

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: PROPECIA (FINASTERIDE)
PRODUCTS LIABILITY LITIGATION

This Document Relates to:
ALL CASES

Master File No.: 1:12-md-02331-JG-VVP
MDL No. 2331

Honorable John Gleeson
Magistrate Judge Viktor Pohorelsky

JOINT DISCOVERY & TRIAL PLAN

~~PROPOSED~~ DISCOVERY & TRIAL PLAN
PROCEDURE AND PRACTICE ORDER NO. 10

The parties have agreed to the following terms relating to the proper course for this MDL.

1. General Merits Discovery: To date, pursuant to the Revised ESI Order entered July 2, 2013 and agreement of the Parties, Merck has produced no less than forty-two (42) 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. 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. Plaintiffs shall complete general merits discovery no later than November 20, 2015.

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 Certification Process: With respect to those custodial files that were previously produced, Merck shall:
 - a. On or before December 15, 2014, 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");
 - b. With respect to each custodial file to be produced in the future pursuant to this Order, Merck shall provide a Certification of Completion within thirty (30) days of production of each such file.
 - c. After January 15, 2015, Plaintiffs may commence depositions of those witnesses for whom Merck has provided a Certification of Completion.
 - d. 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.

If Merck does not provide a Certification of Completion for any witness's Custodial File, the Parties shall meet and confer with respect to such witness. Plaintiffs shall be able to depose any such witness upon thirty (30) days' notice following the meet and confer, and shall have the right to re-depose the 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. 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 cancer, breast enlargement 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).
5. Lexecon Waivers. The Parties agree to waive their respective rights under *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), for all cases selected as part of the original ten (10) Case Pool selections. For any case selected by Defendants for the Case Pool, and said Plaintiff declines to waive his/her rights under *Lexecon*, Defendant shall have the right to replace said case within five (5) days following notice of declination to execute a *Lexecon* Waiver.
6. Selection of Cases. The Parties will file their respective Case Pool selections to fill slots in the initial Case Pool with the Court on July 1, 2015 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 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.

7. Case-Specific Discovery. Case-specific discovery on cases selected for the Case Pool shall commence on August 3, 2015 and be completed by November 20, 2015 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". Merck shall refrain from any substantive *ex parte* discussions with physicians pending a final ruling by the Court on *ex parte* communication. 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.

8. Selection of Cases for First Bellwether Tranche. On December 18, 2015 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 December 18, 2015 Plaintiffs and Merck shall file a statement with the Court identifying the reason the proffered picks constitute a representative trial pick;
 - b. On January 15, 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 February 12, 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.

9. 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 Six. 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.
10. Expert Reports and Expert Discovery for Cases in the First Bellwether Tranche. On or before March 18, 2016, the Parties will disclose in writing the identities of 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 April 15, 2016, the Parties will disclose rebuttals expert reports, if any. The Parties will make their designated experts available for deposition between April 25, 2016 and May 27, 2016.
11. 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: June 24, 2016;

- b. Opposition Brief: July 22, 2016; and
- c. Reply Brief: August 5, 2016.

The Court will hold a hearing to consider these motions on a date to be determined.

- 12. Final Discovery. The Parties shall complete all remaining discovery of cases set for trial within 60 days before trial.
- 13. Trial Schedule. The trial for the First Bellwether Tranche is expected to commence on or about October 10, 2016. The Court will issue a schedule order governing all trial related obligations.

For the Plaintiffs:

/s/ Timothy J. Becker
Plaintiffs' Executive Committee

Date: October 28, 2014

Timothy J. Becker
tbecker@johnsonbecker.com
33 South Sixth Street, Suite 4530
Minneapolis, MN 55402
Telephone: (612) 436-1800
Facsimile: (612) 436-1801

For the Defendants:

/s/ Charles F. Morrow
Lead Counsel

Date: October 28, 2014

Charles F. Morrow
chip.morrow@butlersnow.com
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
6075 Poplar Avenue, Suite 500
Memphis, TN 38119
(901) 680-7200

So Ordered:

November 14, 2014