

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

**IN RE: NUVARING PRODUCTS
LIABILITY LITIGATION**

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) **Case No. 4:08-MD-01964 RWS**
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**STATUS HEARING
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
MAY 15, 2013**

APPEARANCES

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(Appearances continued on Page 2)

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(PROCEEDINGS STARTED AT 10:18 AM.)

THE COURT: Before we get started, those on the telephone it's listen only, so please mute your phones so I don't have to listen to whatever music or dogs you happen to have in the household at the time.

We are here this morning in the case styled *In Re: NuvaRing Products Liability Litigation*, MDL No. 1964, this court's number 4:08-MD-1964. Would counsel make their appearances, please?

MR. DENTON: Roger Denton for the steering committee, plaintiffs' steering committee.

MS. LANDERS: Ashley Brittain-Landers for plaintiff.

MS. KRAFT: Kristine Kraft for plaintiffs.

MR. SHKOLNIK: Hunter Shkolnik, plaintiffs.

MR. BALL: Dan Ball for defendants.

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

MR. YOO: Thomas Yoo for the defendants.

MR. STRAUSS: Steve Strauss for the defendants.

THE COURT: Very good. Anyone else appearances?

MS. LEONARD: Shelly Leonard, Your Honor, good morning, for the plaintiffs.

MR. PERKINS: Brian Perkins.

MR. STEVENS: Paul Stevens, Your Honor, for plaintiffs.

1 MS. ROJAS: Rachal Rojas for plaintiffs.

2 THE COURT: Very good. I have proposed agenda items
3 from both plaintiffs and defendants. Any announcements before
4 we begin to go through the agenda set for today?

5 MR. DENTON: I don't believe so, Your Honor.

6 MR. BALL: No.

7 THE COURT: So on behalf of the plaintiffs, number
8 one, issues relating to the first bellwether case which is set
9 for October 21. Who wants to take that? That would be the
10 Prather case.

11 MR. DENTON: Yes, Your Honor. Roger Denton. I am
12 not sure at this point there were any particular issues.

13 MR. BALL: It's on our agenda as well. I had one
14 issue.

15 THE COURT: Might as well do them at the same time so
16 I don't double back.

17 MR. DENTON: Okay. There may be something lurking
18 that I want to bring up, but go ahead.

19 THE COURT: You're waiting for an epiphany.

20 MR. BALL: No. Your Honor, my only issue on this,
21 and when we submitted our joint order on that, we had the
22 juror -- prospective jurors coming in, like, the Wednesday or
23 Thursday before October 21 to fill out jury questionnaires.

24 THE COURT: I was going to mail them a questionnaire,
25 as you saw from my order, and have them fill it out. If you

1 saw my pretrial order, it didn't just mirror your suggestion.

2 MR. BALL: No. I noticed that.

3 THE COURT: I was going to mail out juror
4 questionnaires and then make those questionnaires available to
5 you rather than requiring them to come to the courthouse on a
6 separate day. That would be more traditional with how we do
7 business here.

8 MR. BALL: I must have missed the mailing part.

9 THE COURT: Off the top of my head, I'm sure I would
10 have asked -- Chris, did we put anything in there about
11 soliciting questions for the questionnaire?

12 THE CLERK: I don't know if it said, Judge, in the
13 order itself the date that --

14 THE COURT: I will certainly entertain any --

15 THE CLERK: The point is, we're mailing them out --

16 MR. BALL: All right. The order says that we're
17 supposed to, by August 16, submit proposed questionnaire.
18 We've got that. But I don't see anything in the -- I didn't
19 know that --

20 THE COURT: It was my intention then to send out the
21 questionnaire to the potential pool, and then I'll make those
22 answers available to you rather than having jurors come in
23 here, sit down in the courthouse, and answer questions.

24 MR. BALL: That answers my question. So we'll get
25 them, like, several days --

1 THE COURT: Then we can prescreen, and there may even
2 be some for whatever reason who aren't available, and then so
3 by the time you come in for voir dire that Monday, that's
4 generally the plan.

5 MR. BALL: So we would get the questionnaires then a
6 few days before the 21st is the idea?

7 THE COURT: No. I won't just give them to you that
8 morning.

9 MR. BALL: The other question I had on this --

10 THE COURT: And I'll clarify that today so that --

11 MR. BALL: Logistically, do you -- I know there's,
12 you know, twenty counties that make up this division of the
13 Eastern District and goes quite a ways out. Do you -- do we
14 get juries from that whole area?

15 THE COURT: Two weeks ago, a professor from the
16 University of Missouri-Rolla was Juror No. 7.

17 MR. BALL: There you go. That answers my question.

18 THE COURT: Yeah. I mean, we'll go as far south as
19 Dent County.

20 MR. BALL: Right.

21 THE COURT: As far west -- I think we go past Phelps
22 County to the west.

23 MR. BALL: Yeah. I know that that's the counties. I
24 wanted to make sure that that was what our venire was going to
25 be, so okay.

1 THE COURT: I've never had a venire that isn't
2 anything other than the whole Eastern Division.

3 MR. BALL: Fine. That was my question. Thank you.

4 THE COURT: I think St. Francois County, probably
5 Cape. Criminal it's different.

6 MR. DENTON: I think that's it on the scheduling
7 order, Judge.

8 THE COURT: Very good. Pending summary judgment
9 motions and bellwether cases whether oral argument will be
10 heard.

11 MR. DENTON: Your Honor, we just want to make sure,
12 frankly, whether you want oral argument or whether you're
13 going to just write orders on those cases, but we'd like to
14 just understand what that is, what your preference is, and
15 then get these ruled upon so we know where we're at. I think
16 there's seven, if I'm correct.

17 THE COURT: Typically, we don't have oral argument.
18 Do you think these cases are of an extraordinary enough nature
19 that I should have oral argument?

20 MR. DENTON: We are fine without oral argument.

21 THE COURT: Mr. Yoo. And Mr. Yoo wants me to remand
22 these with the cases if we remand them, which begs the
23 question.

