

FILED

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Carol E. Higbee, P.J.Cv.

IN RE: FOSAMAX LITIGATION

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC COUNTY**

CASE NO. 282

CIVIL ACTION

APPLIES TO ALL CASES

STIPULATION AND ORDER REGARDING CONFIDENTIAL INFORMATION

Upon the Stipulation of the parties, and for good cause shown, the Court issues the following Confidentiality Order:

WHEREAS, certain documents and information may be sought, produced, or exhibited by and among the parties to the above-styled proceeding (the "Action") which relate to the parties' confidential and proprietary information that may be subject to protection pursuant to R. 4:10-3(g); and

WHEREAS, the parties will provide a significant amount of discovery materials in this Action and the parties agree that a protective order will facilitate a timely and efficient discovery process;

IT IS HEREBY STIPULATED AND AGREED, AND FOR GOOD CAUSE SHOWN, ORDERED THAT:

Scope

1. This Confidentiality Order shall govern all documents, the information contained therein, and all other information produced or disclosed during this Action whether revealed in a

document, deposition, other testimony, discovery response or otherwise, by any party in this Action (the "Supplying Party") to any other party or parties (the "Receiving Party").

2. Third parties who so elect may avail themselves of, and agree to be bound by, the terms and conditions of this Confidentiality Order and thereby become a Supplying Party for purposes of this Confidentiality Order.

3. The entry of this Confidentiality Order does not prevent any party from seeking a further order of this Court pursuant to R. 4:10-3.

4. Nothing herein shall be construed to affect in any manner the admissibility at trial or any other court proceeding of any document, testimony, or other evidence.

Confidential Information

5. "Confidential Information," as used herein, means information of any type, kind or character that the Supplying Party believes in good faith constitutes, reflects, discloses, or contains information subject to protection under R. 4:10-3(g), whether it is a document, information contained in a document, information revealed during a deposition or other testimony, information revealed in an interrogatory response, or information otherwise revealed. Any transcript of an *in camera* hearing shall be treated as confidential pursuant to this Order.

6. Specific documents and discovery responses produced by a Supplying Party may be designated as containing Confidential Information by marking them with the words "Confidential Information – Subject to Confidentiality Order" without obscuring any part of the text. Such a designation shall subject the document and its contents to this Order. In lieu of marking the original of a document, the designating party may mark the copies that are produced or exchanged. A party in this Action may designate as Confidential Information any document or information produced by or testimony given by any other person or entity that the party

reasonably believes qualifies as Confidential Information pursuant to this Confidentiality Order.

7. Any material produced or provided in this Action for inspection is to be treated by the Receiving Party as Confidential Information pending the copying and delivery of any copies of the same by the Supplying Party to the Receiving Party.

8. Information disclosed at any deposition taken in connection with this Action may be designated by any party as Confidential Information in accordance with the procedures set forth below. All testimony provided at deposition shall be considered Confidential Information for a set period of time as set forth below and the court reporter shall mark all pages of deposition testimony taken in this Action with the designation "Confidential Information – Subject to Further Confidentiality Review." In order to maintain the Confidential Information status of such testimony, a party must notify all other parties and the court reporter in writing within forty-five (45) days of receipt of the final transcript of the conclusion of a witness' testimony of the specific pages and lines of the transcript that should be treated as confidential. Only those portions of the transcript so designated within that 45 day period shall be deemed Confidential Information.

Permissible Disclosure of Confidential Information

9. The Receiving Party may show and deliver Confidential Information only to a "Qualified Person," which as used herein means the following:

- (a) Plaintiffs' counsel of record, including attorneys, clerical, secretarial and other staff employed or retained by such counsel;
- (b) outside counsel for Merck, including attorneys, clerical, secretarial and other staff employed or retained by such counsel;

