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

CASE MANAGEMENT ORDER NO. 11

May 3, 1999

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CLUSTERING OF CASES FOR DISCOVERY AND DEPOSITION PROTOCOLS

Pursuant to Case Management Order No. 1 ("CMO No. 1") approved 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 pre-trial discovery in these cases. The Plaintiffs' and Defendants' Discovery Subcommittees have reached agreement regarding a procedure for clustering cases for discovery purposes and protocols for depositions. This Order, and the protocols contained herein, applies to all diet drug cases which are presently or hereafter assigned to the undersigned.

I. Clustering of Diet Drug Cases for Discovery

New York Diet Drug cases will be clustered for the purposes of discovery as follows:

1. Cases Eligible for Clustering

Unless waived by the defendants in a given case, a case will not be eligible for clustering unless: (i) plaintiff(s) have served, in accordance with CMO No. 2, a completed Bill of Particulars ("Bill") and Plaintiffs' Initial Disclosure ("PID"), including documents or other

materials responsive to the requests in the PID; and (ii) ninety (90) days has passed since the receipt by defendants of a Bill and PID in substantial compliance with CMO No. 2 and all the original signed authorizations plaintiffs are required to provide pursuant to CMO No. 2.

2. Selecting Cases For A Cluster

(a) The parties agree to cluster for discovery every sixty (60) days twenty (20) diet drug cases that are eligible for clustering. The number of cases per cluster may be modified depending on (i) the number of cases eligible for clustering; (ii) the advisability or necessity of doing so in light of other activities and/or demands in these cases; or (iii) other practical concerns. The number of cases in a particular cluster shall be reduced on a one-for-one basis by the number of cases receiving expedited treatment pursuant to CMO No. 10 since the last cluster date. The Plaintiffs' and Defendants' Discovery Subcommittees shall negotiate in good faith to the extent that either seeks any other modification in the number of cases to be clustered. The Plaintiffs' and Defendants' Discovery Subcommittees shall, in any event, meet as soon as practicable after November 15, 1999 to determine whether and, if so, the extent to which the number of cases to be clustered should be modified based on the experience of the parties hereunder and the circumstances then existing.

(b) Eligible cases shall be clustered on a modified first in, first out basis, considering: (i) the date the action was commenced; (ii) the date by which the case became eligible for clustering; (iii) whether a case has been expedited pursuant to CMO No. 10; and (iv) the law firm which commenced the case (i.e., to attempt to ensure that clustering of cases is done fairly as among plaintiffs' counsel).

(c) The first cluster shall be made on or before May 15, 1999. Thereafter, additional cases shall be clustered on or before the 15th day of the months of July, September, November, January, March and May, until all eligible diet drug cases have been clustered. Clusters shall be identified by cluster date (the "Cluster Date") consisting of the month and year of their designation date.

(d) At least two (2) weeks before each Cluster Date, Defendants' Liaison Counsel shall distribute to the Plaintiffs' and Defendants' Discovery Subcommittees a list of cases that are eligible for clustering. The Plaintiffs' and Defendants' Discovery Subcommittees shall meet (either in person or telephonically) and agree on the cases to be clustered.

(e) Defendants' Liaison Counsel shall file in the Master File created for this litigation and serve on all parties on the Master Service List provided for by CMO No. 1 a notice setting forth the list of clustered cases for each cluster and the date by which discovery must be completed for the cases in each cluster.

(f) Any unresolved issue relating to the clustering of cases may be raised with the Court by the Plaintiffs' or Defendants' Steering Committee. In addition, any party in the cases to which the Order applies shall have the right to contest: (i) the placement or omission of a particular case on the list of eligible cases; and/or (ii) the clustering of or failure to cluster a particular case for discovery; provided that before presenting any such issue to the Court the contesting party shall first have presented the matter complained of to the appropriate discovery subcommittee without amicable resolution. The discovery subcommittees and the parties are directed to use the utmost good faith in attempting to cluster cases without the need for the Court's intervention.

3. **Defense Coordinating Counsel**

For each case within a cluster, the Defendants' Discovery Subcommittee shall designate counsel to serve as coordinating counsel for that case. Defense Coordinating Counsel shall be identified in writing to all parties in that action with a copy to Plaintiffs' and Defendants' Liaison Counsel. Defense Coordinating Counsel shall be responsible to work with counsel for the plaintiff(s) in the particular case in the scheduling and noticing of depositions and other discovery for the assigned case and to communicate with the parties to an individual case on discovery issues.

