

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

IN RE: PROPECIA (FINASTERIDE) PRODUCTS LIABILITY LITIGATION	Master File No.: 1:12-md-02331-JG-VVP MDL No. 2331
This Document Relates to: ALL CASES	Honorable John Gleeson Magistrate Judge Viktor Pohorelsky JOINT DISCOVERY & TRIAL PLAN

**DISCOVERY & TRIAL PLAN
PRACTICE AND PROCEDURE ORDER NO. 10 (AMENDED)**

This matter came before the Court on September 2, 2015, to consider amending Discovery & Trial Plan Practice and Procedure Order No. 10 (“PPO No. 10”). Based on the parties’ filings, arguments and the entire record herein, the Court hereby vacates PPO No. 10 and enters the following Amended PPO No. 10:

1. General Merits Discovery: To date, pursuant to the Revised ESI Order entered July 2, 2013 and agreement of the Parties, Merck has produced approximately sixty-eight (68) custodial files. Plaintiffs shall have the right to identify additional relevant witnesses as discovery continues. The Parties shall meet and confer concerning such additional witnesses, and Merck retains the right to approach the Court with objections to such requests. Plaintiffs shall be entitled to serve interrogatories, not to exceed twenty-five (25). Plaintiffs have previously served requests for production of documents. In the event Plaintiffs believe additional requests for production of documents are necessary beyond the requests set out in the Defendant Fact Sheet, the Parties shall meet and confer concerning such additional requests for production of documents. There is no presumptive limit to the number of corporate depositions Plaintiffs may take. However, in the event Defendants believe the number becomes unreasonable, the Parties shall meet

and confer to propose agreed-to limitations, if any, and to seek Court intervention if necessary. Plaintiffs shall complete general merits discovery no later than June 24, 2016.

2. Custodial Production Protocol: With respect to the previously produced custodial files and those to be produced, Merck shall provide the following:

- a. dates of each witness's employment at Merck and the current position(s) for current employees and the last known position for former employees;
- b. a copy of the employee's curricula vitae no less than ten (10) days before the deposition; and
- c. if the witness is no longer employed by Merck, the witness's last known address.

3. Custodial File Tier I-VI Certification Process: With respect to those custodial files, whose files were produced in Tier I-VI productions, produced, Merck shall:

- a. On or before September 15, 2015, provide a written certification stating that, to the best of its knowledge, information and belief, the complete file has been produced (a "Certification of Completion"); and
- b. The PEC may commence depositions of custodians whose production was completed in Tier I-VI on or after October 15, 2015.

If Merck fails to provide a Certification of Completion pursuant to this Order the PSC shall be able to re-depose any such witness if the custodial file is supplemented at a later date, provided good cause is shown for the need to re-depose the witness. Any such deposition shall be limited to the subject matter contained in the supplemental production.

4. Additional Custodial Files: With respect to each Custodial File to be produced in the future pursuant to this Order, Plaintiffs may notice a deposition of the witness thirty (30) days after Merck's provision of the Certification of Completion.

5. Case Pool. The representative case pool (“Case Pool”) will consist of ten (10) total cases. The Case Pool shall be chosen from all cases directly filed in, or transferred to, the Eastern District of New York MDL 2331. Each side will select five (5) cases for inclusion in the case pool. The Case Pool will be comprised of persons claiming Propecia caused them to suffer some form of harm to the Reproductive System or depression. For purposes of this Order, harm to the Reproductive System shall encompass sexual dysfunction, including erectile dysfunction, libido disorders, ejaculation disorders, and orgasm disorders; male infertility and/or poor seminal quality, and testicular pain. Plaintiffs’ alleging that their consumption of Propecia exclusively caused prostate, breast enlargement, suicide, or breast cancer shall be subject to a separate PPO governing the trial of those cases. The Case Pool shall be comprised of cases involving only a Merck Defendant(s).
6. Defense Fact Sheets. On or before February 1, 2016, Plaintiffs will provide Merck with a list of fifty (50) Plaintiffs. Merck must serve on Plaintiffs substantially complete Defense Fact Sheets for these fifty (50) cases by April 15, 2016. Merck must also serve on Plaintiffs substantially complete Defense Fact Sheets for the five (5) cases selected by Merck for the Case Pool no later than May 27, 2016.
7. Selection of Cases. The Parties will serve upon the other their respective Case Pool selections to fill slots in the initial Case Pool with the Court on May 13, 2016 at 5:00 p.m. Eastern Standard Time. Neither party may select a case for the Case Pool unless the Plaintiffs supplied to Counsel for Merck both: (i) substantially completed medical record authorizations (meaning authorizations for the prescribing physician, the primary care physician, and pharmacy records), and (ii) a Plaintiff’s Profile Form by no later than January 1, 2015. In the event the Defendant settles a pick from the Case Pool from one of the Plaintiffs’ Case Pool selections, the Plaintiffs may select another case [from the 50 cases in which DFS were

produced for inclusion in the Case Pool. In the event the Plaintiff voluntarily dismisses a case from one of the Defendants' Case Pool selections, the Defendant may select another case for inclusion in the Case Pool. The Parties will not be entitled to an additional pick, in the event the Defendant settles a case designated as a "Defense Pick" from the Case Pool selection or the Plaintiffs' dismiss a case designated as a "Plaintiffs' Pick" from the Case Pool selection. Cases that are involuntarily dismissed pursuant to an Order of this Court shall not be substituted.

