

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
IN RE: NEW YORK DIET DRUG LITIGATION

Index No. 700000 98

-----X
THIS DOCUMENT APPLIES TO ALL DIET DRUG
CASES VENUED IN NEW YORK COUNTY

**ORDER WITH
NOTICE OF ENTRY**

-----X
PLEASE TAKE NOTICE that the attached Case Management Order No. 1 of
which the within is a true copy was signed by the Honorable Helen E. Freedman on May 28,
1998.

Dated: New York, New York
October 30, 1998

SIMPSON THACHER & BARTLETT

By: 

Thomas C. Rice

Office and Post Office Address
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000

Defendants' Liaison Counsel

To: All Counsel of Record on the Master Service List in effect as of October 30, 1998.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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IN RE: NEW YORK DIET DRUG LITIGATION

Index No. 700000/98

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CASES VENUED IN NEW YORK COUNTY

CASE MANAGEMENT
ORDER NO. 1
May 28, 1998

-----X
I. Applicability Of This Order

This Order applies to pre-trial procedures involving the diet drugs fenfluramine, dexfenfluramine and/or phentermine (collectively hereinafter referred to as "diet drugs" or the "diet drug cases," as the case may be) which are presently or hereafter assigned to the undersigned.^{1/}

II. Objectives

1. It is the objective of the Court to bring about the fair and economical resolution of the diet drug cases. In an effort to achieve this goal, this case management

^{1/} Pursuant to the order of Administrative Judge Crane, dated October 8, 1997, all cases commenced or pending in the Supreme Court, New York County have been assigned to this Court for all purposes. Additionally, pursuant to an Administrative Order signed on April 20, 1998, by Chief Administrative Judge Lippman, the Cunningham v. Gate Pharmaceuticals et. al., Index No. 22617/97 and Morgan v. Wyeth-Averst Laboratories Company et al., Index No. 6505/98 have been transferred from Bronx County to this court for all purposes excluding trial. It is anticipated that cases pending in other counties in New York City and elsewhere in New York State may be assigned to this Court for pre-trial purposes, in which event this CMO will become applicable to those cases.

order ("CMO No. 1"), which has been prepared in consultation with the representatives of the plaintiffs and defendants in the cases that have been heretofore filed, is established to govern the early stages of discovery in the diet drug cases and to allow the parties to obtain material and necessary documents and information without imposing undue burdens.

III. Filing Procedures

A. Files

1. The cases herein have been centralized, not consolidated. The Court hereby directs that a master file, known as New York Diet Drug Litigation ("NYDDL") Master file (the "Master File"), Index No. 700000/98 shall be established (without fee) in the Office of the Clerk of New York County for all diet drug cases assigned to the undersigned. The original of this Order shall be filed by the County Clerk in the Master File, and a copy shall be deemed to be part of the record of each coordinated action. All subsequent entries on the NYDDL file shall also be applicable to all of the diet drug cases.

2. A separate file shall also be maintained in the Office of the Clerk of New York County under a separate Index Number for each individual diet drug case assigned to this Court, and entries shall be made therein in accordance with this Order. Within thirty days after the entry date of this CMO No. 1, Plaintiffs' Liaison Counsel (as designated below), in cooperation with each plaintiff's attorney of record, shall provide to the Court and to Defendants' Liaison counsel (as designated below) a list of all plaintiffs and the index number assigned to each individual action. This list of index numbers and plaintiffs shall be amended (from time to time by Plaintiffs' Liaison Counsel) to reflect the final resolution of a

case, the commencement of a new case or the transfer of an existing case to or from this Court.

B. Captions of Cases

1. Every document filed in these coordinated actions shall bear a caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

IN RE: NEW YORK DIET DRUG LITIGATION

-----X

2. If a document relates to all of the diet drug cases, the following will be added to the caption:

-----X

THIS DOCUMENT APPLIES TO
ALL DIET DRUG CASES VENUED
IN NEW YORK COUNTY

Index No. 700000/98

-----X

3. If, instead, a document relates to one or more specific cases but not to all cases, the specific caption(s) for the cases to which the paper is applicable will be added as follows:

-----X

Plaintiff(s) name,

-against-

Index No. [individual case number]

Defendant(s) name.

-----X

C. Filing of Papers

1. When a paper has general application to all the diet drug cases, the caption (as set forth in paragraph III.B.2 above) shall so indicate and shall bear index number 700000/98, and the Clerk of New York County shall file such a paper in the Master File.

