that in deposition.

17 THE COURT: Here's where I'm going to end up, Ms.
18 Kraft, and it may take a little bit of work, but I'm going to
19 deny the motion to compel as it exists. However, I'm
20 concerned about compensation between Dr. Suissa and the
21 defendant, however that's defined.

22 But I want to see what you asked him in the
23 deposition, and to the extent he referenced documents in the
24 deposition he hadn't produced or otherwise referenced them, I
25 want to see from you a renewed motion to establish how he used

1 or referenced any documents he may not have produced.

2 Otherwise, do you disagree with Mr. Yoo that he would
3 have otherwise produced everything required by Rule 26?

4 MS. KRAFT: Yes.

5 THE COURT: So here's what I want from you, a very
6 specific: Here's what Rule 26 requires; here's what he didn't
7 do; here's where he talked about a document but didn't produce
8 it; and here's where he was asked about compensation, but we
9 don't know the answer to that question for whatever reason
10 specific as to the nature of the testimony.

11 It's going to take a little bit of work by somebody,
12 but I don't want just: He's brought any and all e-mails for a
13 ten-year period between you and the defendant. It's just too
14 much. But you would have asked -- taken a good deposition,
15 and so to the extent that there are documents referenced by
16 him that were not produced to the extent inquiries about his
17 compensation were made but not answered or referred to in
18 other documents, or deficiencies in his compliance with Rule
19 26, file that within ten days.

20 MS. KRAFT: Yes, we can do that.

21 THE COURT: Response ten days. And I'll take it from
22 there.

23 MS. KRAFT: Your Honor, may I ask, can we also
24 include in this renewed motion the scope of documentation
25 going back, you know, in time to consulting work that he has

1 done with Organon over the course of the years and --

2 THE COURT: I mean, did you inquire about that at the
3 deposition? I assume if it was important enough to know, you
4 asked him the question.

5 MS. KRAFT: I don't know offhand. I'd hate to say.

6 THE COURT: I'm going to leave it the way it is.
7 Just go through the deposition, and if there -- like I would
8 in any other case. If this expert talks about a document that
9 he didn't produce, he needs to get it for you. If there's
10 open questions about compensation, he needs to fill in the
11 gaps. And if he didn't comply with Rule 26, he needs to
12 comply with Rule 26.

13 MR. SHKOLNIK: Your Honor, if I can just follow up on
14 one of those points.

15 THE COURT: Yeah.

16 MR. SHKOLNIK: Here the deposition was focusing on
17 him as the expert, and we did ask about background
18 information. The question here is, defendants have provided
19 absolutely zero to us about their past relationships with this
20 witness and his work in terms of how much was he paid as a
21 consultant for birth control-related products. We don't have
22 that.

23 THE COURT: I'll let you open the -- I'll let you ask
24 the question in your amended motion to compel as to how much
25 he's been paid by the defendant.

1 MR. SHKOLNIK: And if there's any statements about
2 these other birth controls, we think those are things we're
3 looking for.

4 THE COURT: By the defendant. I wasn't limiting it
5 to any particular drug or birth control device.

6 MR. SHKOLNIK: Thank you, Your Honor.

7 THE COURT: The jury is entitled to know if he has a
8 bias, and that bias could be in the form of compensation. As
9 you would with anyone else.

10 Mr. Yoo, the good news is, you get to respond and
11 say, well, the period of time they want is too broad, you
12 know, but --

13 MR. YOO: Your Honor, I would request that that
14 obligation, if there's an obligation there, be reciprocal. We
15 want that information as to all of their experts.

16 MR. BALL: We obeyed --

17 THE COURT: Come on. One at a time. And you got to
18 be at the podium.

19 MR. YOO: They can't have it as a one-way street
20 here. It's convenient for them to --

21 THE COURT: I mean, understand it's a persuasive
22 argument that if this is what you ask for from this witness
23 for whatever period of time and -- but you're going to get a
24 chance to respond, and I haven't ruled -- that you're going to
25 set a template here. I'm not going to treat different experts

1 differently. I wouldn't do that. So understand the scope of
2 your requests, it's good for everybody, wherever we end up.

3 MR. SHKOLNIK: Your Honor, we understand that, but
4 there is a little bit of a difference here. These experts are
5 not hired by any of our clients to do studies, to do research.

6 THE COURT: But if you've hired them, if you've hired
7 them or a similarly situated counsel with you have hired them,
8 that's the same bias issue as if Organon hired them.

9 MR. SHKOLNIK: Well, I think they asked them
10 extensively about each one of -- they've done that.

11 THE COURT: I'll treat everybody the same. I have no
12 problem with that.

13 MR. SHKOLNIK: And the witnesses have responded.

14 THE COURT: Everybody's got -- whatever it is,
15 whatever the rule is, that's the rule, but we haven't finished
16 it yet. You will both get to weigh in on this and see where
17 we end up.

18 MR. YOO: Thank you, Your Honor.

19 THE COURT: Everyone understands you're going back to
20 the deposition that was taken. We are not reinventing
21 anything here.

22 MR. YOO: Absolutely.

23 MS. GEIST: Yes, Your Honor.

24 THE COURT: Except for the issue as to compensation.
25 I don't know what was asked in the deposition.

1 So what we have left is the motion to file under
2 seal. Anything else that's compelling?

3 MS. GEIST: Yes, Your Honor.

4 THE COURT: Do you want to take a five-minute break,
5 or do you want to go?

6 MS. GEIST: I'm fine, Your Honor. Are you guys okay?

7 MS. KRAFT: Yes.

8 MS. GEIST: I actually snuck out, Your Honor.

9 THE COURT: I saw that. No wonder you're okay.

10 MS. GEIST: Your Honor, it's actually my hope that we
11 will be able to resolve this motion fairly quickly, so maybe
12 it will take less than five minutes.

13 Your Honor, this motion pertains to the six Daubert
14 challenges that have been filed by the defendants. Your
15 Honor, as we just discussed before, the topic was the
16 agreements between the parties, and I think here again we need
17 to start from that place, did we have an agreement concerning
18 motions to file concerning documents under seal?

