IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS LIABILITY LITIGATION	**MDL NO. 2342** **12-MD-2342** **HON. CYNTHIA M. RUFE**
THIS DOCUMENT RELATES TO ALL ACTIONS	

SPECIAL DISCOVERY MASTER'S REPORT AND RECOMMENDATION NO. 3
(REGARDING TRIAL POOL SELECTION PROTOCOL)

I. INTRODUCTION

Pretrial Order No. 23 called for the parties to "submit joint or competing proposals governing (1) selection of Trial Pool Cases, (2) the scope of general causation *Daubert* [proceedings], (3) scheduling of summary judgment and specific causation *Daubert* motions in Trial Pool Cases, and (4) protocol for selection and scheduling of the first cases to be tried" by May 15, 2013. (Id. Paragraph 8) At various times since around May 15, 2013, the parties have presented to me, as Special Discovery Master, their competing proposals governing these matters. They have worked on a Trial Pool Selection Protocol covering the subjects discussed above. It has included many points on which they agree, and a few points on which they have not reached agreement.

The points of agreement and disagreement are shown in Exhibit A to this Report and Recommendation, which was presented to me as a joint statement of how the parties agree and

differ on the terms of a Trial Pool Selection Protocol.[1] I worked with the parties in a concerted effort to reach agreement on a Trial Pool Selection Protocol just before the conference held with the Court on July 18, 2013, and we have had several conferences and discussions since then. The parties have presented arguments about their positions in meetings and in letters in recent weeks.

I have held several discussions with counsel for the parties in which I explored possibilities for agreement. The parties have not reached agreement. Therefore, it is necessary for me to issue a report and a recommendation on the provisions of a Trial Pool Selection Protocol. See Pretrial Order No. 22.

This Multi-District Litigation presently involves the consolidation of about 430 cases. The parties and the Court have been developing a process by which there will be a trial pool, from which cases are to be tried. The first Trial Pool case is to be tried by October 13, 2014. Pretrial Order No. 23, paragraph 8.

The first step in selecting the cases that will eventually be in the Trial Pool is designation of an Initial Discovery Pool. Cases in the Initial Discovery Pool are eligible for selection to the Trial Pool. The parties presented a proposal that would have a discovery pool of 25 cases, and the Court accepted it. See Pretrial Order No. 17, dated January 17, 2013; Pretrial Order No. 21, dated February 25, 2013; and Pretrial Order No. 24, dated April 1, 2013. Thirteen were to be selected by the Pfizer Defendants, and twelve were to be selected by the Plaintiff's Steering Committee.

[1] Since Exhibit A was submitted to me, it has emerged that the parties disagree about more of the second and third paragraphs of Section II of Exhibit A than is marked. At one point, their disagreement appeared to have been narrower.

Specified discovery is to be taken in cases in the Initial Discovery Pool, and then there is to be selection of a Trial Pool from among the cases in the Initial Discovery Pool. The parties have not agreed on some aspects of how the selection process of Trial Pool cases is to occur. Their disagreements and my recommended resolutions are discussed below.

II. ISSUES ARISING FROM DISMISSAL BY PLAINTIFFS OF CASES IN THE INITIAL DISCOVERY POOL

Ten of the cases selected for the Initial Discovery Pool by the Pfizer Defendants have been withdrawn by the plaintiffs. The Pfizer Defendants advance a number of reasons why this calls for provisions in the Trial Pool Selection Protocol that allow the Pfizer Defendants to respond to withdrawals.

As called for in the Pretrial Orders discussed above, the Pfizer Defendants chose thirteen cases for the Initial Discovery Pool, and the PSC chose twelve. Shortly after the selections were made, seven of the plaintiffs chosen by the Pfizer Defendants dismissed their own cases without prejudice. Upon the Pfizer Defendants' selection of seven replacement cases, three of the replacement plaintiffs dismissed their own cases without prejudice. There have been some replacements, and the parties inform me that they are working with a list of 24 Initial Discovery Pool cases, each side having selected twelve.