- (c) designated in-house counsel for Merck, including the clerical, secretarial and other staff working directly for in-house counsel in the legal department;
- (d) with respect to any Confidential Information produced by any Plaintiff or third-party with respect to Plaintiff, any employee of the Receiving Party to whom it is necessary to disclose such information for the purpose of assisting in, or consulting with respect to, the preparation of this Action;
- (e) experts and consultants retained by any Party for purposes of assisting the Parties and their attorneys of record in the preparation and presentation of the claims or defenses if the proposed recipient signs the attestation described in paragraph 11 and attached as Exhibit A; *however*, and subject further to the provisions of paragraph 13, if any Plaintiff wishes to disclose Confidential Information to such an expert or consultant who is or has been within the past six (6) months an employee, officer, director, agent, contractor, subcontractor or non-litigation consultant of any company that manufactures, markets, distributes, or sells any bisphosphonate or any type of product used for the treatment or prevention of osteoporosis or Paget's disease, the party wishing to make such disclosure shall provide the counsel who designated such information as confidential with information concerning the proposed recipient that does not identify the proposed recipient but is sufficient to permit an informed decision to be made with respect to any potential objection. If the Supplying Party objects to the proposed disclosure, it shall within ten (10)

days (1) request that the Court direct the party wishing to make disclosure to produce additional information about the proposed recipient and/or (2) submit such papers and argument as it may feel are necessary to allow the Court to make an informed decision. Because only the party seeking to make the disclosure may know who the proposed recipient is, it is the responsibility of the party seeking to make the disclosure to determine whether prior to making any disclosure whether the proposed recipient is a person described in this paragraph;

- (f) Judges and court reporters, court personnel or videographers present at trial, conferences, hearings, arguments or depositions held in this matter, subject to the terms set forth below;
- (g) any Special Master appointed by the Court, and any members of their staffs to whom it is necessary to disclose the information;
- (h) any attorney of record for claimants in other pending U.S. litigation alleging personal injury or economic loss arising from the alleged use, purchase, or payment of Fosamax or Fosamax Plus D for use in this or such other action, provided that the proposed recipient is: (i) already operating under a stipulated Confidentiality Order and (ii) agrees to be bound by this Order and signs the attestation described in paragraph 11 that is attached hereto as Exhibit A.
- (i) Subject to the provisions of paragraph 13, the Receiving Party may show Confidential Information to a witness during a deposition, hearing, or trial. Confidential Information shown to any witness during a deposition shall

not lose its Confidential status through such use, and counsel shall exercise their best efforts and take all steps reasonably required to protect its confidentiality during such use. If, after a deposition is noticed or a hearing or trial is set, the Supplying Party objects to Confidential Information being shown to that witness, the Supplying Party shall attempt to confer with counsel to resolve the issue. If counsel are unable to resolve the issue themselves, counsel may seek an order from the Court prohibiting or limiting such use or for other relief. Furthermore, any deponent, other than a current employee of the Supplying Party or the author or recipient of a document containing Confidential Information, shall be shown a copy of this Order and asked to sign the undertaking attached as Exhibit A before being shown or examined about Confidential Information. Regardless of whether a deponent signs the undertaking, this Order will apply to any deponent who is shown or examined about Confidential Information;

- (j) with respect to any Confidential Information produced by any Plaintiff or third-party with respect to Plaintiff, any treating physician or health care provider of the Plaintiff to whom it is necessary to disclose such information for the purpose of assisting in or consulting with respect to, the preparation of this Action; and
- (k) other persons who may be specifically designated by consent of the Supplying Party or pursuant to Court Order.

10. Confidential Information shall not be disclosed or made available to persons other than Qualified Persons.

11. All Qualified Persons to whom Confidential Information is provided under this Order shall be furnished with a copy of this Confidentiality Order and shall be bound by its terms, and counsel for each party shall maintain a log of all persons to whom they have provided a copy of this Order. Furthermore, prior to the disclosure of Confidential Information to any person identified in Paragraph 9(e), 9(h), or 9(i) hereof, such person shall be furnished with a copy of this Confidentiality Order, shall agree to be bound by its terms, and shall also execute a copy of the attestation which is attached as Exhibit "A." These certifications are strictly confidential. Counsel for each party shall maintain the certifications without giving copies to the other side. The parties expressly agree, and it is hereby ordered that, except in the event of a violation of this order, they will make no attempt to seek copies of the certifications to determine the identities of persons signing them. If the Court finds that any disclosure is necessary to investigate violation of this Order, the disclosure will be limited to outside counsel only and outside counsel shall not disclose any information to their clients that could tend to identify any certification signatory unless and until there is specific evidence that a particular signatory may have violated the Order, in which case limited disclosure may be made with respect to that signatory. Persons who come into contact with Confidential Information for clerical or administrative purposes, and who do not retain copies or extracts thereof, are not required to execute certifications. Counsel for the Party to whom the Confidential Information was produced shall obtain and maintain a copy of this executed attestation.