No further copies of the papers need to be filed. Any document so filed shall be deemed to have been filed in each case to which this Order applies and shall constitute part of the record of each such case.

2. When a paper is applicable only to an individual case, the attorney submitting such paper for filing shall caption the paper (as set forth in paragraph III.B.3 above) to indicate the case(s) to which it is applicable. The Clerk of New York County shall not file such a paper in the Master File; rather, after receipt by the Clerk, the Clerk shall file the original in the first captioned individual case file under the appropriate index number and shall file copies of the paper in any other cases to which it applies. It shall be the responsibility of the attorney submitting paper for filing to supply the County Clerk with

sufficient copies of any such paper to facilitate compliance with the directions of this paragraph.

3. The filing of a motion or other paper in the Master File or individual case file shall not confer standing on a party where it does not otherwise exist.

IV. Rules of Procedure

The Civil Practice Law and Rules ("CPLR"), the Uniform Rules for Trial Courts, and the express provisions of this and any future Case Management Orders, shall govern all proceedings herein.

V. Liaison and Steering Committee Counsel

Appointment of Liaison Counsel and Steering Committee Counsel to act as set forth below will facilitate communications among the Court and counsel, minimize duplication of effort, foster the coordination of joint positions, and provide for the efficient progress and control of this litigation.

A. Liaison Counsel

1. Co-Liaison Counsel for the plaintiffs ("Plaintiffs' Liaison Counsel") shall be Seth R. Lesser of the firm of Bernstein, Litowitz, Berger and Grossmann, LLP, and Paul Napoli of the firm Napoli, Kaiser & Associates LLP.

2. Liaison Counsel for the defendants ("Defendants' Liaison Counsel") shall be Thomas C. Rice of the firm of Simpson Thacher & Bartlett.

3. Liaison Counsel are vested by the Court with the following responsibilities and duties:

a. to prepare and maintain an official service list of plaintiffs' and defendants' counsel in the diet drug cases including the persons or companies they represent upon whom papers shall be served in this litigation;

b. to receive orders, notices, correspondence and telephone calls from the Court and the Clerk of the Court on matters of general applicability on behalf of all plaintiffs or defendants, as the case may be, and to notify such other plaintiffs' or defendants' counsel of communications received from the Court; and

c. to perform such other administrative tasks as may be necessitated by this or future CMO's, by the agreement of the parties, or by order of the Court.

4. Except as may be expressly otherwise provided in this or future CMO's, all pleadings, motions and other papers served in these cases shall be served on plaintiffs' and defendants' counsel for all of the parties in the case(s) to which such papers apply. Notwithstanding the requirements of paragraph VII.A.5 herein, service on a Liaison Counsel does not suffice as service on any other party.

5. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary. Liaison Counsel shall not have the right to bind any party except Liaison Counsel's own clients. Further, Liaison Counsel shall remain free to represent the interests and positions of their clients free of any claim (including without limitation any claim of conflict) arising from service as Liaison Counsel.

6. Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel shall be reimbursed periodically but not less than every three months by counsel for plaintiffs and counsel for defendants, respectively, for their necessary and reasonable expenses actually

incurred in performing their tasks pursuant to this Order. Liaison Counsel shall keep records of such expenses in reasonable detail for examination by counsel from whom reimbursement is sought. Reimbursable expenses may include copying costs; postage and, when necessary, costs for use of Federal Express or other delivery services; and other reasonable costs and expense. Liaison Counsel shall be paid by each plaintiff's and defendant's counsel on an equitable basis to be agreed upon by the parties or fixed by the Court with each plaintiff and defendant having to pay a proportionate share of the expenses incurred by its respective Liaison Counsel. Invoices for expenses as Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days after the date of submission.