24 MR. YOO: That was our proposal, Your Honor, and it
25 followed some discussion we had with the Court at a prior

1 conference about Your Honor's desire to start remanding cases.
2 And so it was in the context of if there's anything to remand,
3 it would be these cases because they are fully worked up, and
4 you would have done your role as the MDL court in getting them
5 ready for trial, and so we thought remanding these six cases
6 made sense.

7 It would also allow us to get a result from a
8 different jurisdiction, and if these cases are going to be
9 remanded to the transferor --

10 THE COURT: Although they aren't diverse, is my
11 recollection. I think all but one are still going to New
12 Jersey if they go back.

13 MR. YOO: I think five of the six would go back to a
14 judge in New Jersey. And it made sense from our perspective
15 that the summary judgment motions would go with the remand
16 because it would serve to educate the district judge receiving
17 the case about the issues and the basic facts of the case.

18 And we felt it was also appropriate for that court to
19 decide for itself whether there should be a trial in that
20 district or whether the case deserves summary judgment.

21 On a more practical level, we know Your Honor's got a
22 lot to do here. The focus now is on the Prather case. It
23 took Judge Martinotti a long time to get through the serial
24 summary judgment motions that were heard in New Jersey.

25 As Your Honor knows, as your staff knows, the papers

1 on these six motions already take up many, many boxes. We
2 feel it's necessary to supplement the current record with some
3 important recent findings by the FDA on the very issues --
4 some of the very issues that are in these motions.

5 So there's going to be more paperwork. It is going
6 to take a long time to get through all of these motions. And
7 so for all of these reasons we felt it was appropriate to have
8 these motions decided by the respective transferor courts.

9 THE COURT: There's two issues here. Sorry. There's
10 really two issues. You raised a new one. I will let you know
11 at the June conference whether I'm going to rule the motion
12 for summary judgment or remand them. Obviously, if I remand
13 the cases at all, to alleviate the concerns the plaintiffs
14 articulated in their papers, is that we're sending a case back
15 to be tried by a judge who has no familiarity at all with the
16 issues.

17 If I do start remanding cases, I'm going to remand
18 them with the summary judgment motions; so whether that judge
19 likes it or not, they're going to understand the issues in the
20 case before they try to do a pretrial conference in any of
21 these cases.

22 Now, you just talked about supplementing your
23 motions. I mean, do I have a motion in front of me to
24 supplement the motions?

25 MR. YOO: I don't think we filed that yet, but as I

1 recall, Your Honor, the last time we were together we brought
2 that to Your Honor's attention. It was our understanding that
3 that would be okay to do, to submit a motion to supplement the
4 record.

5 THE COURT: If I have a motion, I will deal with it.

6 MR. DENTON: Right, because we absolutely object to
7 it because it's after briefing was closed. There's always
8 going to be additional new evidence in this case, and you have
9 to have a cutoff. And if they're going to add additional
10 evidence, we have to do discovery as to that additional
11 evidence.

12 So we believe that as to fully briefed motions, that
13 they should be decided at that time because if we get into a
14 serial situation with a product still on the market and new
15 studies coming out or new information coming out --

16 THE COURT: It's never going to stop.

17 MR. DENTON: -- it's never going to end. So we need
18 a deadline, and I think that's the appropriate deadline, and
19 that's the position Judge Martinotti took in New Jersey on the
20 summary judgment.

21 THE COURT: Tell me about -- let's take what we know.
22 Tell me about Prather. I mean, are you anticipating
23 supplementing your motion in Prather?

24 MR. YOO: Well --

25 THE COURT: I mean, that's set for trial in front of

1 me in October.

2 MR. YOO: Yeah. There's -- in addition to the FDA
3 findings, there's obviously Judge Martinotti's 91-page ruling
4 we feel is relevant and something that we want an opportunity
5 to discuss with Your Honor in the papers. So our
6 supplementation would encompass more than just the FDA
7 findings.

8 But let me go back to the FDA finding for a minute.
9 We're not talking about a couple of pieces of paper that
10 someone found in discovery. We're talking about a 22-page
11 analysis by the FDA on both the scientific issues that the
12 plaintiffs have raised as well as the label issues.

13 In short, among other things, the FDA analysis says
14 the warning language which compromises the NuvaRing warning
15 language is state of the art. This accurately describes the
16 conflicting literature over the last 17 years. We think that
17 is something that any judge deciding summary judgment needs to
18 consider.

19 Mr. Denton, I think, just said Judge Martinotti took
20 a different approach on summary judgment in New Jersey.
21 That's not correct. Judge Martinotti made no rulings about
22 the summary judgment motions and whether we can supplement or
23 not.

24 THE COURT: At some point, though, the record had to
25 be --

1 MR. DENTON: He actually did rule that you couldn't
2 supplement the record. Period. Thomas, you're just wrong
3 about that, I'm sorry.

4 THE COURT: Well, I can figure that out, and I'll
5 call Judge Martinotti.

6 MR. YOO: Your Honor, I stand corrected on that. I
7 was confusing his Kemp ruling with his summary ruling. What
8 he did was, he obviously granted summary judgment without even
9 considering the FDA analysis. But we think going forward it
10 is something that the Court should consider on pending summary
11 judgment.

12 THE COURT: So are you going to file a motion to
13 supplement in Prather? is the question.

14 MR. YOO: Yes, Your Honor.

15 THE COURT: Well, file the motion. And, Mr. Denton,
16 you know you'll get a chance to respond, and I'll take it up.

17 MR. DENTON: Right, right.

18 MR. YOO: And with respect to the other --

19 THE COURT: But we can't do this at a free-flowing
20 conversation. I mean, you're going to have to make a motion,
21 and they get a chance to respond to it.

22 MR. YOO: And with respect to the other pending
23 summary judgment motions, if those are going to be sent back
24 to the transferor courts, we can take up the issue of
25 supplementation with those transferor judges.

1 THE COURT: Because I'm sure the first thing that
2 will happen will be an amended Rule 16 conference in the
3 original jurisdiction.

4 MR. DENTON: Just so it's clear, I know you commented
5 on this, but I don't think I heard it. You are not going to
6 rule on summary judgment motions pending in those other six
7 cases?