12. With respect to a testifying expert designated by any Party, a copy of such attestation shall be produced at the time the expert is deposed.

13. Before disclosing Confidential Information to any person who is, independent of this litigation, a current director, officer, employee of, or counsel for a company other than Merck that is marketing or has in development any type of bisphosphonate product or any product used in the treatment or prevention of osteoporosis or Paget's disease, or a consultant, other than an occasional consultant, who is currently consulting with respect to any bisphosphonate or any type of product used for the treatment or prevention of osteoporosis or Paget's disease, the party wishing to make such disclosure shall give at least ten (10) days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made. If, within the ten day period, a motion is filed objecting to the proposed disclosure, the designated document or item shall not be disclosed unless and until ten days have elapsed after the appeal period from a Court order denying the motion. Alternatively, the party wishing to make such disclosure may provide the counsel who designated such information as confidential with information concerning the proposed recipient that does not identify the proposed recipient but is sufficient to permit an informed decision to be made with respect to any potential objection. If there is no consent to the disclosure within ten (10) days, the party wishing to make the disclosure may submit the information to the Court for a determination of whether the disclosure may be made. The objecting party will have opportunities to (1) request that the Court direct the party wishing to make disclosure to produce additional information about the proposed recipient and/or (2) submit such papers and argument as it may feel necessary to allow the Court to make an informed decision. Because only the party seeking to make the disclosure may know who the proposed recipient is, it is the responsibility of the party seeking to make the disclosure to

determine prior to making any disclosure whether the proposed recipient is a person described in this paragraph.

Use of Confidential Information

14. All Confidential Information produced or exchanged in the course of this Action shall be used solely for the purpose of preparation and trial of the cases included in this Action and shall not be used in connection with any other matter or for any other purpose. Confidential Information shall not be disclosed to any person except in accordance with the terms hereof.

15. Nothing herein shall be deemed to restrict in any manner any Party's use of its own documents or materials.

16. Nothing herein shall affect the right of any Party to seek additional protection against the disclosure of any documents or materials.

Protection of Confidential Information

17. Counsel shall take all reasonable and necessary steps to assure the security of any Confidential Information and will limit access to Confidential Information to those persons authorized by this Order. In addition, any summary or copy of Confidential Information shall be subject to the terms of this Confidentiality Order to the same extent as the information or document of which such summary or copy is made, and must be clearly labeled "Confidential Information – Subject to Confidentiality Order."

18. If Confidential Information in the possession of a receiving party is subpoenaed by any court, administrative or legislative body, or any other person or organization purporting to have authority to subpoena such data or information, the party to whom the subpoena is directed shall not, to the extent permitted by applicable law, provide or otherwise disclose such documents or information without first waiting ten (10) business days after notifying counsel for

the Supplying Party in writing of (1) the information and documentation which is requested for production in the subpoena; (2) the date on which compliance with the subpoena is requested; (3) the location at which compliance with the subpoena is requested; (4) the identity of the party serving the subpoena; and (5) the case name, jurisdiction and index, docket, complaint, charge, civil action or other identification number or other designation identifying the litigation, administrative proceeding or other proceeding in which the subpoena has been issued.

19. If a Receiving Party learns of any unauthorized disclosure of Confidential Information, the party shall immediately upon learning of such disclosure inform the Supplying Party of all pertinent facts relating to such disclosure and shall make all reasonable efforts to prevent disclosure by each unauthorized person who received such information and to recover the Confidential Information received by each unauthorized person.

20. In the event a Supplying Party discovers after the production of any documents, materials, or information that it inadvertently produced or provided discovery of any Confidential Information without redacting, marking, or identifying it as confidential, the Supplying Party may provide written notice to the Receiving Party that the document, thing or other information, response, or testimony is Confidential Information and should be treated as such in accordance with the provisions of this Order. Upon receipt of such notice, the Receiving Party must treat such documents, things, information, responses, and testimony as Confidential Information, and upon receipt of properly marked documents, shall return the unmarked documents and things and shall not retain, and shall take reasonable steps to ensure others have not retained, copies thereof.