4. **Discovery of Plaintiffs and Non-Product Defendants**

(a) All fact discovery in a clustered case (other than discovery of any Product Defendant covered by section III of this Order) shall be completed by the 15th day of the twelfth (12th) month following the Cluster Date of that case.[1] Any party may serve and file a Note of Issue and Certificate of Readiness when all discovery in a clustered case is complete. Plaintiffs may elect to file a Note of Issue and Certificate of Readiness prior to the expiration of the two year cut-off for discovery of the Product Defendants other than the American Home Products Corporation Defendants established by this Order (see section III infra); provided, however, that a plaintiff who elects to do so shall be deemed to have waived the right to take further discovery, or utilize other discovery taken in New York, after the date of filing the Note of Issue and Certificate of Readiness. This waiver applies only to discovery taken in an action in this State and shall not restrict such plaintiff from utilizing discovery obtained in cases filed in other states.

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[1] For example, such discovery in a case comprising the May 1999 cluster shall be completed on or before May 15, 2000.

In addition to the general time limit for discovery, the sub-limits set forth in paragraphs I.4.(b) and (c) shall apply.

(b) The deposition of the plaintiff(s) shall be taken within one hundred and twenty (120) days of the Cluster Date of the plaintiff (s) case.

(c) The deposition of the health care defendant(s) shall be taken within forty-five (45) days of the completion of the plaintiff (s) deposition(s).

(d) In addition to the named plaintiff(s), defendants may, as of right, depose up to five non-party health care witnesses in the following categories:

(i) The physician(s) who prescribed the diet medication(s) at issue in the action; and

(ii) Any physician(s) or other health care provider(s) who treated the plaintiff who ingested diet drugs for any medical condition relevant to the allegations in the complaint or associated bill of particulars at issue in the action; defendants may not depose non-party mental health professionals pursuant to this subsection except those who have treated plaintiff for emotional or mental injury relevant to the allegations in the complaint or associated bill of particulars (but not, under this subsection, with respect to the emotional aspect of a claim for pain and suffering).

(e) Unless the parties agree or the Court orders otherwise, the depositions taken pursuant to section I.4(d) of prescribing and treating physicians are to discover relevant facts and are not expert depositions. See section V.2 infra. Without in any way limiting the generality of the first sentence of this section, subsection (e), a physician who has discussed with

the plaintiff his or her opinion as to the cause of the plaintiff's condition may be asked about the conversation and the opinion expressed.

(f) The entry of this Order is without prejudice to the right of any party to object to the deposition of an "as of right" physician on the ground (and only on the ground) that said physician does not meet the definition of section I.4(d). In the event a party wishes to dispute the examination of such a physician, such party shall within ten (10) days of service of notice of the deposition, notify the party noticing the deposition in writing, specifying the nature of the dispute. If the parties are unable to amicably resolve the dispute, the disputing party may make an appropriate motion to the Court.

(g) Non-party depositions noticed to obtain documents which are either canceled upon receipt of the requested documents, or where the questioning of the deponent is limited to the production and identification of the documents sought, shall not be included in determining the number of depositions the defendants may take pursuant to section I.4(d).

(h) Parties taking prescribing and treating physician depositions pursuant to section I.4(d) shall use their best efforts to keep the depositions as brief as possible. Unless otherwise agreed, the party noticing the deposition of a prescribing or treating physician shall be responsible for the reasonable fees payable to the deponent for time spent at the deposition. When scheduling depositions of a plaintiff's prescribing and/or treating physicians who reside outside the New York metropolitan area, the parties will use their best efforts to coordinate the scheduling of such depositions to avoid the need for multiple trips to a particular location.

(i) In addition to the foregoing, the defendants may depose as of right (subject only to the next sentence of this subsection (i)), non-party pharmacist(s) or other non-parties who provided the diet drugs in cases where there is an issue of product identification. Before

deposing any non-party pharmacist regarding an issue of product identification, the party seeking such information shall first notice a deposition on written questions of the non-party pharmacist in compliance with the applicable procedure and endeavor to obtain the necessary product identification information by such means.

(j) The foregoing shall not preclude the deposition, by agreement or otherwise, of any other fact witness to the extent permitted by the CPLR or applicable case law. Without in any way limiting the generality of the immediately preceding sentence, this Order in no way limits or waives the rights of any party to conduct or object to additional non-party witness depositions of any type.

(k) This Order should not be read to dispense with the need to subpoena a non-party in order to compel such non-party's appearance for deposition, nor shall it be read to limit the right of counsel for the non-party to object to the subpoena or seek any other appropriate relief.

5. **Physical and Mental Examinations**

(a) No later than sixty (60) days after depositions (other than depositions of the Product Defendants taken pursuant to section III hereof) have been completed, Defense Coordinating Counsel shall notify plaintiffs' counsel of each doctor whom defendants, or any of them, wish to have examine a plaintiff, including the doctor's area of specialty. No defendant shall be permitted to designate a doctor and notice the examination of a plaintiff in a particular case more than 12 months after the cluster date for that case absent good cause shown. The plaintiff shall not be examined by more than one doctor per defendant in a particular area of specialty and the defendants in a particular case shall consider in good faith the extent, if any, to

which they can share examining doctors (plaintiffs reserve the right to revisit this issue should the experience of the parties so require).