19 And, Your Honor, I refer the Court to the protective
20 order between the parties which I think is very clear.
21 Paragraph 32 of the protective order, which governs the
22 exchange of confidential information between the parties up to
23 the time of trial, so all pretrial discovery, all proceedings
24 up to the time of trial is governed by the clear terms of the
25 protective order.

1 Paragraph 32 says very clearly: "A party may not
2 file in the public record in this proceeding any confidential
3 information. If a party seeks to file any confidential
4 information that has been exchanged pursuant to the protective
5 order, such filing shall" -- and it's not permissive, it's
6 directive -- "such filing shall be done" --

7 THE COURT: You should know that in the Eighth
8 Circuit "should" also means "shall." That's well-established
9 case law.

10 MS. GEIST: Yes. But, Your Honor, my point in
11 referring to the protective order is that it is simply clear.
12 Confidential information has been exchanged between the
13 parties pursuant to this order, signed by all. It governs
14 until the time of trial. Both parties have followed this
15 procedure consistently up until this moment where we have a
16 dispute now.

17 Plaintiffs have filed documents under seal that have
18 been marked as confidential, and defendants have filed
19 documents under seal. We have proceeded based on the parties'
20 course of conduct in this proceeding.

21 Your Honor, the documents that appear to now be in
22 dispute are documents that were attached as exhibits to our
23 Daubert challenges. For the most part, Your Honor, and I will
24 be fairly general -- for the most part we're talking about
25 plaintiffs' expert reports and then their testimony from

1 plaintiffs' experts at their depositions.

2 Our position, Your Honor, is that -- and it's set
3 forth clearly in our Daubert motion -- that the opinions
4 concerning NuvaRing reached by these experts are not reliable
5 based on a number of reasons, including qualifications and
6 lack of scientific sound methodology.

7 Your Honor, if these opinions which have been reached
8 and set forth in these reports, which are attached to our
9 motions, are filed and disseminated to the public, then under
10 those circumstances, Your Honor, then the defendants could
11 potentially be harmed. The reason for that, Your Honor, is, I
12 think, pretty obvious. NuvaRing is a currently marketed
13 product. Merck certainly has a business interest in the
14 product, and we're talking about what we would consider fairly
15 inflammatory statements about that product.

16 This is a product that has not been removed from the
17 market by FDA, there have been no concerns raised by
18 regulatory authorities about this product, and we have a
19 business interest in the product. Yet we're dealing with
20 experts whom we've challenged who have looked at, you know, we
21 argue, a very, very small set of information before rendering
22 their opinions about the product.

23 It's our position, Your Honor, that in connection
24 with the court's gatekeeper role that's required under
25 Daubert, that such opinions need to be considered first by the

1 court in order to determine whether or not they are reliable.

2 If Your Honor determines that they are reliable and
3 disagrees with our Daubert challenges, then those opinions
4 will be put into evidence at trial. But if Your Honor at the
5 end of the day agrees with our arguments that the opinions
6 rendered in those reports are not based on sound methodology
7 and that the experts do not even have the qualifications to
8 make those opinions but the reports are out in the public
9 realm, well, then, you know, there's a number of analogies I
10 could speak to, Your Honor. The bell cannot be unrung. The
11 cat is out of the bag. The horse is out of the barn.

12 THE COURT: You can't put the toothpaste back in the
13 tube, yeah.

14 MS. GEIST: We can't undo the harm. So until Your
15 Honor has had a chance to review those motions and make Your
16 Honor's own determination as to whether those opinions will be
17 admissible at trial because they're reliable, we think it is
18 premature to unseal those opinions relating to this product.

19 THE COURT: But how does the public have confidence
20 that I reached the right decision if they don't know what I
21 considered? Remember at the end of the day what we do is
22 public. Anyone can come in right now and listen. And no one
23 suggested to me that the trial has to have the doors locked
24 and people can't come. And in fact, you concede now and in
25 your papers that if I find they meet the standards, that it

1 will all come out.

2 And I understand the business interest. I also am a
3 great believer in the free market of ideas. If you're crazy,
4 you just show people they're crazy and eventually they'll go
5 away. Hopefully. Not always.

6 MS. GEIST: You know, Your Honor, at the end of the
7 day, you are going to review our Daubert challenges, and
8 you're going to make a decision, and presumably that will
9 be --

10 THE COURT: But where is the public confidence in my
11 decision if they don't know what I decided?

12 MS. GEIST: Well, Your Honor, you're presumably going
13 to render a written opinion.

14 THE COURT: Will I unseal it then?

15 MS. GEIST: If Your Honor determines that these
16 reports and these opinions that we're talking about are based
17 on sound scientific methodology, good science, and they should
18 be admitted at trial, well, then, Your Honor, we would have no
19 argument that anything maintained is maintained --

20 THE COURT: But I want to turn it upside down.
21 There's a group of people also who if I say it's not sound
22 scientific methodology and it's an opinion that should not be
23 given any weight in a courtroom, how does the public have any
24 confidence in that decision if they don't know what I saw,
25 relied upon, or considered?

1 MS. GEIST: Well, presumably, Your Honor, the opinion
2 will say, maybe not with great specificity, but will say what
3 the Court relied on in reaching your determination. And, of
4 course --

5 THE COURT: But they'll never know what the question
6 was. They'll only know the solution to a problem they never
7 knew existed because it's all sealed. What did the judge do?
8 How did he get there? What did he consider? What did he know
9 when he made this decision? Where can the public have
10 confidence in the outcome if they don't know what the question
11 was?

12 MS. GEIST: Your Honor, I think we're anticipating
13 that Your Honor's opinion will go through those steps and
14 allow the public to see what exactly the Court did in order to
15 reach that decision at the end of the day.

16 And our concern, Your Honor, is, we're very confident
17 in these motions. We wouldn't have filed them if we weren't
18 otherwise confident. We think Your Honor is going to find in
19 our favor and agree that these are opinions that are very
20 inflammatory and they were reached based on a very limited
21 review of documents and not reached based on sound scientific
22 methodology.

23 And if Your Honor agrees with us at the end of the
24 day, then those opinions will never be before the jury or the
25 public at trial because they are not reliable. And that's the

1 point, Your Honor. If they're let out now and thereafter Your
2 Honor concludes that they're not reliable, they should not be
3 put into evidence, they would confuse the public and the jury,
4 well, then, where are we? Because they're already out in the
5 public.