21. The disclosure of information or documents to any person not qualified to receive such information or documents pursuant to the terms and conditions of the Confidentiality Order, or without following the terms and conditions of the Confidentiality Order, may subject the person making such disclosure to a finding of contempt and the imposition of sanctions, costs, or

other penalty, as ordered by the Court.

22. The inadvertent production by any Party, whether in this Action or in any other proceedings, of a document subject to a claim of privilege, work product, or other statutory or court-ordered confidentiality shall not result in a waiver of any of the foregoing protections in this Action for the produced document or for any other privileged or immune documents containing the same or similar subject matter. Furthermore, irrespective of what may have already occurred or what may occur in the future in productions made during other proceedings, the fact of an inadvertent production by a party in this Action shall not be used as a basis for arguing that a claim of privilege, work product, or other statutory or court-ordered confidentiality has been waived in such other proceedings. If any party should inadvertently produce a document, upon notice of such disclosure, all originals and copies thereof, as well as all notes or other work product reflecting the contents of such materials, shall be immediately returned to the Supplying Party, and such returned material shall be deleted from any litigation support or other database. If the Receiving Party wants to challenge the claim of privilege, work product, or other statutory or court-ordered confidentiality, it must also promptly present the information in dispute to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

23. Nothing herein shall prevent disclosure beyond the terms of this Order if the Party designating the information as Confidential Information consents in writing to such disclosure or, if the Court, after notice to all affected parties and a hearing, orders such disclosure. Nor shall anything herein prevent any counsel of record from using Confidential Information in the examination or cross-examination of any person who is indicated on a document containing the Confidential Information as being an author, source or recipient of the Confidential Information, irrespective of which Party produced such information.

24. Any material produced or provided in this Action for inspection is to be treated by the Receiving Party as Confidential Information pending the copying and delivery of any copies of the same by the Supplying Party to the Receiving Party. The Parties have the right to have persons present in the inspection room at all times during the inspection of documents by another Party's representatives. Original documents shall remain in the custody and control of the Supplying Party at all times.

25. Within forty-five (45) days after conclusion of any attorney's last case in this Action, including any appeals related thereto, all Confidential Information produced pursuant to this Order, including all copies and notes taken from such information containing summaries of such Confidential Information (other than attorney work product which shall be clearly labeled as containing Confidential Information, and shall be maintained as confidential under the terms of this order), shall be destroyed by the party in possession thereof and certified to have been destroyed by an affidavit provided to the Supplying Party. This includes all Confidential Information provided to outside persons. Counsel for the party who disseminated the Confidential Information shall bear the burden of retrieving any such documents from outside persons and destroying those documents in accordance with this paragraph. Counsel for the disseminating party shall notify counsel for the Supplying Party of the failure to retrieve any Confidential Information including the name of the person from whom Confidential Information was not retrieved and a description of the Confidential Information that was not retrieved.

Changes in Designation of Information

26. Any party may object to the propriety of the designation (or redesignation) of specific material as Confidential Information by serving a written objection upon the Supplying Party's counsel. The Supplying Party or its counsel shall thereafter, within ten (10) calendar

days, respond to such objection in writing by either: (i) agreeing to remove the designation, or (ii) stating the reasons for such designation. If the Objecting Party and the Supplying Party are subsequently unable to agree upon the terms and conditions of disclosure for the material(s) in issue, the document will have its designation removed unless within ten (10) days after written notice that the parties' negotiations are ended, the Supplying Party moves the Court for an order upholding the designation. On such motion, the Supplying Party shall have the burden of proving that the material is Confidential Information. The material(s) in issue shall continue to be treated as Confidential Information unless and until the Court decides otherwise.

27. Any Supplying Party may designate as Confidential Information or withdraw a Confidential Information designation from any material it has produced; provided, however, that such redesignation shall be effective only as of the date of such redesignation. Such redesignation shall be accomplished by notifying counsel for each party in writing of such redesignation and simultaneously producing a re-designated copy of such material.