B. Steering Committee

1. Plaintiffs' Steering Committee shall, subject to further order of the Court effecting such changes as circumstances may require, be comprised of the following:

- a. ✓ Bernstein Litowitz Berger and Grossmann LLP (Seth R. Lesser)
- b. ✓ Law Offices of Marc J. Bern PC (Marc Jay Bern)
- c. ✓ Law Offices of Brophy and Laub (Alfred Laub)
- d. ✓ Dankner & Milstein, P.C. (Jay W. Dankner)
- e. ✓ Davis, Saperstein & Salomon, P.C. (Marc C. Saperstein)
- f. ✓ Donner, Hariton & Berke, P.C. (Ira M. Hariton)
- g. ✓ Napoli, Kaiser & Associates, LLP (Paul J. Napoli)
- h. ✓ Parker & Waichman (Jerry Parker)
- i. ✓ Rheingold, Valet & Rheingold (Paul D. Rheingold, Hunter J. Shkoinik)

j. Schneider, Kleinick, Weitz, Damashek & Shoot (Steven T. Schwartz)

2. Defendants' Steering Committee^{2/} shall, subject to further order of the Court effecting such changes as circumstances may require, be comprised of the following:

- a. ✓ Arnold & Porter (Peter L. Zimroth)
American Home Products Corporation
A.H. Robins Company, Inc.
and their affiliated entities
- b. Simpson Thacher & Bartlett (Charles E. Koob, Thomas C. Rice, Robert A. Bourque)
American Home Products Corporation
A.H. Robins Company, Inc.
and their affiliated entities
- c. ✓ Skadden, Arps, Slate, Meagher & Flom (Barbara Wrubel)
Interneuron Pharmaceuticals, Inc.
- d. ✓ Schneck, Weltman & Hashmall (Edward S. Weltman)
Teva Pharmaceuticals USA, Inc.
- e. ✓ Schoeman, Marsh & Updike, LLP (Beth L. Kaufman)
SmithKline Beecham Corporation
- f. ✓ Lester, Schwab, Katz & Dwyer (Frederick Fern, Alan M. Winchester)
Eon Labs Manufacturing, Inc.
Zenith Goldline Pharmaceuticals, Inc.
Shire Richwood, Inc.
- g. ✓ Richards & O'Neil, LLP (Peter C. Neger, Victor C. Bushell)
Medeva Pharmaceuticals, Inc.
Medeva Pharmaceuticals Manufacturing, Inc.
Fisons Corporation
- h. ✓ Goodwin Procter & Hoar LLP (Kenneth Cohen)
CVS Pharmacy, Inc.
CVS Revco Pharmacy, Inc.

^{2/} Attached hereto as Appendix A is a document prepared by Plaintiffs' and Defendants' Liaison Counsel, based on current information, which reflects certain of the defendants and the products at issue.

- i. ✓ Martin Clearwater & Bell (Joseph DeMarzo)
Certain Health Care Defendants
- j. ✓ Aaronson, Rappaport, Feinstein & Deutsch, LLP (Janice Lyons)
Certain Health Care Defendants

3. The Plaintiffs' and Defendants' Steering Committees shall have the following responsibilities and duties for their respective constituencies:
 - a. to consider and propose future case management orders or other case management issues;
 - b. to call meetings of counsel for plaintiffs and defendants, respectively, for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs and other matters;
 - c. to coordinate, to the extent practicable, the briefing of motions;
 - d. to coordinate, to the extent practicable, the argument of motions;
 - e. to coordinate the conduct of discovery procedures including, where practicable, coordination with other proceedings;
 - f. to coordinate the examination of witnesses at examinations before trial;
 - g. to coordinate the selection of counsel to act as spokesperson at pretrial conferences; and
 - h. to perform such other duties as may be set forth in future CMO's, agreed upon by the respective parties, or ordered by the Court.
4. The Steering Committee shall not have the right to bind any party as to any matter without the consent of counsel for that party. If, on any issue, a party has a position

different from that set forth by the Steering Committee or any members thereof, that party shall be entitled to present that position to the Court separately. Further, the members of the Plaintiffs' and the Defendants' Steering Committee shall remain free to represent the interests and positions of their respective clients free of any claim (including without limitation any claim of conflict) arising from service on such Steering Committee.

C. Multidistrict Litigation Liaison Counsel

The diet drug cases commenced or pending in federal court have been transferred by Order of the Judicial Panel on Multidistrict Litigation to the United States District Court for the Eastern District of Pennsylvania for coordinated and consolidated pretrial proceedings. The consolidated cases, entitled In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation, MDL Docket No. 1203, are assigned to Senior Judge Bechtle. Appointment of MDL Liaison Counsel will facilitate communications with the parties and committees appointed in MDL 1203. MDL Liaison Counsel shall, subject to further order of the Court effecting such changes as circumstances may require, be comprised of the following:

1. MDL Liaison Counsel for the plaintiffs ("Plaintiffs' MDL Liaison Counsel") shall be Seth R. Lesser of the firm of Bernstein, Litowitz, Berger and Grossmann, LLP, and Paul D. Rheingold of the firm of Rheingold, Valet & Rheingold.