The matter of case selection and dismissal was discussed at the conference of July 18, 2013. Without describing any specific plaintiff or the facts of any specific case, Plaintiffs' Co-Lead Counsel described reasons why some cases may now be seen as having been filed prematurely. A case may have been filed based on a parent's memory of what was prescribed to her during her pregnancy some years ago; further review of records (presumably obtained after the case was filed) might reveal that her memory was incorrect or incomplete. Or records may

not be readily available because the events took place long ago.[2] Plaintiffs' Co-Lead Counsel also described how recent genetic testing—presumably completed after the suit was filed—may have undercut the strength of a particular case.

Plaintiffs' Co-Lead Counsel also described ways in which the PSC did not view some of the ten dismissed cases as "representative."

Pretrial Order No. 24 describes the process by which a withdrawn or dismissed case may be replaced, so that the complement of 25 cases in the discovery pool may be filled out. (Id., at paragraph 4, 5 and 6) This has largely occurred, as noted above, and there are now 24 cases in the Discovery Pool.

There is no rule or sanction in place that prevents the ongoing withdrawal without prejudice of cases between now and the time of trial, at least in the absence of an answer or a motion for summary judgment having been filed. Fed. R. Civ. P. 41(a)(1)(A)(i). This has occurred with ten of the 23 cases selected by the Pfizer Defendants for the Initial Discovery Pool. The Court has expressed its concern that continued withdrawal and replacement of cases will result in prejudicial delay, and it is obvious that if it continues, it will be to the detriment of efficient management of the Multi District Litigation and to timely achievement of milestones and deadlines set out in various Pretrial Orders. The unilateral right of one side to withdraw cases from a pool is inconsistent with the purposes of bilateral designation of the cases that are put into the pool.[3] The large-scale exercise of the right to dismiss without prejudice is

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[2] Cases chosen for the discovery pool that were later dismissed arose from dates of birth as long ago as August 2002, and as recent as March 2012. In five of the ten withdrawn cases, the pregnancy during which Zoloft was alleged to have been ingested took place within the last seven years.

[3] In at least one MDL, one side had the sole right to choose which cases went into the trial pool. In re: Propulsid Prods. Liab. Litig., MDL No. 1355, 2003 WL220233398 (E.D. La. Mar. 11, 2003), discussed in Fallon, Grabill and Wynne, *Bellwether Trials in Mutidistrict Litigation*, 82

inconsistent with the purpose of having an MDL. One pair of commentators has stated, "[A]llowing opt-outs would defeat the core function of the MDL, which is to conserve resources by consolidating as many lawsuits as possible in a single forum." Silver and Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and Proposal*, 63 Vanderbilt L.R. 107, 124 (2010).

The ability to dismiss cases voluntarily on a large scale is available in this case because the allegedly injured people are minors who are represented in their individual cases by guardians or parents. The statutory limitations periods on claims by minors are quite long, and a dismissal does not, for the most part, preclude the re-filing of the claim later. That is a partial explanation of why it is happening here and why the parties have not presented any discussion in other cases of whether and how to respond to the phenomenon.

If there were only a limited number of cases withdrawn from the Initial Discovery Pool or from Trial Pool eligibility, it would not be unusual. It can be sensible to allow, at various stages of an MDL, each side to strike cases from the pools or to veto the other side's (or even the judge's) selections. See Fallon, Grabill and Wynne, *Bellwether Trials in Mutidistrict Litigation*, 82 Tulane L.R. 2323, at 2263-65 (2008). I do not view the possibility that a few more cases will be withdrawn as deeply problematic, particularly if those withdrawals allow for countervailing action by the Pfizer Defendants. It is the large scale of the withdrawals and the possibility that they may be continuing as the trial date approaches that are particularly problematic. I more concerned about withdrawal of many cases at times when withdrawal will create burden, delay and inconvenience.

Tulane L.R. 2323, at 2363-65 (2008). Neither party has suggested that unilateral selection of cases would be appropriate here. If plaintiffs withdrew all cases in the Initial Discovery Pool that were selected by the Pfizer Defendants prior to trial, it would be tantamount to having unilateral selection of bellwether trials.

The Pfizer Defendants propose to deal with the difficulties raised by the prospect of continued withdrawal of cases by plaintiffs in a few ways.

a. Should the Pfizer Defendants Be Allowed Countervailing Strikes Following Plaintiffs' Voluntary Dismissals

First, the Pfizer Defendants propose that if a plaintiff voluntarily dismisses a case in the Initial Discovery Pool after a certain date (proposed as August 15, 2013, in the last written submission) and if that dismissal is based on information that was known or should have been known by plaintiffs before that date, then the defendants will be able to strike an equal number of cases selected by plaintiffs from the Initial Discovery Pool or from Trial Pool eligibility.