Filing Papers in Court Records

28. The parties will use the following procedure for submitting to the Court papers consisting of, relating to, containing, incorporating, reflecting, describing, or attaching Confidential Information: any such information shall be filed in the normal course with the confidential documents or discussions of same deleted but identified by Bates number. The parties shall then meet and confer on whether the specific documents referenced are actually confidential. This requires serious review of the need for confidentiality of the specific pages. Those documents determined not to be confidential shall then be forwarded to the court within ten (10) days of the original filing along with the documents still considered confidential which shall be submitted to the Court in a separate envelope, labeled with the case name, case number, the motion to which the documents relate, and a listing of the titles of documents (such titles not to reveal

Confidential Information) and shall bear the legend: THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION COVERED BY A PROTECTIVE ORDER OF THE COURT AND IS SUBMITTED UNDER SEAL PURSUANT TO THAT PROTECTIVE ORDER. THE CONFIDENTIAL CONTENTS OF THIS DOCUMENT MAY NOT BE DISCLOSED WITHOUT EXPRESS ORDER OF THE COURT. The parties will file the sealed envelope with the Team Leader of the Mass Tort Division in the Clerk's office. Such material shall be kept under seal until further order of the Court; however, such materials shall be available to the Court, and to all persons entitled to receive such information under the terms of this Order. The parties must take all reasonable steps to minimize such sealing.

- a. When submitting Confidential Information pursuant to this paragraph, the submitting party shall submit, to the extent reasonably possible, only those pages of the deposition transcript, document, or other matter containing Confidential Information that are cited, referred to, or specifically relied on by the submitting party. The submitting party shall not submit or lodge the entirety, or other portions, of the deposition transcript, document, or other matter containing Confidential Information.

29. Use of Confidential Information at trial shall be determined by subsequent agreement of the parties or order of this Court.

Miscellaneous Provisions

30. Beginning March 31, 2009, and on a bi-monthly basis thereafter, the parties shall produce a log that identifies any documents whose confidentiality designation has been changed from confidential to non-confidential or from non-confidential to confidential. The log shall be produced in a searchable electronic format that can be used with commercially available database software (e.g., Microsoft Access) identifying the following information for each

document produced in this Action: the document's (a) beginning and ending Bates numbers; (b) date; (c) title; and (d) confidentiality status (e.g., "Confidential" or "Non-Confidential").

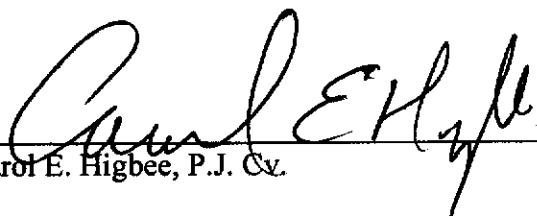
31. It is expressly understood by and between the Parties that in producing Confidential Information in this litigation, the parties shall be relying upon the terms and conditions of this Confidentiality Order.

32. By written agreement of the parties, or upon motion and order of the Court, the terms of this Confidentiality Order may be amended or modified. This Confidentiality Order shall continue in force until amended or superseded by express order of the Court, and shall survive any final judgment or settlement in this Action.

33. Notwithstanding any other provision in the order, nothing in this Order shall affect or modify Merck's ability to review Plaintiffs' information and report information to regulatory agencies.

IT IS SO ORDERED.

SIGNED AND ENTERED this 21 day of January, 2009.



Carol E. Higbee, P.J. Cv.

Exhibit A

IN RE: FOSAMAX LITIGATION

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC
COUNTY**

CASE NO. 282

CIVIL ACTION

APPLIES TO ALL CASES

**CERTIFICATION CONCERNING MATERIAL COVERED
BY CONFIDENTIALITY ORDER**

I, _____, being duly sworn, state that:

1. My present address is _____. My present employer is _____ and the address of my present employer is _____.

My present occupation is _____.

2. I have received a copy of the Confidentiality Order in this action. I have carefully read and understand the provisions of the Confidentiality Order.

3. I will comply with all of the provisions of the Confidentiality Order. I will hold in confidence, will not disclose to anyone not qualified under the Confidentiality Order, and will use only for purposes of this action, any Confidential Information, including the substance and any copy, summary, abstract, excerpt, index or description of such material, that is disclosed to me.

4. I will return all Confidential Information that comes into my possession, and all documents and things that I have prepared relating thereto, to trial or outside counsel for the party by whom I am employed or retained or from whom I received such material when requested to do so.

5. I understand that if I violate the provisions of the Confidentiality Order, I will be subject to sanctions by the Court and that the parties may assert other remedies against me. I hereby submit to the jurisdiction of this Court for the purpose of enforcement of the Confidentiality Order in this action.

Signature

Printed Name