8 THE COURT: Well, I'm going to tell you at the June
9 status conference what my intentions are.

10 MR. DENTON: Okay. I'm sorry. I just didn't hear
11 you.

12 THE COURT: I want to think about it a little bit
13 more and see where we're going, and in June I will give you a
14 definitive answer whether I'm going to keep those cases or
15 rule the summary judgment motions and then send them back or
16 send them back as a package. But what I suggested was, if I
17 do decide to remand cases, it might not be a bad idea to
18 remand them with the summary judgment motions pending so that
19 judge -- it's your way of educating the judge on the issues in
20 the case before you try to try it in front of them.

21 MR. DENTON: I just asked for clarification. I
22 wasn't sure I heard you.

23 THE COURT: I'm not making a determination today.

24 MR. DENTON: Thank you.

25 THE COURT: But I'll make a determination before the

1 month when we get back together again. All right. When
2 there's a motion, then we will deal with the motion. Until
3 then, don't borrow trouble.

4 Ms. Geist?

5 MS. GEIST: Yes, Your Honor.

6 THE COURT: Plaintiffs' motion to compel defendants
7 to supplement discovery responses. Actually, that's Ms.
8 Kraft's motion.

9 MS. KRAFT: Right.

10 MS. GEIST: It is Ms. Kraft's motion.

11 THE COURT: It just puts Ms. Geist on the hot seat,
12 that's all.

13 MS. GEIST: I'm happy to have Ms. Kraft address it
14 first, Your Honor, if you prefer.

15 MS. KRAFT: Right. The motion is now moot at this
16 time until we have the opportunity to review the responses
17 that were provided last night. So we will --

18 MS. GEIST: I have nothing to add, Your Honor.

19 MS. KRAFT: We will take a look at that
20 supplementation.

21 THE COURT: Last night would have been better than
22 before last night, but, you know.

23 MS. KRAFT: Right.

24 THE COURT: I'm sure there's a reason, Ms. Geist.

25 MS. KRAFT: We were hoping to get them earlier so

1 that we can continue to move things forward, but it is what it
2 is. So we'll evaluate those promptly.

3 THE COURT: Of all the things, you know, like "with
4 all due respect," "it is what it is" is an acceptable answer.

5 MS. KRAFT: But in that regard it brings up a
6 proposed order that we submitted along with our motion to
7 compel that we would like the Court to enter just to lock down
8 all these different issues.

9 And previously we had a stipulation entered with
10 respect to ongoing discovery that addressed the defendants'
11 time lines for producing additional documents relating to FDA
12 issues and updating custodian files, but the one aspect of
13 that order that we didn't include was a continuing obligation
14 to supplement their interrogatory answers. The initial order
15 simply provided a deadline of February 28 at that particular
16 time for them to supplement all answers to discovery, which is
17 now done as of yesterday.

18 So with our motion that we filed, Document No. 1549,
19 we submitted a proposed order that includes on the second page
20 only one addition to the original stipulation that was
21 entered, and that addition reads: "Defendants have a
22 continuing obligation to supplement their answers to
23 interrogatories and agree to supplement their answers to
24 interrogatories every 45 days."

25 So we would ask the Court to enter that order. And I

1 would expect the defendants don't have an opposition to that,
2 but we'll find out.

3 MS. GEIST: Your Honor, thank you. The motion is
4 moot, and just to sort of defend myself, Judge, I did speak
5 with Ms. Kraft frequently on our continuing obligation. There
6 were a large number of interrogatories that had been served by
7 the plaintiffs. I did indicate I would need until today to
8 provide those responses. So in a way, Your Honor, I was
9 actually a day early, so I don't think I should necessarily be
10 taken to task.

11 THE COURT: All depends on from which end of the
12 prism you look at it. What do you think about the --

13 MS. GEIST: We are now up to speed. About the
14 proposal to supplement every 45 days, Your Honor, I don't
15 necessarily have an issue with it, although I think it is far
16 from pragmatic. We are not going to have supplemental
17 information to these interrogatories every 45 days. We're
18 simply not going to do it.

19 There's just not going to be that type of new
20 information. A lot of the information that we did supplement
21 related to sales and marketing issues, annual expenditures, et
22 cetera. So I just don't see this being feasible because every
23 45 days will come and I will not have any new information to
24 supplement.

25 I would suggest that we look at a date before the

1 first trial in October to make sure that we are up to speed in
2 advance of the trial.

3 THE COURT: Is this something you guys can work out?

4 MS. GEIST: We haven't discussed it, Your Honor, but
5 I would be happy to work it out with Ms. Kraft. I just
6 don't -- again, Your Honor, from a pragmatic perspective, we
7 just went through all these interrogatories. There's nine or
8 ten different sets. We're not going to have anything new 45
9 days from now in the vast majority of them.

10 THE COURT: Are you envisioning every 45 days they
11 affirmatively say that nothing is different, or just if they
12 have anything, they should, on a 45-day cycle, be sure to
13 supplement it if they have it?

14 MS. KRAFT: Well, both. We would like them every 45
15 days to indicate to us what the answer is, we don't have
16 anything to supplement or we do and here it is, because to
17 have a nice regular routine of every 45 days keeps us on
18 track. If we start kind of dicing this up based on trial
19 schedules that may or may not get continued down the road or
20 change for whatever reason, we're going to be up in arms
21 again, and you know, I think we've gone through some times in
22 the past when, you know, we've moved deadlines, and we'd like
23 to keep this on track because it is consistent with the
24 document production as well. So we would like to have it
25 every 45 days, yes.

1 MS. GEIST: Your Honor, I would just -- it sounds
2 like make-work to me, to be honest, Your Honor. I don't see
3 the end goal here. I think plaintiffs certainly want to have
4 up-to-date information. We, of course, have the same interest
5 in ensuring that our interrogatories are up to date prior to
6 the first trial. I'm happy to do that. We can agree now, I
7 think, on a date, say, mid September or beginning of October,
8 whatever Ms. Kraft and I decide is reasonable, prior to the
9 first scheduled trial.