6 MR. YOO: Your Honor, if I can add a couple of
7 thoughts. I understand Your Honor's desire to strike a
8 balance, but if everything supporting the Court's pretrial
9 rulings is up for public consumption, then confidentiality
10 would only be observed in the breach. It would go beyond the
11 experts' reports.

12 What about our internal company documents that we
13 would file under seal in support of our position? There is
14 just no way to, in the interest of allowing the public access
15 to what the Court's rationale was and what evidence the Court
16 had before it, allow full dissemination of this type of
17 information. There will be an appellate record, of course; so
18 if plaintiffs want to challenge Your Honor's pretrial rulings,
19 there will be another tribunal that will have access to all of
20 this information.

21 We think, you know, going back to the goose/gander
22 scenario we talked about earlier, if the Court were to make
23 rulings based on plaintiffs' medical records, you know, the
24 interest in protecting privacy there would still have to be
25 observed even though the Court would likewise have an interest

1 in allowing the public to see what the Court considered in
2 making its rulings.

3 THE COURT: Well, typically with medical records, I
4 mean, obviously they're going to come in at trial, and I still
5 don't hear that the courtroom is going to have to be sealed
6 for a trial.

7 MS. GEIST: No, Your Honor. And that's why in a way
8 what we're seeking is sort of an interim step, if you would.
9 At the end of the day, Your Honor, again if Your Honor rules
10 that the opinions of the experts that we have challenged are
11 reliable and should go to the jury, well, then we have no
12 argument that anything remains under seal. All we're asking
13 Your Honor is, let's get to that stage first, let Your Honor
14 perform his gatekeeping function, look and determine whether
15 or not there's reliable opinions, determine what should go
16 before the jury and into evidence, and if Your Honor disagrees
17 with us, well, then everything comes out.

18 THE COURT: Ms. Kraft?

19 MS. KRAFT: Thank you, Your Honor. On that last
20 point, I mean, exactly right. We are not going to seal the
21 courtroom here, and we're not going to seal the courtroom I
22 would not suspect any more so with respect to the Daubert
23 hearing or the argument on the Daubert hearings that -- or
24 motions that will occur.

25 What defendants are seeking to do is something for

1 which there's just no authority. They are seeking to mix --

2 THE COURT: Well, let's give her piece of her
3 argument its due, that if something is marked confidential,
4 they have a duty not to file as a matter of public record.
5 And that goes both ways. Whether it's your clients' medical
6 records or any documents they have marked confidential, we do
7 have an agreement that it won't be filed without a hearing,
8 right? That's why we've done what we've done so far.

9 MS. KRAFT: Right. And I didn't mean that aspect of
10 it. I mean, at this point in time if we want to back up to
11 sort of the procedural history here, what we have in place is
12 the protective order, and so the documents were filed under
13 seal.

14 I strongly dispute the interpretation of the
15 protective order as the defendants interpreted, which I hear
16 them to be saying that the unsealing of documents cannot even
17 be addressed until during the time of trial, and that's just
18 simply not what the order says.

19 I mean, it contemplates clearly that at a later point
20 in time the parties can, in fact, raise issues to the Court in
21 order to unseal documents, and that's the stage that we're at.

22 The protective order, while we're on that, I do want
23 to point out that the defendants have waived their right to
24 designate the deposition transcripts of our experts and the
25 reports as confidential.

1 Paragraph 13 of the protective order on page 5, I
2 will read it to you verbatim, but it explicitly states that
3 the parties have to designate deposition testimony as
4 confidential either on the record at the time that the
5 deposition is taken or within 30 days thereafter by sending a
6 letter asking the court reporter to keep it confidential, and
7 that wasn't done here.

8 Paragraph 13 says -- and I'm going to read it with
9 respect to the relevant portion, but it says, quote:
10 Information disclosed at a deposition taken in connection with
11 this proceeding or other related proceedings may be designated
12 as confidential by (A) designating testimony as confidential
13 on the record during the taking of the deposition; and/or (B)
14 designating the portions of the transcript that are
15 confidential in a letter to be served on the court reporter
16 and opposing counsel within 30 calendar days of the supplying
17 party's receipt of the transcript of the deposition.

18 I'm not aware of any such action being taken pursuant
19 to the protective order.

20 Aside from that, what I want to point out that now
21 that we're at the stage where the defendants are seeking to
22 keep these documents under seal and we're seeking disclosure
23 of the documents, they're mixing two standards. They're
24 attempting to put in place the Daubert standard that needs to
25 come first and foremost before the analysis that the Court is

1 to do here, and that concerns the right of public -- of the
2 right of the public to have information about the civil court
3 system, the recognition of the right of the public to inspect,
4 and the disclosure of information about cases.

5 And there's a strong public interest here to have
6 information about this proceeding just as in any other case.
7 It's one of the functions of the court is to address that
8 issue. The defendants haven't -- the standard for the
9 defendants is to present a compelling justification for
10 nondisclosure, and that doesn't exist here. The standard rule
11 is disclosure. It's not the exception.

12 We've got a large pharmaceutical company who has put
13 a product out on the market that is defective and has affected
14 millions of women, and they have a right to know information
15 about the litigation and the information that is the subject
16 of the current motion. So we would request that the Court
17 allow the documents at issue to be unsealed.

18 MS. GEIST: Your Honor, I think if it wasn't clear
19 before, it's abundantly clear now what plaintiffs intend to do
20 and why they're arguing so strenuously that these expert
21 reports be filed in the public docket. I think that Rule 26
22 and the Eighth Circuit case law is very, very clear that
23 courts can protect documents from disclosure where there is a
24 concern that the documents may become a vehicle for improper
25 purposes.

1 And I would suggest, Your Honor, that that is
2 probably what is going on here. We have proceeded. Again,
3 both parties have proceeded in keeping all of these materials
4 exchanged pursuant to the confidentiality agreement between
5 the parties. None of the depositions have been filed in the
6 court. When they have, both parties have filed them under
7 seal. Suddenly everything is changing.