2. MDL Liaison Counsel for the defendants ("Defendants' MDL Liaison Counsel") shall be Thomas C. Rice of the firm of Simpson Thacher & Bartlett and Johnathan Price of the firm of Schneck, Weltman & Hashmall.

VI. Privileges

The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication, transmission or dissemination of information in connection with the diet drug cases among the plaintiffs' counsel, or among the defendants' counsel, shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the work product doctrine, the protection afforded to material prepared for litigation or any other privilege to which a party may be entitled. Cooperative efforts, as described above, shall not in any way be used against any of the parties, be cited as purported evidence of a conspiracy, wrongful action or wrongful conduct, and shall not be communicated to the jury at the trial of any action. Nothing in this paragraph shall in any way affect the applicability of any privileges or protection against disclosure otherwise available under law.

VII. Pleadings

A. Service of Process

1. American Home Products Corporation, A.H. Robins, Inc., Interneuron Pharmaceuticals, Inc. and the phentermine manufacturers and distributors who have been named as defendants in any of the diet drug cases will, and any other party at its election may, designate, within fifteen (15) days of the date of entry of this CMO No. 1, the name and address of a person authorized to accept service of the Summons and Complaint in any newly filed case by filing such designation in the NYDDL Master File and serving same on Plaintiffs' and Defendants' Liaison Counsel. The defendants filing such designation will stipulate that service of process by certified mail upon the person designated shall be deemed

proper service for the purposes of Section 312-a of the CPLR. Service on any other defendant shall be made in accordance with the CPLR.

2. If a party at any time wishes to change the designation made pursuant to the immediately preceding paragraph of this CMO No. 1, such party shall file a revised designation in the NYDDL Master File and serve Plaintiffs' and Defendants' Liaison Counsel with a copy of the revised designation. Liaison Counsel will be responsible for providing notice of such revised designation on their respective constituents. Such revision shall be effective fifteen (15) days after the filing and service of the revised designation on Liaison Counsel.

B. Service of Papers Pursuant to CPLR Rule 2103(b)

1. Within thirty (30) days of the date of entry of this CMO No.1, Plaintiffs' and Defendants' Liaison Counsel shall jointly prepare and shall serve and file in the NYDDL Master File a master service list (the "Master Service List"). The Master Service List shall contain the name, address and telephone number of the attorney(s) (or in the case of a party appearing pro se, the person) who will be deemed to be the person upon whom valid service of papers (other than process) is to be made by any other party in accordance with Rule 2103 of the CPLR. Any party desiring to make a change to the Master Service List shall notify the Plaintiffs' and Defendants' Liaison Counsel in writing of such change.

2. Liaison Counsel shall publish an updated Master Service List or supplement thereto on or before the first of each month, which shall thereafter apply. If no change to the Master Service List is necessary, Liaison Counsel shall file a notice so stating. The Master Service List shall bear a heading showing the date of the service list and indicating that it may be used until superseded by another list. When service of a document

is made, it shall be sufficient to attach an affidavit of service to any such document indicating that the document has been served on the persons entitled to be served as shown on the Master Service List in effect on the date that service of that document was made.

3. Regardless of any other provision governing service, all documents of general applicability to be filed in the Master File in the New York Diet Drug Litigation shall be served on Plaintiffs' and Defendants' Liaison Counsel. In any filing relating to an individual action or group of individual actions, service shall be made on each party of record in each such action. Regardless of the number of cases in which a law firm has appeared, service of one copy upon that firm shall be sufficient for each case subject to this CMO, in which that law firm has appeared on behalf of a party.

C. Notice of Medical Malpractice Action

Plaintiff shall not file a Notice of Medical Malpractice Action in any of the diet drug cases involving a physician or other health care provider, but in lieu thereof shall, no later than 90 days after service of the defendants' answers to the complaint, file a Request for Judicial Intervention and pay appropriate fees therewith designating the case as a matter which should be assigned to the New York Diet Drug Litigation calendar of this Court. Discovery in the action shall proceed in accordance with this CMO No. 1 and any future Case Management Orders entered by this Court.