10 THE COURT: I'm going to enter the order, but I'm
11 going to require supplementation every 60 days. That gives
12 you two moments before the October trial, so that it would
13 drop us into July and then September, and then we have an
14 October trial setting.

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

16 MS. KRAFT: Thank you.

17 THE COURT: That gives us all a heads-up if we've got
18 an issue.

19 MS. KRAFT: Thanks.

20 MR. YOO: Your Honor, just briefly, I think Your
21 Honor asked the question on summary judgment whether we would
22 like oral argument. I don't know if I answered that.

23 THE COURT: I didn't ask you that, you're correct.

24 MR. YOO: Well, if you're asking us, we would like
25 oral argument on summary judgment. I think Judge Martinotti

1 found it helpful. I think Mr. Shkolnik and Ms. Leonard would
2 agree it was a very substantive discussion. So we would
3 request oral argument.

4 THE COURT: Okay.

5 MR. YOO: Thank you.

6 THE COURT: At the June status conference, if we have
7 oral argument I'll announce a date, and we'll work that out at
8 that time at least certainly as to the Prather case. Begs the
9 question about what we do with the other six pending motions.

10 All right. Then we have the additional generic
11 discovery to be conducted. And curious as to whether this
12 is -- there's a division here of subclasses you're talking
13 about or whether additional generic discovery as to all cases
14 or -- I mean, it's clear from your papers that the plaintiffs,
15 at a minimum, believe that post October of 2011 injuries may
16 be in a different category than those who suffered a claim
17 before October of 2011. So when I read that, I didn't know if
18 that's what you were -- if you were making a subtle reference
19 to that or there's some other bigger overarching issue as to
20 all cases.

21 MS. KRAFT: Yes, Your Honor. It would be the latter.
22 The generic -- and the purpose of putting this on the agenda,
23 by the way, is just simply to let the Court know that we will
24 be continuing with conducting discovery applicable to all
25 cases. For example, one of the items that we'll be conducting

1 discovery on relates to the TASC study, which is the
2 company-funded study regarding VTE risk, and specifically will
3 focus on the underlying case summaries of the subjects of that
4 study to, you know, further evaluate the protocols and the
5 overall management and the adjudication reports of the events
6 in that study.

7 So it's just simply to let the Court know we will be
8 conducting additional discovery on various generic-related
9 issues.

10 THE COURT: We don't have a schedule as such now, do
11 we, for that discovery to take place? I mean, you're kind of
12 out there, right? I mean, for example, my concern about the
13 Prather case in October, if you're suggesting there needs to
14 be generic discovery done in that case or that generic
15 discovery that could affect that case --

16 MS. KRAFT: This is just generic discovery going
17 forward. I mean, the trial schedule would stay in place as it
18 is, but you know, we intend to --

19 THE COURT: In order to try a case at some point,
20 typically by now we would have said discovery is closed.
21 Summary judgment has been filed. You know, now we're kind of
22 both arguing for something that we both were opposing.

23 Mr. Yoo wants to supplement his motion for summary
24 judgment with additional information. Mr. Denton was clear
25 that was a very, very bad idea. You're suggesting to me,

1 though, that there should be continued generic discovery that
2 may affect the Prather case. Mr. Yoo might tell me that's a
3 very, very bad idea. But you're both arguing for the same
4 thing in a strange world here.

5 MR. YOO: Well, Your Honor, I think we're talking
6 about an official document of finding by the FDA. That's what
7 we're asking to supplement the record with.

8 I think Ms. Kraft is talking about if and when some
9 additional underlying data and documents relating to the TASC
10 study become available, they would like discovery on it. I
11 don't think that goes to our ability to do the Prather case in
12 October.

13 THE COURT: She didn't seem to either. She said the
14 trial setting would remain in place.

15 MR. YOO: But the TASC study has been now reported to
16 the FDA for about five years running. Their experts have had
17 full access to the thousands of pages of the TASC data,
18 including the final study reports. And the purpose of the
19 supplemental expert reports was to deal in large part with
20 this new TASC data.

21 So we have made, mutually, accommodation so everyone
22 can consider the latest TASC information. The final results
23 are in. If they're looking for some --

24 THE COURT: But the study hasn't been published,
25 right?

1 MR. YOO: The study hasn't been published, but that's
2 the last piece. When it comes out in the publication, you
3 know, it comes out in the publication, but the final report,
4 the final report to the FDA, all of that has been fully
5 discovered, and the experts have given reports and been
6 deposited on it.

7 MS. KRAFT: To backtrack on that particular point,
8 though, we had propounded discovery relating to the underlying
9 data of the TASC study, including the adjudication of these
10 series adverse events. And the responses to our discovery
11 request initially were: We can't produce that type of
12 information until after the study is completed.

13 So we were not able to get our hands on that
14 information. It is vital information that could potentially
15 affect multiple cases in the MDL, including Prather. And so
16 now that the TASC study is completed, the defendants should be
17 in a position to produce that information, and that's an
18 example of what we will be proceeding with.

19 MR. YOO: Your Honor --

20 MS. KRAFT: So there's no current issue before the
21 Court. We were simply letting the Court know that we do
22 intend to follow up. It's almost like a supplementation of
23 previously requested discovery that we were unable to get. We
24 were precluded from receiving it according to the defendants'
25 position with respect to what they could release about TASC

1 until the study was completed.

2 MR. YOO: Your Honor, we've met our discovery
3 obligations as to TASC. I think Ms. Kraft is talking about
4 information that may become available to the company in the
5 future, and we will deal with that, along with other discovery
6 issues, as they arise.

7 THE COURT: Okay.

8 MS. KRAFT: That's really all -- again, we simply
9 wanted to let the Court be aware of that issue, and maybe
10 there will be a --

11 THE COURT: I expect by the June status conference as
12 I listen to you talk, and we haven't really gotten to this,
13 but maybe it's part of the plan for continued coordination by
14 the MDL court that I'll see motions on generic discovery to be
15 conducted, whether it relates to the TASC study or anything,
16 and we might as well get to it.