8 I would suspect, Your Honor, that if these are filed
9 or unsealed and open to the public, that they will be
10 disseminated to the media. We have a concern, Your Honor,
11 that indeed at a minimum if this would not damage the
12 defendant's business interest in its currently marketed
13 product, then it would certainly at a minimum have the
14 potential to taint the jury pool. We are about six or seven
15 months away from a jury trial, as we've been talking about.

16 Plaintiffs are arguing very strongly that these
17 documents be open to the public, and again, Your Honor, our
18 position is that these are very inflammatory statements
19 regarding the product. But more importantly, Your Honor,
20 they're based on unreliable methodology. There is very little
21 factual support in these reports to support what the opinions
22 of the experts are.

23 And I think the case law, you know, contrary to what
24 Ms. Kraft said, you know, the courts -- the public access is
25 not absolute. The courts are permitted to maintain documents

1 under seal if they would damage a party's business or
2 property. It's very clear under the rules, Your Honor, and
3 that's our argument here.

4 We think there is a compelling reason why at a
5 minimum, until Your Honor takes a look at these opinions and
6 makes that assessment under Daubert, there is no harm to
7 anyone in maintaining them under seal now during this interim
8 step.

9 Again, Your Honor, at the end of the day, I would not
10 be standing here arguing that they maintain that these
11 documents are maintained under seal if at the end of the day
12 Your Honor concludes that the opinions are reliable and should
13 be put forward to the jury. The argument goes away.

14 But what is the harm in the meantime in maintaining
15 these documents under seal? The only reason that plaintiffs
16 want them, want the seal lifted, Your Honor, I think is
17 patently obvious.

18 THE COURT: Well, don't go anywhere. Oh, Mr.
19 Shkolnik has something to say. Come on. You know my bad
20 habit. Everybody gets to talk.

21 MR. SHKOLNIK: Your Honor, I think the problem that
22 defendant faces here is, we're not talking about a dispute
23 over discovery items which is -- I think there's a diminished
24 sense of -- or diminished right to an open court to the public
25 where we're fighting over whether or not a deposition should

1 go forward or a document should be produced.

2 Here we're talking about a stage in the litigation
3 whereby counsel's own representations earlier -- and I think
4 we all agreed discovery for these cases has come to an end --
5 they're at a point where they're making dispositive motions.
6 These Daubert motions by their own representations, the
7 Daubert motions are dispositive. They are of the opinion that
8 our case is going to be thrown out of court because these
9 experts do not meet the proper standard.

10 When you're reaching -- when you're at a point where
11 you're making dispositive motions, there is a -- I think the
12 proper word is a qualified right of access to the public to
13 everything. As the Court was saying earlier, there are many
14 cases that look at this in terms of what stage in the
15 litigation we are. As the Court pointed out, the Daubert
16 motion may ultimately strike experts' opinions in this case,
17 and the public has a right to know that.

18 And the case law at this stage says the defendants
19 don't get to say, protect our product and hide it from the
20 public, the documents. That's not the standard. And I think
21 they keep going back to, well, will it hurt to wait? It does
22 hurt to wait. By definition, closing the courthouse hurts to
23 wait.

24 These documents were filed by the defendant. They
25 are subject to disclosure. There is nothing protecting them.

1 And that's really what it comes down to. The case law is
2 clear. When you're at a dispositive stage, they should be
3 released.

4 MS. GEIST: Your Honor, the only -- this is a
5 one-sided argument. The only one it hurts to wait -- the only
6 one it would hurt to wait is one side here. The plaintiffs --
7 there is no harm to plaintiffs in waiting until the judge
8 performs the role that the judge needs to perform under
9 Daubert. There is absolutely no harm to plaintiffs.

10 Most of the information that has been exchanged in
11 the litigation the public is unaware of. This is the normal
12 course of litigation pursuant to the confidentiality
13 agreement.

14 But we, Your Honor, in balancing the interests, our
15 potential injury here is clear. The reports are unsealed,
16 perhaps the media picks them up, perhaps on their own, perhaps
17 by encouragement of the parties, and suddenly we have out
18 there in the public realm opinions that we are arguing very
19 strenuously are unreliable, should not be disseminated to the
20 public because they are not sound because they are based on
21 very limited -- I mean, you know, Your Honor, I'm not going to
22 stand here and argue our Daubert motions, but I think if the
23 Court reviews those motions even briefly, you'll get a sense
24 of what we're talking about. And where is the fairness in
25 that?

1 At the end of the day say Your Honor unseals these
2 reports and they are picked up by the media, they're out
3 there, there's headlines, and in a couple months from now Your
4 Honor concludes and agrees with us that these opinions are not
5 going to be submitted into evidence because they are
6 unreliable. Well, then, Your Honor, I go back to my original
7 point. At that stage, you know, the bell can't be unrung.
8 We've already been harmed. So what is the harm to plaintiffs
9 in waiting?

10 THE COURT: You agree that I'm going to unseal
11 everything at some point regardless, or are you arguing that
12 if I rule in your favor, that none of this ever sees the light
13 of day?

14 MS. GEIST: Your Honor, obviously if Your Honor
15 denies our motion, then everything becomes open to the public.

16 THE COURT: I'm contemplating your best-case
17 scenario. I grant your motions. The experts are excluded.
18 Wouldn't I still unseal everything at that point? Or are you
19 suggesting this should forever be sealed if I rule in your
20 favor?

21 MS. GEIST: Your Honor, I'd have to think about that
22 for a moment, to be honest with you. I think if Your Honor
23 grants our motions, and the opinion is quite clear that the
24 opinions in those reports are not sound, and unreliable, then
25 I think that obviously we would be able to hold up Your

1 Honor's decision against some of those unreliable opinions.

2 THE COURT: So at some point I unseal it regardless?

3 MR. YOO: Your Honor --

4 THE COURT: I'm trying to understand where we end up.

5 MR. YOO: Yeah, yeah. I think it's hard for us to --

6 I mean, when we make a representation in court, we want to
7 make sure it's something that's accurate and we can live by;
8 so we're struggling a little bit to think of the various
9 scenarios. As a general matter, we do contemplate that for
10 purposes of having a trial once evidentiary rulings are
11 done --

12 THE COURT: Yeah, I'm not going to close the
13 courtroom.

14 MR. YOO: That's right. That's right. Now, whether
15 there are some feasible carve-out exceptions when we get to
16 trade secret technology information, perhaps, but --

17 THE COURT: That's what I don't know. And perhaps
18 you don't have the 15 pages to educate me, but my simple
19 science mind would have concluded that it wouldn't be too hard
20 to reverse-engineer the NuvaRing.

