

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

CASE MANAGEMENT  
ORDER NO. 10

-----X  
March 11, 1999

**PROCEDURE FOR SEEKING EXPEDITED  
TREATMENT FOR CERTAIN CLAIMS**

Pursuant to Case Management Order No. 1 ("CMO No. 1") entered in these coordinated cases on May 28, 1998, this Court, *inter alia*, established steering committees, and joint subcommittees, of plaintiffs' and defendants' counsel to coordinate the examination of witnesses at examinations before trial in these cases. The Plaintiffs' and Defendants' Discovery Subcommittees have reached agreement regarding certain procedures for considering applications for expedited treatment of certain plaintiffs. This Order and the procedures contained herein apply to all diet drug cases which are presently or hereafter assigned to the undersigned.

I. **General Provisions**

1. **Exclusive Method of Seeking Expedited Treatment for Plaintiffs  
Alleging PPH**

Except as otherwise provided, all applications for expedited treatment by plaintiffs who claim they have been diagnosed with primary pulmonary hypertension shall be made pursuant to this Case Management Order.

2. **No Admissions or Concessions: Admissibility**

The procedures herein are intended to be used in an effort to avoid the expense and inconvenience to the parties and the Court of adversarial proceedings with regard to whether a plaintiff has been diagnosed with primary pulmonary hypertension and, if so, whether expedited treatment is warranted. Accordingly, the fact that defendants have consented to this procedure, and any agreement or consent made pursuant to the procedures set forth herein, shall not constitute an admission or a concession with respect to any matter and shall not be offered for admission, nor shall be admissible as evidence, in the trial of any action. In particular, defendants do not agree, admit or concede that the fact that a plaintiff is undergoing the treatments set forth herein means that such plaintiff is in extremis, has pulmonary hypertension or has a terminal illness. Further, in the event that defendants do not oppose the expedited treatment with respect to a particular plaintiff, this shall not be considered an agreement, admission or concession that the plaintiff has primary pulmonary hypertension, that that condition is caused by the ingestion of diet drugs, or that the plaintiff has a terminal illness.

3. **Perpetuation Depositions**

Nothing in this agreement shall apply to the right, if any, of any plaintiff to seek to hold a de bene esse or perpetuation deposition.

II. **Procedures**

1. **Identification of Plaintiffs Seeking Expedited Treatment**

(a) Counsel for any plaintiff (i) who has received a physician's diagnosis of primary pulmonary hypertension ("PPH") and (ii) who counsel believes merits expedited treatment shall serve a notice on all parties to the action that such plaintiff is requesting expedited treatment.

(b) The notice shall include:

(i) a statement that counsel, after reasonable investigation, has a good faith basis for stating that such plaintiff merits expedited treatment;

(ii) a brief description of such basis;

(iii) a statement that the plaintiff is in extremis and (A) is undergoing prostacyclin treatment; (B) is on continuous, 24-hour-a-day oxygen; (C) is on an official lung or heart-lung transplant waiting list; and/or (D) has been diagnosed by a physician as having a terminal illness within the meaning of CPLR 3-407; and

(iv) a statement as to whether the plaintiff has undergone any of the following diagnostic tests: complete medical history; chest x-ray; CT scan; EKG; pulmonary function test; V/Q scan; echocardiogram; right heart catheterization; lung biopsy; and sleep study.

(c) The notice shall be accompanied by an affidavit:

(i) from a treating physician stating that plaintiff has been diagnosed with PPH, stating the basis of the diagnosis, identifying which tests in Paragraph 1(b)(iv) of this section the physician has reviewed, stating the nature of the treatment set forth in Paragraph 1(b)(iii) hereof that the plaintiff is undergoing, and evaluating the plaintiff's prognosis; or

(ii) from a non-treating physician who has reviewed all relevant medical records (including without limitation the diagnostic tests for PPH listed in paragraph 1(b) hereof). This affidavit shall state that the plaintiff has been diagnosed with PPH and the basis of the diagnosis, shall identify which tests in Paragraph 1(b)(iv) of this section the physician has reviewed, shall state the nature of the treatment set forth in Paragraph 1(b)(iii) hereof that the plaintiff is undergoing, and shall evaluate the plaintiff's prognosis.

(b) The affidavit of the physician shall be accompanied by all documents reviewed by such physician in connection with the affidavit, including without limitation medical records and any other objective evidence relating to the diagnosis of PPH.

2. **Submission of Plaintiff's Initial Discovery, Authorizations, Medical Records and Other Items**

(a) For each plaintiff identified pursuant to Paragraph 1 hereof (hereinafter "Requesting Plaintiff"), such Requesting Plaintiff shall, no later than 10 days after the notice required by Paragraph 1 hereof:

(i) serve on all parties to the case (1) Plaintiff's Initial Discovery ("PID") (as defined and described in CMO No. 2) (including without limitation copies of medical authorizations for all health care providers identified in the PID form and for the records of any diagnostic tests referred to in Paragraph 1(b)(iv) of this section that have been performed); (2) all medical records of physicians and other health care providers in their possession; and (3) any other materials that may be of assistance in evaluating the request for expedited treatment.