D. Joint Pleadings Committee

1. A joint subcommittee of plaintiffs' and defendants' counsel will meet to discuss other matters relating to pleadings in the diet drug cases assigned to this Court. The following counsel have provisionally been appointed to serve on this subcommittee:

Plaintiffs:

Hunter J. Shkolnik
Steven Schwartz
Paul J. Napoli

Defendants:

Thomas C. Rice
William J. Hoffman
Barbara Wrubel
Fredrick Fern
Kenneth Cohen
Janice Lyons

VIII. Motions

A. Procedure

1. As noted above, it shall be the responsibility of the Plaintiffs' and Defendants' Steering Committees to coordinate, to the extent practicable, motion practice in these cases. However, subject to any future orders of the Court concerning motion practice, including without limitation the grouping or sequencing of certain types of motions, motions may be made by a party at any time.

2. Unless otherwise ordered by the Court or agreed by the parties, all motions shall be made returnable on at least twenty-eight (28) days notice.^{2/} Opposition papers, and any cross-motion, shall be served no later than fourteen (14) days prior to the return date. Reply papers, and any opposition to a cross-motion, shall be served no later than seven (7) days prior to the return date.

3. Motions shall be heard on the last Thursday of each month at 3 p.m. in Room 540, unless otherwise directed by the Court.

4. The parties shall make a good faith effort to resolve all disputes before resorting to motion practice. Any motion relating to discovery or any other subject on which accord of the affected parties might reasonably be expected shall contain counsel's statement (made by affidavit or affirmation) that, prior to moving, the movant has conferred with affected adversary parties and made a good faith effort to resolve the dispute without need of court intervention.

^{2/} When service is made by mail, five days shall be added to each of the periods prescribed herein for the making and responding to motions. When service is made by overnight courier service, one day should be added.

IX. Standard Consolidated Disclosure

The Court is aware that cases involving the diet drugs at issue are pending in a number of state and federal courts throughout the nation. A joint subcommittee of plaintiffs' and defendants' counsel shall meet to discuss uniform document requests, interrogatories and/or questionnaires, and other disclosure matters, including the extent to which disclosure in the diet drug cases elsewhere may be coordinated with these proceedings. The following counsel have provisionally been appointed to serve on this subcommittee:

Plaintiffs:

Marc C. Saperstein
Hunter J. Shkolnik
Paul J. Napoli

Defendants:

Thomas C. Rice
William J. Hoffman
Barbara Wrubel
Edward S. Weltman
Victor C. Bushell
Beth L. Kaufman
Fredrick Fern
Joseph DeMarzo

X. Further Matters

Plaintiffs' and Defendants' Liaison Counsel are hereby directed to mail a copy of this Order to all counsel who have appeared in these actions for plaintiffs and defendants, respectively.

SO ORDERED.

Dated: May 28 1998
New York, New York

Helen E. Freedman

Helen E. Freedman, J.S.C.

APPENDIX A

DIET DRUG LITIGATION

"Fen-phen"
(a name that has been used to refer
to the combination use of the diet drugs
fenfluramine and phentermine)

FENFLURAMINE

Trade name - Pondimin[®]

Distributed by

*Wyeth-Ayerst Laboratories, a Division of
American Home Products Corporation*

Manufactured by

*A.H. Robins Company, Incorporated
a subsidiary of
American Home Products Corporation*

PHENTERMINE

Phentermine is or was manufactured
and/or distributed under a number of
different trade names including

*Adipex-P[®] - Gile Pharmaceuticals,
a division of Teva
Pharmaceuticals, U.S.A.,
Inc.*

*Banobese - Seatrace
Pharmaceuticals*

*Fastin[®] - SmithKline Beecham
Corporation*

*Ionamin[®] - Medeva
Pharmaceuticals, Inc.,
Medeva Manufacturing,
Inc., Fisons
Corporation*

Obenix[™] - Abana Pharmaceuticals

*Oby-Cap[™] - Richwood
Pharmaceutical
Company, Inc.*

Zanryl - Ion Laboratories, Inc.

and as generic phentermine by a
number of companies including:

*Eon Labs
Manufacturing, Inc.*

Camall Company

*Rugby Laboratories,
Inc.*

*Zenith Goldline
Pharmaceutical Inc.*

Ivax

"REDUX"
(a diet drug that is clinically
related to fenfluramine)

DEXFENFLURAMINE
(an isomer of fenfluramine)

Trade name - Redux™

Licensed To
Interneuron Pharmaceuticals, Inc. and

Marketed by
*Wyeth-Ayerst Laboratories, a Division of
American Home Products Corporation*