21 MR. YOO: I think those are things that we would need
22 to consider if we actually --

23 THE COURT: Because that's the issue when it comes to
24 a trade secret. You know, classic Missouri case law, it's
25 only protectable for as long as it would take you to

1 reverse-engineer the product.

2 MR. YOO: Right, right. I think it all goes to what
3 is the context for dissemination either in the courtroom or
4 more broadly of this type of information; so if it's in the
5 context of the Court has excluded this evidence as not meeting
6 the scientific standards and information as disseminated
7 accordingly, that's one context, but we're talking about a
8 temporary sealing of this information until we get judicial
9 rulings on the admissibility of this evidence. There's no
10 harm to anyone in continuing to temporarily keep this under
11 seal. If I could cite a certain federal judge, why borrow
12 trouble, right?

13 THE COURT: Well, sometimes trouble finds you no
14 matter what you want to do.

15 MR. YOO: Understood, Your Honor. But to Ms. Geist's
16 point about unnecessarily risking tainting of the jury pool, I
17 just --

18 THE COURT: Well, that's the least persuasive
19 argument. We can select a jury and isolate anyone who's had
20 problems. I mean, we've had far more notorious cases here
21 than -- I mean, that's manageable. We've tried antitrust
22 cases against the National Football League, you know. Michael
23 Crichton had to come here and defend his authorship of the
24 movie *Twister*, you know.

25 MR. YOO: Understood, Your Honor.

1 THE COURT: We can manage jury selection.

2 MR. YOO: We already have some of those issues to
3 deal with. I don't think that this temporary request we're
4 making -- there's no reason to add to that burden.

5 As Your Honor knows, contraception is a very hot
6 topic. We get stories about contraception and abortion and
7 things like that in the media all too frequently. We're
8 concerned that --

9 THE COURT: Sometimes it's Shark Week, you know, and
10 you just can't help it. Nobody cares that you got bit by a
11 shark, but this week it's the hot story.

12 MR. YOO: We think the balance should be struck in
13 favor of continuing to seal it.

14 THE COURT: We need to hear from Ms. Kraft before she
15 falls apart over here.

16 MS. KRAFT: I'm sorry.

17 THE COURT: She's going to fall out before my very
18 eyes.

19 MS. KRAFT: I mean, this is just contrary to the
20 authority on this issue. I mean, they're asking for a special
21 exception here. It doesn't apply. That's why documents and
22 information about the cases are unsealed every day before a
23 case goes to trial.

24 I mean, we are at the appropriate stage. Their
25 entire argument is based on speculation and again trying to

1 create an additional standard or prerequisite here of making a
2 decision on Daubert before making a decision with respect to
3 unsealing these documents. I mean, the public has an interest
4 in civil proceedings and this litigation.

5 And with respect to jurors potentially being
6 prejudiced --

7 THE COURT: We can manage that.

8 MS. KRAFT: That's why we have voir dire. I think
9 it's clear --

10 THE COURT: Actually, you know, Mr. Yoo, I hadn't
11 thought about it. It's a good thing we're not trying these
12 cases until next year. It would be really hard to try these
13 cases right now in terms of jury selection just given the heat
14 that this topic generates at the moment. I'm thinking for
15 both sides, you know. It's just good that the dust is going
16 to settle, particularly in this district that includes
17 Congressman Akin's congressional district.

18 So I'm loathe to have this conversation; however, I
19 am equally loathe to unseal the exhibits to the motions. I
20 want to ask that middle ground question that perhaps you've
21 thought about. Is there a way to redact the motions and
22 unseal a redacted version so at least the public knows what
23 the issue is before --

24 MS. GEIST: Your Honor, I apologize if it wasn't
25 clear in our papers. We did proceed in filing the entirety of

1 the motions under seal. We are only seeking to maintain
2 certain exhibits under seal.

3 THE COURT: Well, I did read the list.

4 MS. GEIST: The motions themselves, Your Honor, may
5 be --

6 THE COURT: You're prepared to unseal the motions
7 themselves?

8 MS. GEIST: Yes, Your Honor.

9 THE COURT: And just retain sealing of those specific
10 exhibits that you listed in your papers?

11 MS. GEIST: Yes, Your Honor.

12 THE COURT: So let's narrow the inquiry because I was
13 loathe to do anything that didn't put the public on notice of
14 the debate before the court.

15 MR. SHKOLNIK: Your Honor, giving us half a loaf on
16 this one from the defense standpoint --

17 THE COURT: I understand.

18 MR. SHKOLNIK: -- sometimes half is good.

19 THE COURT: It's always better than nothing.

20 MR. SHKOLNIK: It is better than nothing. But, Your
21 Honor, here we're dealing with an issue that I think -- we
22 couldn't find an Eighth Circuit case on point, but the Second
23 Circuit was very clear, Joy v. North.

24 THE COURT: At least it's not the Fourth or the
25 Ninth. That's good.

1 MR. SHKOLNIK: We have a Fourth also.

2 THE COURT: Well, but, see, if you're going to have a
3 Fourth, you got to have a Ninth so we can balance it out
4 somewhere.

5 MR. SHKOLNIK: We actually have a Ninth too. We have
6 a Second, Fourth, and Ninth on this one.

7 THE COURT: Okay. Then the Second wins.

8 MR. SHKOLNIK: Documents used by parties moving for
9 or opposing summary judgment should not remain under seal
10 absent most compelling reasons. Rushford v. New York
11 Magazine, Fourth Circuit. If a case goes to trial and
12 documents were submitted to the court as evidence, such
13 documents would have been revealed to the public, dispositive
14 documents in any litigation into the public record
15 notwithstanding any earlier agreement. Ninth Circuit same
16 thing. We have --

17 THE COURT: Who wrote the decisions, do you know, in
18 each of those circuits?

19 MR. SHKOLNIK: I don't know who the judges were who
20 wrote them, Your Honor. I just have my notes.

21 THE COURT: I know you'll find it interesting, maybe
22 confusing, but it does matter to me who the authors are.

23 MR. SHKOLNIK: I'm sure. But it's been pretty
24 consistent across the board where it's been addressed. As
25 long as they're not discovery motions. And that's where I

1 agree with the defendant. These things shouldn't be bandied
2 about as exhibits, should not be disclosed if it's discovery.
3 But now we're at dispositive issues. And to say the public
4 can see the motion but not see what it's relying -- what the
5 motion is based upon, it's nice to argue that the defendants
6 want just to keep it quiet for a little bit longer, keep it
7 sealed for a little bit longer, but that's not the standard.
8 It's not.