17 In the plaintiffs' papers there seemed to be, for
18 lack of a better word, if there were a class action, that
19 there's a new subclass evolving for those who have claims
20 after October of 2011 and then with the original subclass
21 being those who have claims before October of 2011. I think
22 we need to address those issues.

23 I mean, since the emerging complication of this case,
24 not that it's a complication, but management issue, is that
25 the label is the same today as it was ten years ago, right?

1 MS. KRAFT: In terms of VTE risk, yes.

2 THE COURT: And it's possible that cases will be
3 filed next month, six months from now, that would be
4 appropriate to be transferred to this MDL. While there are
5 also cases I think -- when was the Prather injury incurred?
6 That's a early 2000 case?

7 MS. KRAFT: 2003, October 2003.

8 THE COURT: We are now ten years, you know, since.
9 So how to manage this. As new information comes up, it
10 changes the landscape certainly, as the plaintiffs argue, post
11 October of 2011, but the folks, Ms. Prather, I mean it's
12 terrible in the scheme of things, not about anything other
13 than I'm sure she wants to know what's going to come of her
14 case since it's almost ten years old. Even if she loses, I'm
15 sure she'd like to know that's how the logical conclusion to
16 my claim. We have a duty to her to let her know what the law
17 and the jury thinks of her claim.

18 So we need to come to grips with how we segregate or
19 compartmentalize or create subclasses of cases so we can bring
20 those cases that are that old to closure. Best part about my
21 job is, I don't have a real interest in what that closure is
22 other than it is closure. Whether she has a claim that's
23 successful or Organon has its defense is successful, she's
24 entitled to know the answer to that question and not wait as
25 new cases are filed and the landscape changes.

1 So I need some proposals by our June status
2 conference as to whether we compartmentalize or create
3 subclasses so that we can bring those earlier cases to trial
4 or summary judgment, or whatever the judicial conclusion is,
5 so that those folks can have that part of their lives defined
6 for them.

7 MS. KRAFT: Okay.

8 THE COURT: Uncertainty is never a good thing for
9 anybody. But I think then that kind of goes then with this
10 other generic -- I don't want to put them together, but I
11 think they're part of the same conversation, perhaps, as to
12 what discovery is left to be done and what discovery are you
13 going to do, but we just can't leave cases open forever. We
14 need to bring some of these cases to their logical conclusion,
15 whatever that is.

16 MS. KRAFT: Understood, Your Honor.

17 THE COURT: And if we're going to -- I mean, we keep
18 getting cases. I think I told you I got 19 transferred
19 yesterday with another conditional transfer order of more than
20 ten. And then if that's -- if we're going to be adding 20,
21 30, 40 cases a month, those folks from '03 still deserve to
22 have their case brought to closure.

23 I know I'm repeating myself, but you understand the
24 issue we are confronting, and I'd like some guidance by the
25 June status conference. Maybe you can agree, maybe you don't

1 agree, as to how to begin to create subclasses so this MDL can
2 do what it needs to do but people also get the result that
3 they are entitled to.

4 MS. KRAFT: Okay. Thank you.

5 THE COURT: Does that take up the issue of proposed
6 plan for continued coordination, or were there other issues
7 buried in that agenda item?

8 MS. KRAFT: No, Your Honor.

9 THE COURT: All right. Then we have -- well, number
10 one on the defendants' list was the same issue, proposed plan
11 for continued coordination. Are there other issues there for
12 you, or is that kind of the --

13 MR. YOO: Well, Your Honor, both parties' submissions
14 on the case management plan were pretty extensive. There are
15 various moving parts. I think we've addressed some of the
16 important issues already.

17 What would remain, based on our plan, is the work-up
18 of additional cases. As Your Honor will recall, there are
19 about 16, I believe, cases from the original trial pool still
20 before Your Honor. Fact discovery has been completed in those
21 cases. We did not do expert discovery in those cases. We
22 focused on the eight.

23 It's our proposal that instead of just ignoring or
24 walking away from all the work that's been done, it makes
25 sense to use those remaining 16 cases as the next bellwether

1 pool. These were, like the eight that have been fully worked
2 up, cases selected by the parties as being representative, and
3 so we would like to use that as to the next wave of cases to
4 get fully worked up. And when expert discovery has been
5 completed -- and I think the parties agree it makes sense for
6 Your Honor to preside over the coordination of further work-up
7 of those cases. But once discovery is fully done in those
8 cases, those cases can be remanded to the transferor courts.

9 Then if we look further beyond the 16, it's also our
10 proposal that the parties select another group of bellwethers,
11 20, ten selected by each side for further work-up. And the
12 idea will be those will get in line and get transferred out
13 accordingly once expert discovery and fact discovery are
14 completed.

15 And I would add, Your Honor, with that, with respect
16 to that third pool, the plaintiffs think this October 2011
17 date is so important, they can factor that in in their
18 decisions on --

19 THE COURT: Start putting some cases in from -- that
20 may be a little difficult but not impracticable given the
21 amount of, I gather, some discovery that will have to be done
22 on the post 2011 cases, but I don't want to borrow trouble.

23 Mr. Denton, what are you thinking?

24 MR. DENTON: Well, a couple of things, Your Honor. I
25 think there's only ten other cases that are still pending, not

1 16, in that group.

2 MS. KRAFT: Six were struck.

3 MR. DENTON: Six were struck from both sides; so
4 there's only ten that haven't been stricken.

5 And the other issue, Judge, is, we don't want to push
6 off the discovery on a pool that would include the post
7 November 2011, December 2011, whichever date, for injuries
8 occurring after those dates because we want to get that
9 discovery on because that's going to take some time.

10 And so our view is, we need to focus on that
11 discovery very soon, front and center, while -- as a dual
12 process with whatever you're doing with that first group of
13 cases because we don't want that pushed off.

14 Secondly, one of the other concerns we have in our
15 proposal -- and I know you've expressed your views on that,
16 but I'd like to raise it with you again -- if this Court only
17 tries cases venued in the Eastern District of Missouri, by
18 happenstance those plaintiffs were injured here as opposed to
19 any other location in the country, that narrow number of cases
20 is very unlikely to represent, be representative of the
21 injuries of the larger group. It's just too small a sample
22 size, and it's happenstance.