This rule will be difficult to administer because it will require a hearing on what the plaintiff or plaintiff's counsel could or should have known by a particular date. This will involve a determination of what an attorney did in the course of representation, and will inevitably lead to complicated or delicate questions of attorney-client privilege and work product protection.

The plaintiffs argue that this proposal is unfair because, if accepted, it will penalize plaintiffs other than the ones who voluntarily dismiss their cases. I do not attribute much weight to this argument. A plaintiff removed from the Trial Pool or from Trial Pool eligibility is not being punished. That plaintiff will still have the right to pursue his or her case. All the plaintiff is losing is the opportunity to go first; that opportunity was never something that the particular plaintiff had a right to expect upon filing or upon becoming part of the MDL. That opportunity arose from a combination of happenstance and bargaining about how cases are chosen, and it is an opportunity fairly placed in the mix of issues as bellwether cases are chosen.

There is nothing punitive to any plaintiff or deleterious to the core functions of MDL management in allowing the defense to strike from the Trial Pool cases selected by the plaintiffs.

However, having large numbers of cses pulled from the pool at late stages by one side, as I have discussed, is troubling.

With these considerations in mind, I recommend as follows:

> Either side shall be permitted to strike two cases from the Initial Discovery Pool between now and two weeks before the date for selection of Trial Pool cases. This may be done for any reason. (The parties have proposed selection of Trial Pool cases on March 31, 2014. If this is the date chosen, then the date before which these two strikes may be exercised will be March 17, 2014.) Voluntary withdrawal by a plaintiff shall be counted as one of the PSC's strikes for these purposes. If any plaintiff voluntarily dismisses a case in the Initial Discovery Pool for any reason after plaintiffs have exercised their two strikes, then the Pfizer Defendants may strike an equal number of cases as ineligible for the Trial Pool. If either side does not exercise one or both of their strikes by March 17, 2014, then they are forfeited.[4]

Plaintiffs have urged that the solution to the possibility of future withdrawals should be reduction of the number of cases in the Initial Discovery Pool. My recommendation may reduce the number of cases by up to four rather quickly in any event. It may be that it is wise to reduce the pool further, but that arises from issues of scheduling and expense. It is not within the scope of the Trial Pool Selection Protocol, and I believe that the question of the number of cases in the Initial Discovery Pool is better revisited on its merits separately. Twenty-four is not an unusually high number of cases if the trial pool is to include about six cases. Fallon, Grabill and Wynne, *Bellwether Trials in Mutidistrict Litigation*, 82 Tulane L.R. 2323, at 2346-47 (2008).

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[4] In theory, under this recommendation, plaintiffs could withdraw or dismiss many or all of their cases before March 17, 2014, and the defense could counter-strike any remaining cases. I predict that this will not happen. Plaintiffs' withdrawals may still result in additions to the Initial Discovery Pool pursuant to Pretrial Order No. 24, even if that would lead to delay. If the number of cases in the Initial Discovery Pool dwindles to a truly low point quickly and prejudicially, this will no doubt be brought to my attention and to the attention of the Court. The PSC and the Pfizer Defendants would be acting against their own interests if they caused the Initial Discovery Pool to dwindle precipitously.

b. What Should Happen if a Plaintiff Withdraws a Case After it Is Selected for the Trial Pool?

The Pfizer Defendants' proposal also includes a provision that allows Trial Pool cases to be dismissed only by order of the Court and only with prejudice. The PSC argues that it is unlawful for a court to dismiss a case brought on behalf of a minor with prejudice, but they cite no case that precludes such a dismissal under Fed. R. Civ. P. 41(a). By then, presumably, the Pfizer Defendants will have answered any Complaint. If not, their Daubert motions may be deemed to have been motions for summary judgment, in that they will be aimed at precluding evidence that the plaintiff must present in order to prevail. Therefore, it is permissible to require that a withdrawal at that late stage be with prejudice. It is also fair, given the late stage of the proceedings and given the possibility that a number of strikes and withdrawals will have been allowed up to that point under the portion of my recommendation set out above.