9 And allowing half of it or -- they're agreeing to
10 half doesn't serve the ultimate purpose of open disclosure in
11 the courts.

12 MS. KRAFT: Right. And what I would point out, by
13 allowing their Daubert motions to be in the public domain is
14 extremely one sided.

15 THE COURT: But your responses will be in the public
16 domain too, so it's not a one-sided discussion.

17 MS. KRAFT: Well, I mean, our expert reports and
18 deposition transcripts is a central part --

19 THE COURT: Right. But you're going to defend them.

20 MS. KRAFT: Right, but --

21 MR. SHKOLNIK: If I can respond to that, Your Honor.
22 So what counsel would -- I assume if we just verbatim include
23 in our --

24 THE COURT: Well, no. Let's not be disingenuous
25 because then we'd have a different debate.

1 MR. SHKOLNIK: But that's what it leads to, the
2 quotes.

3 THE COURT: No. That takes us into silly land, all
4 right? You're going to defeat the Court's ruling by calling
5 it something that it isn't by taking a report and calling it a
6 motion, I mean, then that's a distinction without a
7 distinction. We're back to square one. We won't go there.

8 MR. SHKOLNIK: But the point being defendants in
9 their papers have identified certain paragraphs almost
10 verbatim from witnesses that they are attacking. It's
11 allowing --

12 THE COURT: You're going to identify, you're going to
13 use the same technique.

14 MR. SHKOLNIK: We certainly will, Your Honor, but
15 it's unfair to have only bits and pieces put out in separate
16 documents.

17 THE COURT: Do you want me to wait to do anything
18 until you file your response and I take a look at both of
19 them?

20 MR. SHKOLNIK: No. We'd like a decision on it, Your
21 Honor. We really would. We think this is an important issue
22 on this, on opening the courthouse for those motions.

23 MS. GEIST: Your Honor, can I just make one last
24 point?

25 THE COURT: It won't be, but that's fine.

1 MS. GEIST: I agree with Mr. Shkolnik's line of
2 cases, Your Honor, but those are summary judgment motions.
3 They are different. In summary judgment motions, you're
4 putting before the court the evidence on which the court needs
5 to rely in order to make that dispositive --

6 THE COURT: You know, the problem here, of course, is
7 those are going to get filed before this is over.

8 MS. GEIST: But, Your Honor, the difference is those
9 opinions that are in those reports don't go into evidence
10 until Your Honor makes the determination about whether they
11 are reliable or not and they should go before the jury.

12 The case law that Mr. Shkolnik was referring to is
13 completely different. I don't disagree, but these are not
14 summary judgment motions.

15 THE COURT: Well, here's where we end up because of
16 what I know and what I don't know. We're going to unseal the
17 motions. You'll get a chance to respond. I have not -- I
18 have to be honest, unless you guys have a different suggestion
19 for me -- read the exhibits that they've listed that they want
20 to remain sealed. I think I have a duty to read them.

21 My instinct is to unseal everything but those
22 exhibits until I've read them, and I'll issue my opinion, and
23 those exhibits, unless you think doing it that way has some
24 unintended consequence to the plaintiff that I'm not
25 appreciating by saying that out loud.

1 MR. SHKOLNIK: It makes sense, Your Honor.

2 THE COURT: So that's what we're going to do. We're
3 going to unseal the motions --

4 MS. GEIST: Yes, Your Honor.

5 THE COURT: -- and the exhibits except for those
6 exhibits that were identified in the papers filed by the
7 defendant. And I'm going to read those exhibits and then make
8 a ruling on what should happen to those. I think I have to
9 read them word for word, line for line before I can make a
10 decision on the argument.

11 I mean, you've made a very -- you understand you've
12 made a very generalized trade secret argument that leaves me a
13 little bit at sea. I had a trade secret case once where they
14 wouldn't tell me what the trade secret was, but they wanted me
15 to find that the other side had infringed on it, and it was
16 really hard, and obviously they lost because if you won't tell
17 me what it is, I can't find it.

18 MS. GEIST: And I understand the challenge, Your
19 Honor, so perhaps after Your Honor has reviewed the exhibits,
20 perhaps it would be appropriate for us to further discuss
21 either in person or by a conference call --

22 THE COURT: Because I'll be candid, your trade secret
23 argument is your most compelling. That's where you would find
24 the compelling justification, is if there is a legitimate
25 trade secret. I hate the word "legitimate" these days, but

1 you know what I mean.

2 MS. GEIST: Understood, Your Honor.

3 THE COURT: We all think we have secrets. Some are
4 trade secrets, some are not. That kind of goes to the reverse
5 engineering question I asked you. If you can reverse-engineer
6 NuvaRing in an afternoon, the trade secret has -- I assume you
7 have a patent, right?

8 MS. GEIST: Yes, Your Honor.

9 THE COURT: So you probably have recognized you were
10 better to patent it than just keep it as a trade secret, you
11 know, because -- for obvious reasons. You opted on
12 intellectual property one path over another since the trade
13 secret, in theory, would have no time period on it.

14 MS. GEIST: I think that's fine, Your Honor. I'm
15 just suggesting to the Court if Your Honor would find it
16 helpful to discuss further --

17 THE COURT: I appreciate it. And maybe.

18 Ms. Kraft?

19 MS. KRAFT: One last thing, if I can.

20 THE COURT: Sure. You too, one last thing.

21 MS. KRAFT: Just remind the Court --

22 THE COURT: You'll know you've lost me in a trial
23 when you get up in front of the jury and say, "One last
24 thing," and I'll say, "Be careful what you promise," and the
25 jury will all laugh when I say that.