(ii) serve the originals of the medical authorizations referred to in paragraph 2(1)(i) hereof, together with an Order in the form attached hereto as Exhibit A, on each health care provider identified in the PID form, requiring the health care provider to submit one copy of the medical records to each of (i) counsel for the Requesting Plaintiff;

(ii) Defendants' Liaison Counsel; and (iii) counsel for any health care provider who is a party. Proof of service shall be provided to Defendants' Liaison Counsel.

(b) Defendants shall notify the Requesting Plaintiff of any deficiencies in the PID (including without limitation deficiencies in the medical authorizations) and of any additional materials needed for evaluation of the Requesting Plaintiff's medical condition, to the extent they

can be identified from the materials received, within five business days of receipt of such materials. The time limit in Paragraph I(A)(1) of CMO No. 6 shall not apply to this notice.

(c) Counsel for Requesting Plaintiffs shall use their best efforts to assist in obtaining medical authorizations and medical records.

### 3. Meet and Confer

(a) As to each Requesting Plaintiff, within 30 days of the receipt of all the materials set forth in Paragraph 2(a) hereof, counsel for the parties shall meet and confer regarding expedited treatment. At this meeting, defendants shall indicate whether they oppose expedited treatment for any Requesting Plaintiffs or whether they have insufficient information from which to make a determination.

(b) With respect to each case in which defendants do not oppose expedited treatment, counsel for the parties shall confer in an effort to agree on a specific expedited schedule, which shall be set forth on the form attached hereto as Exhibit B and shall be in conformance with Paragraph 6 of this section unless otherwise agreed or ordered by the Court. Counsel for the Requesting Plaintiff shall submit such schedule to the Court for approval.

(c) With respect to each case in which defendants oppose expedited treatment, counsel for the parties shall confer in an effort to resolve their differences.

(d) With respect to each case in which defendants contend they have insufficient information, counsel for the parties shall confer on the issue of how to expeditiously obtain the information that is lacking.

### 4. Application to the Court

(a) In the event that the parties are unable to agree on expedited treatment, on a schedule for expedited treatment, or on the need for further information, a Requesting Plaintiff may make an application to the Court.

(b) In the event of an application to the Court, a Request for Judicial Intervention shall be filed pursuant to the applicable procedures.

**5. Scheduling**

(a) Unless otherwise agreed or ordered by the Court, in any case subject to this Order in which the parties agree on an expedited schedule or the Court orders an expedited schedule, the following schedule shall apply:

(i) All non-expert discovery shall be completed within five months from the date the Court signs an order requiring expedited treatment.

(ii) Any party may at any time request additional time for the completion of discovery. Such a request shall first be made by letter to counsel for the other parties and the parties shall confer in an effort to reach agreement on a revised schedule. In the event the parties cannot agree, the party requesting additional time may make an application to the Court demonstrating the need for additional time or otherwise explaining why a change in schedule is appropriate. Until an agreement is reached or the Court grants additional time, the deadlines in a scheduling order shall remain applicable.

(iv) Expert disclosure shall be conducted during a two-month period following the completion of non-expert disclosure under a schedule to be agreed upon and subject to a future Case Management Order.

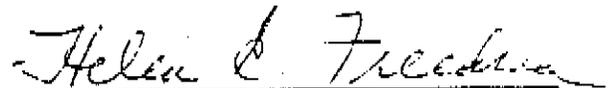
(iii) At the end of the seven-month discovery period, plaintiff shall file, pursuant to applicable procedures, a Note of Issue and Certificate of Readiness.

III. Other Matters

Defendants' Liaison Counsel is hereby directed to serve a copy of this Order with notice of entry on all counsel who have appeared in these actions.

SO ORDERED.

Dated: March 11, 1999  
New York, New York



---

Helen E. Freedman, J.S.C.

**EXHIBIT A**  
**FORM OF ORDER**

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  
ABC,

Plaintiff,

-against-

**ORDER**

XYZ,

Defendant.

-----X  
TO:

YOU ARE COMMANDED, that all business and excuses being laid aside, you and each of you produce at *[insert names and addresses of appropriate counsel]* on the day of \_\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, the following:

*[describe records]*

now in your custody.

Failure to comply with this order is punishable as a contempt of Court and shall make you liable for a penalty and damages sustained by reason of your failure to comply.

SO ORDERED

Dated: *[date]*  
New York, New York

\_\_\_\_\_  
Helen E. Freedman, J.S.C.

**EXHIBIT B**

**DISCOVERY ORDER**

1. **Depositions**

- a. Depositions of plaintiffs shall be completed no later than \_\_\_\_\_.
- b. Depositions of defendant health care providers shall commence no sooner than \_\_\_\_\_ and shall be completed no later than \_\_\_\_\_.
- c. Depositions of defendant manufacturers and distributors shall be completed no later than \_\_\_\_\_.

2. **End Date for all Disclosure**

- a. All disclosure shall be completed no later than \_\_\_\_\_.

3. **Note of Issue**

- a. A note of issue/certificate of readiness shall be filed on or after \_\_\_\_\_.