I recommend that the Court accept in large part the Pfizer Defendants' proposal that Trial Pool cases be dismissed only by order of the Court and only with prejudice, in the absence of a showing of good cause why dismissal should be without prejudice. This provision should become effective after the deadline for strikes and withdrawals of March 17, 2014 that is stated above. This provision should be in the Trial Pool Selection Protocol.

I recommend that there be no provision in the Trial Pool Selection Protocol about the order or priority in which cases are to be tried if there is a dismissal of a Trial Pool case. This should be left for decision if and when the occasion arises.

III. SHOULD THE SELECTION OF TRIAL POOL CASES BE STAGGERED?

The parties agree that there should be six cases in the Trial Pool, with each side choosing three. Defendants propose that the PSC choose three, and that the Pfizer Defendants pick three a few days later. Plaintiffs do not agree that there should be staggered picks.

Simultaneous picking could result in an overlap of cases chosen by the two sides. If this happens, it can only be beneficial. If two sides pick one (or even two or three) of the same cases from the Initial Discovery Pool, it implies that there is something important and useful to be resolved in that particular case, and that it is a good bellwether case. While it is possible that staggered selection will result in overlapping selections, it is less likely than if there are simultaneous selections.

Staggered selections as envisioned by the Pfizer Defendants gives an advantage to the party choosing second. In other contexts where I have helped to resolve differences about procedure, I have not been in favor of one party going before the other on a consistent basis. The parties themselves agree in their draft Trial Pool Selection Protocol that the issue of which side will select the first case to be tried will be solved by what amounts to a coin flip. (See Exhibit A, Section II, second paragraph) Whatever small potential for advantage in going second there is, it can be eliminated by simultaneous selection of Trial Pool Cases.

If the selections of the two parties overlap, there will be fewer than the agreed upon six cases in the Trial Pool. In the unlikely event that there are only four cases selected in a simultaneous selection process, then each side may make an additional selection in order to round out the Trial Pool. If there are five cases resulting from a simultaneous selection process, and at least one of them is a commonly-selected case, then five cases for the Trial Pool will be enough.

IV. HOW MANY CASES SHOULD BE READY FOR TRIAL BY THE FIRST TRIAL DATE?

The parties present competing proposals for Section VII of the Trial Pool Selection Protocol. The Pfizer Defendants propose that each side be required to have one case ready for

trial by October 13, 2014. They state that this will avoid unnecessary expense. The plaintiffs propose that all of the Trial Pool cases should be ready for trial on October 13, 2014.

I have considered a number of factors.

First, it stands to reason that trial preparation of an MDL bellwether case is "exponentially more expensive" than trial preparation of a "normal" case because so much is at stake. Fallon, Grabill and Wynne, *Bellwether Trials in Mutidistrict Litigation*, 82 Tulane L.R. 2323, at 2366 (2008). That is why they call it a bellwether. Plaintiffs may, if they are successful, shift the cost of preparation to the many other parties for whom the bellwether case produces a common benefit. Defendants may not. Telling parties to be ready for trials that may not happen should not be taken lightly in the context of an MDL.

Second, preparation of all of the cases gives assurance that there will be a case to try in case a key witness becomes unavailable or some other obstacle to trying a case emerges at the last minute. It also provides assurance that there will be a case to try on the trial date if there is a withdrawal of the first case scheduled. Concerns about the consequences of late withdrawals are discussed above. A disincentive to the late withdrawal of a case would be to require that only a limited number of cases to be ready for trial. By the same token, my recommendations above provide additional disincentives to late withdrawal by providing that such a withdrawal could be with prejudice.

If a choice had to be made now, I would recommend that all cases in the Trial Pool be ready for trial on the first trial date. But it is a close call, with every one of the considerations above capable of being countered with something that is "on the other hand." I recommend that the question be left for a later date, and that the parties will benefit from keeping the question open for discussion and negotiation of other procedural questions that may arise.

V. SUMMARY

This Report and Recommendation discusses a number of provisions for a Trial Pool Selection Protocol, and not necessarily in the order presented in the competing proposals given by the parties. For ease of drafting and reference, this Summary lays out the text that I recommend be placed in the Trial Pool Selection Protocol that the parties presented to me and that I attached to this Report and Recommendation as Exhibit B.