1 MS. KRAFT: I'll remember that most definitely.

2 THE COURT: We've all seen it, right? Just one more
3 question and it's always five, but go ahead.

4 MS. KRAFT: I just want to point out a case that we
5 cited on this trade secret issue in our pleading, Document No.
6 1292 at page 6. *In re: Iowa Freedom of Information Council*,
7 724 F.2d at 663 to 664. Quote: We do not wish to be
8 understood as announcing a rule that the presence of the trade
9 secret will in every case, and at all events, justify the
10 closure of a hearing.

11 THE COURT: We're not going to close the hearing, we
12 know that. We're not closing the courtroom. I think we've
13 all agreed.

14 MS. GEIST: We agree, Your Honor.

15 MS. KRAFT: Right.

16 THE COURT: But the trade secret issue is when you go
17 through the hierarchy of compelling reasons, trade secret is
18 pretty far up there in terms of, you know, you can't use the
19 court process to unwind a trade secret of a business entity or
20 a person.

21 MS. KRAFT: That's right. And I'm just pointing out
22 it's not an absolute rule.

23 THE COURT: Right.

24 MR. SHKOLNIK: This is not a one more, Your Honor.
25 Do these have a deadline for when the unsealed documents are

1 refiled in the court, the ones that are agreed upon?

2 THE COURT: I thought we'd unseal them. I just got
3 to be real careful, so you guys watch. In case I make a
4 mistake, you call me, and it will be on me, not anybody else
5 in this building, if I unseal the wrong thing.

6 MS. GEIST: I would think, Your Honor --

7 THE COURT: If you'd leave me a --

8 MS. GEIST: There's a memorandum --

9 THE COURT: There is. You have a list in your papers
10 that says what you're worried about.

11 MR. SHKOLNIK: I thought it would be easier to just
12 put in the documents so that you don't have to worry about it.

13 THE COURT: We'll unseal it here because we're going
14 to unseal the motion itself, and then I have to look back at
15 the specific exhibits.

16 (OFF THE RECORD.)

17 THE COURT: So what should we do with the plaintiffs'
18 Daubert motions? Yours are under seal as well. I don't know
19 if you realize that.

20 MS. KRAFT: Then I would propose that they also be
21 unsealed as well.

22 THE COURT: Are there anything in those -- have you
23 looked at those and thought about that reverse side of the
24 question? Do I need to give you a couple days to look at it?

25 MS. GEIST: I would ask the Court's indulgence for us

1 to just take a look at the --

2 THE COURT: Here's what would make me feel better.
3 By the close of business Monday you let me know your position
4 on unsealing the plaintiffs' Daubert motions and then the list
5 of those exhibits to your Daubert motions that you're
6 continuing to assert should not be unsealed, with a list of
7 those that should be unsealed so that I'm not making -- it
8 will keep me from making a mistake.

9 MS. GEIST: I think that's a great suggestion, Your
10 Honor. We'll do that.

11 MS. KRAFT: By the close of business on Monday they
12 are to provide --

13 THE COURT: Monday. They're going to say if they
14 have any objection to unsealing your motions in toto. If they
15 do, they'll tell me which exhibits they don't want unsealed.
16 They'll give me a list of the exhibits they are prepared to
17 unseal attached to their motions and a list of those they want
18 to remain sealed until I read them.

19 MR. SHKOLNIK: That works for us, Your Honor.

20 MS. GEIST: That's fine, Your Honor.

21 THE COURT: I'll do the same thing to yours as well.

22 MR. SHKOLNIK: It works both ways.

23 THE COURT: Right. I'll give you until the end of
24 business Tuesday to tell me if you disagree.

25 MR. SHKOLNIK: Yes.

1 THE COURT: And then Wednesday will be --

2 MS. GEIST: That sounds fine, Your Honor. Thank you.

3 THE COURT: Major League Baseball always suspends
4 guys on Wednesday, apparently, so that will be then. That
5 would be Mr. Yoo's part of the country. A little further
6 north, but last Wednesday we lost a player in San Francisco.
7 This Wednesday we lost a player in Oakland. So next Wednesday
8 is NuvaRing unsealing day.

9 MR. YOO: I won't defend the Ninth Circuit, I won't
10 defend the --

11 THE COURT: You can't defend the Ninth Circuit since
12 they were all in Maui last week. They've ruined it for
13 everybody.

14 Anything further? We need to pick a time to get back
15 together. I'm sure we'll have issues. I've got a lot of work
16 to do, obviously, you've got a lot of work to do, but when
17 should we get together again, just out of an abundance of
18 caution? What do you think?

19 MR. BALL: Late September?

20 THE COURT: That's what I was thinking, five to six
21 weeks.

22 MS. GEIST: We're with Judge Martinotti --

23 THE COURT: We should go after that after. Do you
24 want to go back to back, or do you want to let a week go, or
25 what do you want to do?

1 MR. BALL: We ought to have a few days in between.

2 What day of the week is the 27th?

3 MS. GEIST: It's a Thursday.

4 THE COURT: I hear a bid on October 3 or 4.

5 MR. BALL: The 4th is fine.

6 MS. KRAFT: That should be fine.

7 THE COURT: Does 10:30 work? I will have to move a
8 sentencing, but that's not a big deal. 10:30, October 4 the
9 next status conference, here in person. I think the rest of
10 these are going to be in person until we get this done.

11 **(OFF THE RECORD)**

12 THE COURT: If it's wrong, let me know, and we can
13 move it. I don't know.

14 MS. KRAFT: Your Honor, if I may?

15 THE COURT: See, you weren't really done.

16 MS. KRAFT: No. Well, a couple of things. One item
17 was left off our agenda that I wanted to address, but on this
18 unsealing issue I would propose that the unsealing be on both
19 sides of the fence be done like at the same time or --

20 THE COURT: Correct.

21 MS. KRAFT: -- roughly at the same time. Is that
22 what we're talking about? Because they're being now given
23 some opportunities to make -- to state their position on
24 unsealing our motions till Monday. So I would propose that
25 all that be done roughly at the same time.

