

FILED

OCT 14 2009

Carol E. Hixbee, P.J.Cv.

In Re: FOSAMAX Litigation : SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: ATLANTIC COUNTY
:
: Civil Action Case No. 282
: (Fosamax Litigation)
APPLIES TO ALL CASES :
:

CORE DISCOVERY ORDER
RELATING TO DISCOVERY POOL CASES

THIS MATTER having come before the Court by consent of counsel for Plaintiffs and counsel for Defendant and for good cause shown,

IT IS on this 14 day of October, 2009, **ORDERED** as follows:

For the discovery pool cases identified by the Parties pursuant to the July 20, 2009 Case Management Order and remaining after the elimination of cases pursuant to the Case Management Order dated October 14, 2009:

1. Fact witness depositions shall be limited at this time to "core discovery." For the purposes of expedited discovery of these cases, core discovery shall include in each case the depositions of:

- a) Plaintiff;
- b) Plaintiff's spouse or significant other;
- c) Prescribing physicians;
- d) Oral surgeons or other health care providers who diagnosed and/or treated Plaintiff's alleged Fosamax-related injuries;

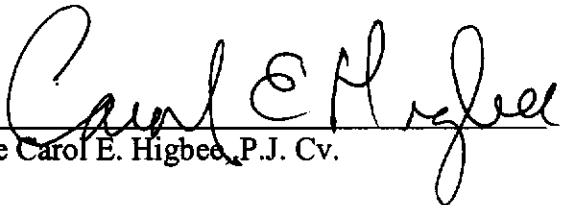
- e) Plaintiff's dental care providers excluding oral surgeons or other health care providers who diagnosed and/or treated Plaintiff's alleged Fosamax-related injuries (not to exceed 2 witnesses);
- f) Sales representatives who interacted with Plaintiffs' prescribing physicians (not to exceed 2 witnesses).
- g) The depositions of health care providers conducted during the fact discovery period shall be completed without prejudice to the Parties' right to take additional depositions of other health care providers after fact discovery is completed and the cases are selected for the trial pool.
- h) The Parties shall notify each other of an intent to call a health care provider at trial who has not been deposed during discovery and the other party shall have the opportunity to depose him or her before trial.
- i) Depositions of health care providers taken pursuant to paragraphs (c)–(f) shall proceed only as discovery depositions. *De bene esse* depositions of health care providers intended for use at trial shall be taken only in the five cases selected for expert discovery and trial preparation. Such depositions shall only proceed upon proper notice after the Parties have identified the five trial pool cases. This provision does not prohibit any Party from applying to the Court to use a videotaped discovery deposition at trial in lieu of testimony subject to the requirements of the Rules of Court.

- j) Defendant shall produce in each discovery pool case the sales representative custodial files described in paragraph 2 herein prior to commencing prescriber depositions in that case.

2. Plaintiff in each discovery pool case may identify up to a maximum of three sales representatives with Fosamax responsibilities who called on Plaintiff's prescribing physician. Plaintiffs shall advise Defendant of the identities of these sales representatives on or before October 15, 2009. For those sales representatives with Fosamax responsibilities who called on the Plaintiff's prescribing physician, and who are identified by October 15, 2009, Merck shall produce, on or before November 15, 2009, the Fosamax-related documents contained in the sales representatives' custodial files, including the following:

- a) Fosamax-specific training materials (including videotapes) related to physician detailing and obstacle handling, including any workbooks or forms completed by the sales representative from 1995 to the present;
- b) Fosamax-related emails, bulletins, memoranda, reports, activity reports, call notes, belief notes, tactical plans, MVX transcripts or summaries, meeting or conference summaries, physician prescribing data and/or ratings, and incentive plans (to the extent the incentive plans specifically reference Fosamax, alendronate, or osteoporosis);
- c) Any promotional and marketing materials related to Fosamax; and
- d) All hardcopy generic training materials (including videotapes) related to physician detailing and obstacle handling, including any workbooks or forms completed by the sales representative from 1995 to the present. The parties acknowledge that Merck has previously made a production of generic sales training materials. On or before October 15, 2009, Plaintiffs Liaison Counsel will identify a subset of up to five hundred documents from the generic training materials that Merck previously produced. Merck will produce copies of this identified subset of materials to the extent such materials are contained in the electronic custodial files of the sales representatives selected by Plaintiffs pursuant to this Paragraph (2) for custodial productions. In the alternative, Merck may provide a certification that identifies the sales representatives designated by Plaintiff and the identified generic training materials that were issued to those specific sales representatives.

Custodial files include all non-identical copies of the materials described above that are contained in the records of the identified sales representatives, whether those materials are stored and maintained by Merck in its facilities, a third-party storage vendor, or at the home or automobile of the sales representative. For the sales representatives who are identified pursuant to paragraph 1 (g) above for deposition, Merck shall also produce within seven (7) days of the deposition the Fosamax-related documents, including but not limited to, evaluations, field reports or notes, and special compensation award notifications, from the representative's personnel file.



Honorable Carol E. Higbee, P.J. Cv.