23 And in our original agreement with the defendants in
24 an order that you approved of and entered, the concept was
25 that you would try more than just the Eastern District cases.

1 In fact, there was a discussion of waiving Lexecon on at least
2 two more cases in addition to Prather. So we would urge you
3 to think about that.

4 THE COURT: Well, Prather is an Eastern Missouri
5 case.

6 MR. DENTON: Yes, she is. But as we think about this
7 process and the overall certainty, closure, whatever, however
8 we want to talk about management --

9 THE COURT: Well, justice --

10 MR. DENTON: Justice is a fair term.

11 THE COURT: -- for your clients.

12 MR. DENTON: We need a mechanism of consistency of
13 trials of representative cases. And I strongly --

14 THE COURT: See, in theory that's what the bellwether
15 was designed to do.

16 MR. DENTON: I understand that. I think if we try
17 cases that are representative in these various subsets, and if
18 you do that and we're not limited to just picking Eastern
19 District of Missouri cases, we have a chance of being
20 successful in that regard. I fear that if we limit it to
21 simply Eastern District cases, it will be whatever
22 happenstance of the injury location, and then we have trials,
23 many, many different jurisdictions, many years down the road,
24 because cases remanded to federal court -- and I'm sure you've
25 received some in other litigations as the court that receives

1 them back -- is it becomes -- they have to fit into the
2 schedule of that other judge. And they tend to start as a,
3 quote, new case, and I don't know how quickly they move
4 through the system.

5 But there's been experiences in other litigations
6 where that's really delayed those cases that are effectively
7 worked up. Not by any intent, it's just the reality of the
8 practicality of the situation. So we --

9 THE COURT: My solution to that is, while we're
10 talking out loud is, I can't try a thousand cases.

11 MR. DENTON: I understand that.

12 THE COURT: It's not going to happen. And if we
13 conclude -- you know, one of the things we talked about is
14 having a strategy for remand, because we can get the cases
15 tried or teed up for summary judgment or whatever the logical
16 conclusion is for the case, we need to get to it, which is
17 your point.

18 MR. DENTON: Yes.

19 THE COURT: And don't delay it. So if we have a
20 large number of '03 and '04 cases and I can only get to so
21 many, we got to figure out when we're going to send those
22 cases back to a jurisdiction that can try them.

23 MR. DENTON: Right.

24 THE COURT: Right?

25 MR. DENTON: Yes, sir.

1 THE COURT: So that's what I need to know from you.
2 I mean, even if -- and I'm a little concerned that if I hold
3 all the thousand I have now and the continued influx of cases,
4 I've artificially suppressed the cases in some way, too, by
5 keeping them all here, but everybody knows nothing's going to
6 happen till 2015, right? I mean, how exasperating is that if
7 you're a plaintiff?

8 MR. DENTON: It is.

9 THE COURT: I'm sure the defendant doesn't want to
10 have that on a footnote or even deal with it or set aside
11 the -- they'd just as soon not be paying lawyers to be here
12 today, I'm sure.

13 So we need a logical methodology by which we make
14 sure these cases -- and if they're going to go back, the
15 sooner they go back, the sooner we solve your problem.

16 MR. DENTON: Right.

17 THE COURT: That that judge puts it in their calendar
18 for 2014 and not wait until sometime in '14 and maybe get to
19 it in '16. That's not healthy either.

20 MR. DENTON: Right.

21 THE COURT: But that gives us time to do our job here
22 and get you a sense like you already have from Judge
23 Martinotti how the New Jersey cases are going to go, how are
24 the cases going to go in Eastern Missouri. How many -- we can
25 try four cases probably here before somebody gets a new case

1 teed up in another jurisdiction, but if we waited to do those
2 four cases and then send them back, I've done a disservice to
3 your client.

4 MR. DENTON: No. I understand that. I guess the --

5 THE COURT: So I need you all to think real hard
6 about that and come up with a proposal about when we do start
7 remanding these cases. Even if I did everything Mr. Yoo
8 wanted me to do, we got ten cases, we deal with those, then he
9 wants me to -- I forget how many he said, a third level, come
10 up with another 20. So we've done 30. You know, that's 3
11 percent of the number of cases pending. We still got, you
12 know, 970 people who deserve their day in court, and we need
13 to manage that too.

14 In the meantime we may have some new information,
15 based on how the cases are being resolved, for Judge Anderson
16 and others to talk about, but I also have to plan for the
17 possibility that we don't.

18 MR. DENTON: Right. No. We hear that, and we'll
19 work with the defendants on that. I think my two points that
20 I wanted to maybe underscore was, is we need a group worked up
21 for generic discovery that includes these post 2011 injuries.
22 We've repeated that. And I'd like to do that sooner rather
23 than later.

24 THE COURT: Well, I want a proposal from you all at
25 the June status conference as to the discovery schedule for

1 the post October 2011 cases.

2 MR. DENTON: Okay.

3 THE COURT: Let's get on with that.

4 MR. DENTON: Very good.

5 THE COURT: But what that also implies is -- the
6 opposite is that we're closing the door on the cases before
7 October of 2011 and there's definition there so these cases
8 are ready to be tried.

9 MR. DENTON: Right.

10 THE COURT: Not that we're going to wait now for post
11 October of 2011 discovery and hold them here for another 18
12 months. I think that's a disservice to everybody too.

13 MR. DENTON: I hear you, Your Honor. We will work
14 with them.

15 THE COURT: There's a corollary here to opening the
16 door on that, and I think we got to close the door on the
17 others and keep moving.

18 MR. DENTON: All right.

19 MR. YOO: Based on their submission, this new
20 discovery -- I just want to be clear. The concept of doing
21 discovery on new material issues as they occur as they come up
22 I don't have a problem with that, but just so we're clear,
23 it's not like there's this whole area that's been untapped
24 that we now need to go into.

25 Their own submission says, based on these new data, a

1 new label has been proposed, and once a new label is finalized
2 by FDA, they would like some discovery into that process. So
3 I don't think a new label is going to be finalized by our next
4 conference. We will certainly submit our thoughts to Your
5 Honor.