1 THE COURT: It's a good point. Do you want to state
2 your position on unsealing on Monday and everybody respond to
3 on Tuesday, and then Wednesday I -- all they're really going
4 to do is look at the exhibits to your motion to make sure
5 they're not the same exhibits, I take it, that they wanted to
6 keep sealed on their motion so that we don't end up doing
7 something we hadn't planned on doing in the first instance.
8 Do you follow me?

9 I just was trying to make sure I didn't seal
10 something here and unseal it over there and then end up not
11 doing what I had planned to do, and that was to read the
12 exhibit before I unsealed it. I was trying to avoid my
13 mistake, more than put anything on you guys.

14 MS. KRAFT: Okay, thanks. The last item that we had
15 is listed as Item No. 4 on our agenda, and we are seeking here
16 an order from the Court setting forth deadlines for
17 supplemental production of documents. We'd like to have an
18 order in place by the Court that requires supplemental
19 production every 30 days.

20 There's, you know, current issues going on with
21 respect to potential label changes, things like that, that the
22 supplementation of custodian files, while there has been
23 production in the past, we feel that it's very important as we
24 head towards preparation of the trial that we have a firm
25 order in place requiring production every 30 days as opposed

1 to there being just --

2 THE COURT: Any objection?

3 MS. KRAFT: -- uncertainty as to when that is going
4 to occur. And I think we're at the stage now where we need to
5 have all responsive documents that are supplementation to the
6 discovery requests that we have served in the past
7 supplemented on a routine and rolling basis as a firm deadline
8 that we can go to the court and address issues to the extent
9 applicable.

10 MS. GEIST: Your Honor, Ms. Kraft raised this request
11 with me, and I responded to her by e-mail that it was not
12 possible nor feasible to do rolling productions on an
13 every-thirty-day basis. It's simply not practical, Your
14 Honor.

15 There's a number of steps that need to be completed.
16 Vendors need to go in, you need to arrange time with the
17 custodians, and then it goes through processing. And I don't
18 want to bore the Court with the details, but 30 days is
19 absolutely impossible. You know, normal course in large
20 litigation such as this is every six months. We have been
21 abiding by every six months. We have been abiding by every
22 six months.

23 THE COURT: We can't do six months because that takes
24 us into a trial. So what do we do?

25 MS. GEIST: Your Honor, we're on schedule right now

1 per our prior agreement as to every six months as we're
2 rolling out a bunch more supplemental documents in September.

3 Then we're doing -- the next sweeps are in play.
4 Then those would -- I would say let Ms. Kraft and I agree on
5 what date after September we do the next supplemental
6 production. I'm happy to consider whether that's less than
7 six months, but, Your Honor, you know, we're talking about the
8 large custodian sweeps. What we're not talking about is the
9 data and the documents that we have been providing plaintiffs
10 on a much, much more expedited routine fashion.

11 Every time there's been an update, an interim report
12 on the TASC data that the Court has heard so much about, we
13 provide that to the plaintiffs. When the plaintiffs asked us
14 to provide any documents relating to the FDA-sponsored Kaiser
15 study that was released in October of last year, we responded
16 to that discovery and gave them all of those documents, Your
17 Honor.

18 So in terms of everything being up to date, before we
19 did our three company expert witnesses in New York, we swept
20 from all of those folks and represented to the plaintiffs that
21 at the time they took those three expert witness depositions,
22 they had, you know, up-to-date, real time, the latest and the
23 greatest documents from those custodians.

24 So, Your Honor, when there is a need and an issue
25 such as a new interim report to FDA, we're turning it around

1 real time. But in terms of the process and going forward and
2 going in and sweeping and using vendors and doing that, Your
3 Honor, I would suggest that our every-six-month update has
4 been reasonable. The next deadline to roll out those
5 documents is September.

6 Ms. Kraft in her e-mail had made a special request
7 for Giselle Rose's documents. She's one of the key regulatory
8 persons in the company who had been deposed. Her documents
9 will be rolled out. They were provided six months ago, and
10 they're going to be rolled out now the end of next week. So
11 we're pretty much up to date, Your Honor.

12 If we start to become a little bit concerned in terms
13 of getting documents updated prior to trial, I think we should
14 talk about what sounds reasonable. So maybe instead of six
15 months from September, we can agree on four months or
16 something, but this is something I would like to discuss with
17 Ms. Kraft.

18 MR. SHKOLNIK: Your Honor, if I can just respond to
19 this. I'm always in agreement for discussions to try to work
20 things out, but -- and I always hate to point at other cases,
21 but across the river when we got towards the end in Yaz, they
22 were 30 day. What was originally a four month and five months
23 and six months, because we were getting in the push to trial
24 and a lot happening in that case with potential label changes,
25 it was required to have a 30-day turnaround on documents from

1 key custodians. No one's talking about every custodian in the
2 company. We're seeing more and more of the documents coming
3 from the same sources.

4 Maybe the option is as to certain important key
5 witnesses that it's a 30-day turnaround, and if they want a
6 little bit longer on the others, that's a possibility. But
7 we're getting ready for trial, and there is a lot happening
8 with FDA right now, and we need this information.

9 MS. GEIST: Well, Your Honor, that's the first time
10 I'm hearing about that. That sounds perfectly reasonable to
11 me. I suggest we talk about it and we isolate which
12 custodians.

13 THE COURT: Well, do your production in September.
14 We'll see you on October 4. And it's all possible. Just be
15 prepared to -- but try to work it out. If not, I'll decide
16 and we'll move forward.

17 MR. SHKOLNIK: Thank you.

18 MS. GEIST: Thank you.

19 THE COURT: I do understand you've submitted your
20 reports. This is sealed going forward.

21 **(A PORTION OF THE HEARING WAS ORDERED SEALED BY THE COURT, AND**

22 **THE PROCEEDINGS CONTINUED AS FOLLOWS:)**

23 THE COURT: Anything further?

24 MR. YOO: Nothing further, Your Honor.

25 MR. SHKOLNIK: Nothing.

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THE COURT: See you October 4. Thank you.

MS. GEIST: Thank you, Your Honor.

MS. KRAFT: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED AT 12:45 PM.)

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 94 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 6th day of September, 2012.

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