I recommend that Section II of the Trial Pool Selection Protocol, entitled "Trial Pool Cases," state as follows:

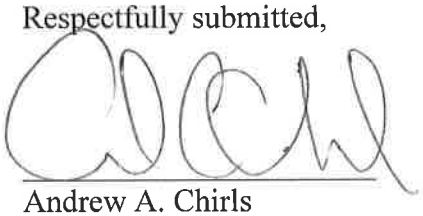
> Each side shall on March 31, 2014, designate three cases for the Trial Pool from the Initial Discovery Pool. They shall inform the Special Discovery Master of their selections simultaneously in a manner and at a time to be arranged by the Special Discovery Master. If their selections yield five or six cases, then the selection process will be complete. If their selections yield fewer than five cases, then they shall select additional cases by simultaneously disclosing additional selections to the Special Discovery Master within two business days thereafter, in order to get to a minimum of five and a maximum of six cases.
>
> Any cases selected by both sides will be tried before the other cases in the Trial Pool. The Special Discovery Master shall randomly select the side that will choose the first case to be tried after any case that was selected by both sides. The other side will then select the next case to be tried, and trial selection will alternate thereafter.
>
> On or before March 17, 2004, up to two cases chosen for the Initial Discovery Pool by the Pfizer Defendants may be stricken from the Initial Discovery Pool or from Trial Pool eligibility by PSC, and up to two cases chosen for the Initial Discovery Pool by the PSC may be stricken from the Initial Discovery Pool or from Trial Pool eligibility by the Pfizer Defendants. Voluntary dismissal of a case by a plaintiff shall be considered one of the PSC's strikes for the purposes of this paragraph. If any plaintiff voluntarily dismisses any case or cases selected by the Pfizer Defendants in the Initial Discovery Pool after the PSC has exercised their two strikes, then the Pfizer Defendants may identify and strike an equal number of

> cases selected by Plaintiffs for the Initial Discovery Group, thereby making them ineligible for the Trial Pool. If either side does not exercise one or both of their strikes by March 17, 2014, then they are forfeited.
>
> After March 17, 2014, Initial Discovery Pool cases and Trial Pool Cases may be dismissed only by order of the Court and any such dismissal will be with prejudice in the absence of good cause shown why the dismissal should be without prejudice. If the Court permits a Trial Pool Case chosen by the Pfizer Defendants to be dismissed in these circumstances, the Pfizer Defendants will be permitted to select a replacement case, and the Court will consider whether and how this has an impact on the trial dates of cases in the Trial Pool and on the order in which cases shall be tried.

I recommend that Section VII of the Trial Pool Selection Protocol, entitled "Trial," state as follows:

> The parties will have cases ready for trial by October 13, 2014, subject to further order of the Court. On or around February 1, 2014, the Special Discovery Master will make a Report and Recommendation about the number of cases that should be ready for trial to commence on that date. The parties are to present a joint proposal or competing proposals to the Special Discovery Master on this point on or before January 15, 2014.

Respectfully submitted,



Andrew A. Chirls
Special Discovery Master
Fineman Krekstein & Harris, P.C.
1735 Market Street, Suite 600
Philadelphia, Pennsylvania 19103
215-893-8715

Dated: August 23, 2013

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS LIABILITY LITIGATION	§	**MDL NO. 2342**
	§	**12-MD-2342**
THIS DOCUMENT RELATES TO ALL CASES	§	**HON. CYNTHIA M. RUFE**

PRETRIAL ORDER NO._____
TRIAL POOL SELECTION PROTOCOL

This Court having considered the scope of these proceedings, the number of plaintiffs, the amount of discovery that will be required, and the time necessary to complete pre-trial preparations, hereby establishes a Trial Pool Selection Protocol.

I. SCOPE OF GENERAL DAUBERT PROCEEDINGS

General causation Daubert hearings shall be held the week of February 17, 2014, subject to the convenience of the Court. The scope of the Daubert hearings will be general causation.

General causation expert reports shall be submitted in accordance with Pretrial Order No. 23, and the parties shall thereafter determine whether to propose any further grouping of experts for the general Daubert hearings. All other procedures shall go forth in accordance with Pretrial Order No. 23.