6 THE COURT: Well, of course, a new label changes
7 everything, but I don't know that.

8 MR. YOO: So we're talking about some events that
9 have yet to occur, is my point. And if I can go back to --

10 THE COURT: But, see, my point is, I don't want these
11 possible hypothetical new events to slow down what we've done,
12 although recognize that they may affect some more recently
13 filed cases.

14 MR. YOO: Yeah. I think in terms of the pool of
15 seven cases before Your Honor and this pool of an additional
16 16 cases we're talking about, this new hypothetical discovery
17 doesn't affect those cases, number one. And number two, this
18 idea of going from the current seven to the remaining 16
19 before we get to this new group of post October 2011 cases is
20 not only practical and efficient, the parties have put in a
21 lot of work to work up those cases.

22 But to Your Honor's point about giving some
23 recognition to the plaintiffs that have been standing in line
24 for a long time before we leapfrog over these cases that have
25 been worked up for fact discovery and get to these new filed

1 cases -- and I don't think there are very many such cases in
2 your inventory at this time -- I don't think that makes sense.
3 I think we ought to go to the second group that's been
4 standing in line, and then we can get to the third group when
5 we get to the third group. And by then you may have a
6 sufficient inventory of those cases that Your Honor has a
7 clear idea of what you want to do with those cases, but right
8 now that third group is kind of a hypothetical discussion.

9 MR. DENTON: It certainly isn't hypothetical, because
10 there are cases on file after that injury date, there's no
11 doubt about it. So it's not hypothetical and --

12 THE COURT: You're just kind of saying what I just
13 said to Mr. Denton, and that is, by opening the door and going
14 forward, we're also trying to close the door on what we've
15 done so we can bring it to conclusion.

16 MR. YOO: That's right, Your Honor.

17 MR. DENTON: The problem, though, Judge, with even
18 the existing cases, what the FDA says about the label and what
19 they say about TASC and what they say about these other
20 studies may very well be relevant and admissible even in the
21 Prather case.

22 THE COURT: It might be.

23 MR. DENTON: We don't know. You don't know. You
24 haven't been presented with that evidence to consider that.
25 So to assume that it's not, is hypothetical, or at least it's

1 not an issue yet for you to consider because they are talking
2 about the issues in this case. We'll fight, I'm sure, in
3 motions and down the road as to what's admissible and what's
4 not, but my point is, is that this ongoing discussion with the
5 FDA has some relevance potentially to even the cases that were
6 filed many years ago.

7 THE COURT: Where you're most correct is, there's
8 nothing in front of me to reach that to give Mr. Yoo or anyone
9 else on the defense side an opportunity to respond so the
10 issue is forged and I can make a ruling.

11 MR. DENTON: Right.

12 THE COURT: But I'm also -- maybe I am for the first
13 time borrowing trouble in trying to figure out how to go
14 forward but while give all due justice to those who are ready,
15 because this MDL is a little bit different, you know. In Yaz
16 there was a label change, right?

17 MR. DENTON: There was.

18 THE COURT: There was a fence built around all the
19 cases. Okay, what are we going to do? There is no fence.
20 It's a big open field, and things are just continuing to grow,
21 and so we need to manage that. It's another piece -- it's
22 what makes this MDL unusual is that it continues to grow and
23 it's evolving over time, but we also have to recognize that,
24 bring the earlier cases to conclusion but accommodate the
25 changing information.

1 And the plaintiffs' point is that October 2011, at
2 this point in time, is a logical dividing point. May or may
3 not turn out that way, but that's the argument at the moment.
4 But I want to understand that because we do have to manage all
5 of the cases.

6 MR. DENTON: Sure, certainly. I agree.

7 THE COURT: So in Ortho-Evra was there a label change
8 there?

9 MR. DENTON: Many label changes.

10 THE COURT: So then you had very discrete
11 subcategories to deal with.

12 MR. DENTON: Yes.

13 THE COURT: Which none of exist here, but the cases
14 continue to come in.

15 MR. DENTON: Well, but there is certainly a
16 discussion, and I think both sides would agree there is one --
17 a label change coming. It's a question of what it will say
18 and when. I think that's --

19 THE COURT: That's where I can't borrow trouble. It
20 may or may not happen. We don't know what it's going to say.

21 Ms. Kraft?

22 MS. KRAFT: Well, I was just going to point out the
23 label change with Yaz occurred after the trial was taken off
24 the calendar. The trial was taken off the calendar --

25 THE COURT: But it's still a defining moment.

1 MS. KRAFT: Four or five month after that.

2 THE COURT: You don't want to go through that,
3 though. I don't want to channel Judge Herndon in that
4 December hearing you all had that apparently didn't go so
5 well.

6 MR. DENTON: New Year's Eve.

7 THE COURT: Didn't go so well.

8 MR. DENTON: Actually, though, the outcome was -- I
9 mean, it did get us off center and got things done.

10 THE COURT: Okay. Do you want me to channel Judge
11 Herndon from New Year's Eve then?

12 MR. DENTON: I would prefer not to have an email from
13 you on New Year's Eve.

14 THE COURT: Yeah, exactly. You don't want to do
15 that.

16 Anything else we should talk about before we talk
17 about what we're going to accomplish before our June
18 get-together?

19 MR. DENTON: I think that's it.

20 THE COURT: Yes, sir? If it didn't happen at the
21 podium, it didn't happen.

22 MR. STEVENS: Your Honor, and I don't know if this is
23 the right time, but we had brought a motion to request
24 scheduling of remand motions of certain cases that were
25 recently transferred to the court.

1 THE COURT: I have the philosophical issue with the
2 motion because it didn't come from the plaintiffs' steering
3 committee. And I can't manage this case if a thousand
4 different plaintiffs and then a different lawyer with a
5 different motion. You got to work through the plaintiff
6 steering committee.

7 I am not opposed to the idea, but you've got to
8 funnel it through the plaintiff steering committee; otherwise,
9 this case turns into -- the MDL turns into total chaos if
10 every individual plaintiff -- then why have a plaintiff
11 steering committee?