8. Lexecon Waivers. Plaintiffs Executive Committee ("PEC") shall only include on its lists of fifty plaintiffs for production of Defense Fact Sheets, Plaintiffs who agree to waive their rights under *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). On or before March 1, 2016, Defendants will provide Plaintiffs with a list of fifty (50) plaintiffs. Plaintiffs will thereafter endeavor to secure *Lexecon* waivers for these fifty (50) Plaintiffs and notify Merck on or before April 1, 2016 of the Plaintiffs from whom *Lexecon* waivers have been secured. In the event Plaintiffs are unable to secure *Lexecon* waivers for forty-seven (47) of the Plaintiffs identified by Merck, Merck may petition the Court for guidance. If objection is not made in accordance with this provision, the parties waive their respective rights under *Lexecon*. For any case selected by a party for the Case Pool where the party declines to waive his/her rights under *Lexecon*, the party shall have the right to replace said case within (5) five days following notice of declination to execute a *Lexecon* waiver. The parties shall act in good faith in making objections.
9. Case-Specific Discovery. Case-specific discovery on cases selected for the Case Pool shall commence on May 30, 2016 and be completed by September 15, 2016 with discovery in each case being governed by the Federal Rules of Civil Procedure, the local rules of this Court, and any further discovery orders of this Court. Case-specific discovery for the ten Case Pool

selection cases shall be limited to the following until the Court identifies the representative trial cases:

- a. the prescribing physician(s);
- b. the physician(s) who diagnosed the plaintiff's injury;
- c. the plaintiff(s);
- d. two (2) (current or former) sales representative(s) for the prescribing physicians. If Merck is unable to produce sales representatives for the prescribing physician(s), then it shall produce the district or regional sales manager for the appropriate geographical area. Plaintiffs reserve the right to notice depositions of additional sales representatives should they deem it necessary but agree to meet and confer with defendant before so doing, and Defendant reserves the right to object to additional depositions of sales representatives.

Damages witnesses shall be deposed after the Court identifies the representative trial cases. Plaintiffs shall be responsible for noticing the depositions of any prescribing and/or diagnosing physicians for all "Plaintiffs' Picks", and Merck shall be responsible for noticing the depositions of all "Defense Picks". The expense of conducting any such depositions shall be paid by the Party noticing the deposition. The order of questioning shall be as follows: for "Plaintiffs' Picks" the PSC shall be the initial questioner, and for "Defense Picks" Merck shall be the initial questioner.

10. Selection of Cases for First Bellwether Tranche. On September 30, 2016 at 5:00 p.m. Eastern Standard Time, each party shall file with the Court its proposal for three (3) trial cases from its picks among the Case Pool, as the first wave of Bellwether dispositive motions and trials (the "First Bellwether Tranche"). In connection with their proposed selections, the Parties shall complete the following:

- a. On September 30, 2016 the PEC and Merck shall file a statement with the Court identifying the reason the proffered picks constitute a representative trial pick;
- b. On October 7, 2016 the Parties may file a statement in response to the opposing parties' selection as a representative trial pick;
- c. The Court will endeavor to select the First Bellwether Tranche on or before October 28, 2016.

The Court will select a total of four (4) representative cases to populate the First Bellwether Tranche. Replacement picks, if any, shall be governed by the procedure set forth in Paragraph 6. Delay, if any, will be limited to that reasonably necessary to prepare the new selection for trial. Any case resolved through summary adjudication, motion practice or trial that results in a final judgment shall count as a "Trial Pick" for purposes of this Paragraph.

11. Completion of Discovery. Immediately upon the Court's selection of the First Bellwether Tranche, the Parties may conduct an additional seven (7) depositions, excluding depositions of expert witnesses. These depositions will not include Plaintiff's physician and/or other treating physicians who were deposed pursuant to Paragraph 9. In the event either Party believes additional depositions are required, the Parties shall meet and confer to discuss the relevancy of said witness. If the parties are unable to reach an agreement regarding the additional witness, the party seeking to take the deposition may seek relief from the Court.
12. Expert Reports and Expert Discovery for Cases in the First Bellwether Tranche. On or before December 15, 2016, Plaintiffs will disclose in writing the identities of their experts as required by Fed. R. Civ. P. 26(a)(2)(A) and will serve the reports and other materials as required by Fed. R. Civ. P. 26(a)(2)(B), for all cases in the First Bellwether Tranche, including case specific reports. On or before February 1, 2017, Merck will disclose in writing the identities of

its experts as required by Fed. R. Civ. P. 26(a)(2)(A) and will serve the reports and other materials as required by Fed. R. Civ. P. 26(a)(2)(B), for all cases in the First Bellwether Tranche including case specific reports. On or before March 1, Plaintiffs will disclose rebuttals expert reports, if any. The Parties will make their designated experts available for deposition between March 15, 2017, and May 12, 2017.

13. Motions. All motions to exclude or limit expert testimony pursuant to Federal Rule of Evidence 702 and all dispositive motions shall be filed as follows:

- a. Opening Brief: May 30, 2017;
- b. Opposition Brief: June 15, 2017; and
- c. Reply Brief: June 30, 2017.

The Court will hold a hearing to consider these motions on a date to be determined. Total briefing for each Parties' *Daubert* briefs shall be limited to 50 collective pages per side for opening briefs, 50 collective pages per-side for opposition briefs, and 25 pages per side for reply briefs.

14. Other Dispositive Motions: Each Party shall be entitled to request motion practice, including dispositive motion practice, pursuant to the Local Rules. Nothing in this Order shall prohibit the opposition party from arguing the motion is premature and/or untimely.

15. Final Discovery. The Parties shall complete all remaining discovery of cases set for trial within 60 days before trial.

16. Trial Schedule. The Court anticipates that the First Bellwether Tranche shall be trial ready by September, 2017. The Court will issue a scheduling order governing all trial related obligations, including the specific date for commencement of trial, following entry of the *Daubert Orders*.

Dated: _____

HON. VIKTOR V. POHORELSKY
U.S. MAGISTRATE JUDGE