II. TRIAL POOL CASES

The Parties will select a total of six (6) Trial Pool Cases, three cases selected by each side, from the Initial Discovery Group. Plaintiffs' picks will be due on March 31, 2014, and the Pfizer Defendants' picks will be due on April 4, 2014. *[Highlighted language proposed by Pfizer. Plaintiffs do not agree to staggered picks.]*

The Special Discovery Master shall then randomly select the side that will choose the first case to be tried. The other side will then select the second case to be tried, and trial selection will alternate thereafter. Trial Pool Cases can be dismissed only by order of the Court and any such dismissal will be with prejudice. If the Court permits a Trial Pool Case chosen by the Pfizer Defendants to be dismissed with prejudice, the other case chosen by the Pfizer Defendants will be substituted in the trial order. If a Trial Pool Case chosen by the Pfizer Defendants is dismissed, the Pfizer Defendants will be permitted to select a replacement case and may move for an extension of the initial trial date on this ground. *[Highlighted language proposed by Pfizer. Plaintiffs do not agree that Pfizer can move for an extension.]*

If, on or after August 15, 2013, Plaintiffs voluntarily dismiss any case or cases selected by the Defendants for the Initial Discovery Group based on information that was known to or should have been known to Plaintiffs through the exercise of reasonable diligence prior to August 15, 2013, Defendants may identify an equal number of cases selected by Plaintiffs for the Initial Discovery Group that will be ineligible for the Trial Pool. *[Highlighted language proposed by Pfizer. Plaintiffs do not agree..]*

III. *LEXECON*

As to the Trial Pool Cases selected pursuant to section II of this Order, Plaintiffs and the Pfizer Defendants agree to waive the right to seek remand to the transferor court pursuant to the Supreme Court's decision in *Lexicon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), in order to permit trials to be presided over by the MDL court; provided, however, the Pfizer Defendants may unilaterally revoke such waiver if the Plaintiffs refuse to make available live at trial the mother (unless she has terminated or lost custodial rights to the minor plaintiff),

guardian(s) and/or other legal representative(s) who is/are bringing the claim on behalf of the minor plaintiff.

IV. TRIAL EXPERT DISCOVERY

Plaintiffs' additional generic non-causation expert reports and all case specific expert reports for Trial Pool Cases will be served on May 1, 2014. The Pfizer Defendants' additional generic non-causation expert reports and all case specific expert reports for Trial Pool Cases will be served on June 1, 2014. Generic and case specific expert discovery for Trial Pool Cases shall be completed by July 8, 2014. Plaintiffs' experts on a particular issue shall be deposed before the Pfizer Defendants' expert on that same issue, but all of Plaintiffs' experts need not be deposed prior to the deposition of the first Pfizer Defendants' expert. Depositions shall not be duplicative.

V. MOTION PRACTICE RELATED TO INITIAL TWO TRIAL POOL CASES

A. Daubert Motions

1. Daubert Motions shall be filed and served by July 15, 2014.

2. All Responses to Daubert Motions shall be filed and served by August 15, 2014.

3. All Replies to Daubert Motions shall be filed and served by September 1, 2014.

B. Dispositive Motions

1. Dispositive Motions shall be filed and served by July 15, 2014.

2. Responses to Dispositive Motions shall be filed and served by August 15, 2014.

3. Replies to Dispositive Motions shall be filed and served by September 1, 2014.

VI. PRETRIAL

The Court shall conduct pretrial and final settlement conferences at dates to be determined. The Court will issue future orders related to conduct of the pretrial conference and submission of a Proposed Pretrial Order, including items such as jury instructions.

VII. TRIAL

[Defendants' proposal:] The parties will have two (2) Trial Pool Cases, one from each side, ready for trial to commence by October 13, 2014. [Plaintiffs' proposal:] The parties will have six (6) Trial Pool Cases, three from each side, ready for trial to commence by October 13, 2014.

SO ORDERED this _____day of _____, 2013.

_____
Honorable Cynthia Rufe

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS LIABILITY LITIGATION	§	**MDL NO. 2342**
	§	**12-MD-2342**
THIS DOCUMENT RELATES TO ALL CASES	§	**HON. CYNTHIA M. RUFE**

PRETRIAL ORDER NO._____
TRIAL POOL SELECTION PROTOCOL

This Court having considered the scope of these proceedings, the number of plaintiffs, the amount of discovery that will be required, the time necessary to complete pre-trial preparations, and Report and Recommendation No. 3 of the Special Discovery Master, hereby establishes a Trial Pool Selection Protocol.