12 MR. STEVENS: I understand, Your Honor.

13 THE COURT: If you follow me.

14 MR. STEVENS: We had made an attempt at that, and we
15 wanted to bring the issue to the Court today.

16 THE COURT: Okay.

17 MR. STEVENS: These cases have simple diversity
18 issues and have gone on several months and certainly don't
19 belong in front of Your Honor and need to be taking Your
20 Honor's time.

21 THE COURT: And there will be a -- I have no doubt.
22 I don't always know what Mr. Yoo's thinking, but he might have
23 a different opinion.

24 MR. YOO: It's possible.

25 THE COURT: And so I need you to work with the

1 plaintiff steering committee, and I'm sure that they will make
2 sure that the issue is teed up for me one way or the other.
3 They may disagree as to how to tee it up or the timing, but
4 I'm sure they will figure it out. And then the defendant will
5 get a chance to respond, and I'll rule on it.

6 But the bigger issues you got to work through the
7 plaintiff steering committee. If the plaintiff steering
8 committee ceases to represent the plaintiffs, then there may
9 need to be another meeting on that issue. That's all
10 resolvable in the democratic -- small "d" -- democratic view
11 of the world.

12 MR. STEVENS: Thank you, Your Honor.

13 THE COURT: All right. Things we need to accomplish
14 before June. And I'm looking at June 20 at ten o'clock. Any
15 issues with that?

16 MR. BALL: What date?

17 THE COURT: June 20. It's a Thursday.

18 MR. BALL: We actually were flying to -- because of
19 the next meeting and everything we're having -- and our need
20 to respond, to react with our client to what happened, we were
21 going to suggest the 25th, 26th, a few days later, for more
22 time.

23 THE COURT: You will have to come to Boy Scout camp
24 with me --

25 MR. BALL: I've done that.

1 THE COURT: -- somewhere outside of Quincy, Illinois.
2 So that's not -- so look at the week, what about July 1 or 2?
3 I can move -- I will move my 21st docket to the 20th if I need
4 to. Every other Friday we have to move all our criminal
5 proceedings off anyway because of the sequester and furloughs.

6 MR. BALL: I guess the later, the latest we can make
7 it -- Friday the 21st.

8 THE COURT: We'll make it ten o'clock on Friday the
9 21st. Does that, schedule-wise, work for everybody?

10 MR. DENTON: Thank you.

11 THE COURT: Then I'll move my 21st docket to
12 Thursday. That's June 21 at ten o'clock.

13 So the topics for me, and I'm sure you'll all want to
14 supplement it, will be the six remaining cases here, the
15 pending summary judgment and whether or not I should rule
16 those or remand. We have the issue of oral argument in
17 Prather on summary judgment. Maybe you all feel like -- or if
18 you don't have anything new to add, I'll decide that day at
19 the hearing whether we're going to have oral argument or not.

20 We have no motion pending, but Ms. Kraft talked about
21 the possibility of generic discovery and a TASC study and
22 others. You will need to file a motion before then and give
23 them a chance to respond if you think that's appropriate.

24 Ms. Geist, am I causing you anxiety?

25 MS. GEIST: No, no. Not at all, Your Honor. We

1 don't have -- unless I've missed something, we don't have any
2 new discovery requests relating to what Ms. Kraft said and
3 what's set forth in the plaintiffs' plan.

4 THE COURT: Okay. If she wants to open that door,
5 she has to file a motion.

6 MS. GEIST: Or file the discovery.

7 THE COURT: File discovery.

8 MS. KRAFT: It was previously served discovery,
9 actually.

10 MS. GEIST: Well, then I will need to talk with Ms.
11 Kraft about it so we are clear.

12 THE COURT: Okay. Define it or file a motion so I
13 understand exactly what it is our issue is there.

14 MS. GEIST: Thank you, Judge.

15 THE COURT: I would like a discovery plan with the
16 idea that we're headed towards subclasses for generic
17 discovery on post October 2011 cases. If you could -- I don't
18 know if that's a Ms. Geist/Ms. Kraft confab, but let's start
19 talking about how we are going to manage those cases. Even
20 though there's not a lot now, unless and until something
21 changes, I expect those cases to continue to be filed. I
22 don't know that, but I would be surprised otherwise.

23 Or any other proposals on how to manage the continued
24 filings, yet give closure to the earlier filed cases but
25 manage the newly filed cases. If you think October 2012 is

1 not an appropriate subclass breaking point, I'm open to what
2 would be.

3 I don't know off the top of my head whether we have
4 ten cases left of the bellwether pool or 16. There seems to
5 be some confusion. But submit a discovery schedule for those
6 cases, the remaining cases that are not in our seven, out of
7 the original bellwether pool as to how we should do discovery
8 in those cases.

9 And Mr. Yoo had a proposal, but we need to then look
10 at a third level of -- a third category of bellwether cases,
11 begin to get these cases ready for trial or remand, whatever
12 the proposal is from the plaintiffs and defendants.

13 There's a category of cases I should remand at this
14 time or there's a category of cases I should accept as
15 bellwether cases to be tried here and a schedule to get those
16 cases ready, whichever -- I'm open to the discussion.

17 And then we have the issue that was raised today that
18 the plaintiffs' steering committee needs to discuss with the
19 California contingent, if you will, and present a motion there
20 and give the defendant an opportunity to respond to that. And
21 that will be on the agenda for the June 21st. But we've got
22 to coordinate this. We can't have random plaintiffs having an
23 agenda separate and apart from the plaintiffs' steering
24 committee, or the plaintiffs' steering committee -- the
25 composition of that committee needs to change to reflect the

1 composition of the plaintiffs.

2 Any other items you think we should cover?

3 MR. YOO: No, Your Honor.

4 MR. DENTON: No, sir. Thank you.

5 THE COURT: Very good. We'll see you all on June 21.

6 Thank you.

7 **(PROCEEDINGS CONCLUDED AT 11:13 AM.)**

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CERTIFICATE

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

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

I further certify that this transcript contains pages 1 through 45 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 17th day of May, 2013.

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