I. SCOPE OF GENERAL DAUBERT PROCEEDINGS

General causation Daubert hearings shall be held the week of February 17, 2014, subject to the convenience of the Court. The scope of the Daubert hearings will be general causation.

General causation expert reports shall be submitted in accordance with Pretrial Order No. 23, and the parties shall thereafter determine whether to propose any further grouping of experts for the general Daubert hearings. All other procedures shall go forth in accordance with Pretrial Order No. 23.

II. TRIAL POOL CASES

1. Each side shall on March 31, 2014, designate three cases for the Trial Pool from the Initial Discovery Pool. They shall inform the Special Discovery Master of their selections simultaneously in a manner and at a time to be arranged by the Special Discovery Master. If

their selections yield five or six cases, then the selection process will be complete. If their selections yield fewer than five cases, then they shall select additional cases by simultaneously disclosing additional selections to the Special Discovery Master within two business days thereafter, in order to get to a minimum of five and a maximum of six cases.

2. Any cases selected by both sides will be tried before the other cases in the Trial Pool. The Special Discovery Master shall randomly select the side that will choose the first case to be tried after any case that was selected by both sides. The other side will then select the next case to be tried, and trial selection will alternate thereafter.

3. On or before March 17, 2004, up to two cases chosen for the Initial Discovery Pool by the Pfizer Defendants may be stricken from the Initial Discovery Pool or from Trial Pool eligibility by PSC, and up to two cases chosen for the Initial Discovery Pool by the PSC may be stricken from the Initial Discovery Pool or from Trial Pool eligibility by the Pfizer Defendants. Voluntary dismissal of a case by a plaintiff shall be considered one of the PSC's strikes for the purposes of this paragraph. If any plaintiff voluntarily dismisses any case or cases selected by the Pfizer Defendants in the Initial Discovery Pool after the PSC has exercised their two strikes, then the Pfizer Defendants may identify and strike an equal number of cases selected by Plaintiffs for the Initial Discovery Group, thereby making them ineligible for the Trial Pool. If either side does not exercise one or both of their strikes by March 17, 2014, then they are forfeited.

4. After March 17, 2014, Initial Discovery Pool cases and Trial Pool Cases may be dismissed only by order of the Court and any such dismissal will be with prejudice in the absence of good cause shown why the dismissal should be without prejudice. If the Court permits a Trial Pool Case chosen by the Pfizer Defendants to be dismissed in these

circumstances, the Pfizer Defendants will be permitted to select a replacement case, and the Court will consider whether and how this has an impact on the trial dates of cases in the Trial Pool and on the order in which cases shall be tried.

III. *LEXECON*

As to the Trial Pool Cases selected pursuant to section II of this Order, Plaintiffs and the Pfizer Defendants agree to waive the right to seek remand to the transferor court pursuant to the Supreme Court's decision in *Lexicon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), in order to permit trials to be presided over by the MDL court; provided, however, the Pfizer Defendants may unilaterally revoke such waiver if the Plaintiffs refuse to make available live at trial the mother (unless she has terminated or lost custodial rights to the minor plaintiff), guardian(s) and/or other legal representative(s) who is/are bringing the claim on behalf of the minor plaintiff.

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Plaintiffs' additional generic non-causation expert reports and all case specific expert reports for Trial Pool Cases will be served on May 1, 2014. The Pfizer Defendants' additional generic non-causation expert reports and all case specific expert reports for Trial Pool Cases will be served on June 1, 2014. Generic and case specific expert discovery for Trial Pool Cases shall be completed by July 8, 2014. Plaintiffs' experts on a particular issue shall be deposed before the Pfizer Defendants' expert on that same issue, but all of Plaintiffs' experts need not be deposed prior to the deposition of the first Pfizer Defendants' expert. Depositions shall not be duplicative.

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The parties will have cases ready for trial by October 13, 2014, subject to further order of the Court. On or around February 1, 2014, the Special Discovery Master will make a Report and Recommendation about the number of cases that should be ready for trial to commence on that

date. The parties are to present a joint proposal or competing proposals to the Special Discovery Master on this point on or before January 15, 2014.

SO ORDERED this _____day of _____, 2013.

_____
Honorable Cynthia Rufe