(b) Said examinations will occur within thirty (30) days after the applicable notice, and a report will be sent to plaintiff's counsel within sixty (60) days of the examination.

II. Further Depositions of Plaintiffs

In the event that a plaintiff serves, after examination before trial, a supplemental Bill of Particulars, PID or amended complaint alleging that plaintiff suffered injuries not alleged in prior pleadings, defendants shall be entitled to a further non-repetitive deposition of such plaintiff. Defendants reserve the right to seek (and the plaintiffs reserve the right to oppose) a further deposition of plaintiff on any other grounds.

III. Depositions of Product Defendants

1. For purposes of this Order, a Product Defendant is any defendant alleged to have been involved in the manufacture, sale or distribution of any diet drug. Except as otherwise provided herein, all fact discovery:

(a) of defendant American Home Products Corporation, its subsidiaries and/or affiliates shall be completed within one year of the date of this Order; and

(b) of all other Product Defendants shall be completed within two years of the date of this Order.

2. Notwithstanding the foregoing deadline for the completion of discovery of the Product Defendants discovery relevant solely to an individual case (e.g., as to contacts between a Product Defendant and the plaintiff or prescribing physician) shall be completed within the time frame required by this Order for other discovery in the case at issue.

3. The parties recognize that there may be new developments in the diet drug litigation, such as the release of new medical studies, that may justify additional discovery. Plaintiffs reserve the right to seek (and defendants reserve the right to oppose) further discovery of the Product Defendants in the event of such new developments.

4. Within thirty (30) days of the entry of this Order, each Product Defendant shall provide Plaintiffs' Liaison Counsel and the Defendants' Steering Committee with a list of depositions taken of their respective employees in other diet drug cases. Upon the written request of Plaintiffs' Liaison Counsel or a member of Defendants' Steering Committee, made no more frequently than once every three months thereafter, each Product Defendant shall: (a) supplement or update the list(s) of depositions previously provided with the names of any additional witnesses whose depositions were taken since the date of the previous list; and, if requested, (b) provide (within a reasonable time from the request) the requesting party's counsel with the transcript of, and deposition exhibits marked at, any such deposition upon payment of the reasonable costs of copying or providing such material(s), subject, however, to the remainder of this subsection III.4. To the extent that a Product Defendant or its counsel believes that the provision of any such materials (m) may be conditioned, restricted or prohibited by the court(s) in which such deposition(s) were taken or (n) may subject the Product Defendant to any penalty, cost, fee or other adverse consequence in or related to the action in which the deposition was taken, the Product Defendant need not provide such material but may, instead, provide to the requesting party, in writing, the basis for that defendant's belief that the provision of any such materials may be conditioned, restricted or prohibited and the name(s) of the court reporter(s) from whom the transcript(s) of such deposition may be obtained. In the event that the requesting party is unable to obtain from such court reporter(s) the transcript (including any signature and

errata sheet) and the exhibits marked at a deposition, the interested parties shall discuss in good faith the nature of the condition, restriction, prohibition or consequence at issue and whether it may be overcome. Notwithstanding anything to the contrary herein, no Product Defendant will be required by this Order to provide to a requesting party any transcripts (including any signature and errata sheet) and the exhibits marked pertaining to depositions taken in the federal multidistrict litigation entitled In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation, MDL Docket No. 1203, pending in the United States District Court for the Eastern District of Pennsylvania and assigned to Senior Judge Bechtle (the "MDL"). However, the parties reserve their respective rights with respect to requesting from the Court (or opposing) a modification of the immediately preceding sentence to the extent future developments in the MDL dictate.

5. The parties shall make every effort to use depositions obtained from a Product Defendant in other diet drug cases throughout the country for all purposes as if taken in these cases in accordance with this Order; provided, however, that the parties shall not be obligated to use depositions taken elsewhere to the extent that (a) the party has been unable to obtain the transcript (including any signature or errata sheet) and exhibits; or (b) the party using the deposition would be, or should reasonably expect to be, subjected to a fee or surcharge (other than court reporters fees and/or costs of reproducing the transcript and associated exhibits) for such use; and provided further, that to the extent that the deposition of a witness from a Product Defendant is conducted in these cases, any deposition of that witness that is thereafter conducted in any case in another jurisdiction may only be used at the trial of cases subject to this Order to the extent permitted by New York law. The parties acknowledge that depositions taken in other jurisdictions (made applicable to the cases subject to this Order pursuant to this or the next

subsection of this Order) may proceed in accordance with practice rules materially different than those in New York and, therefore, the Product Defendants shall be entitled to preserve and make objections they otherwise would have been entitled to make had the depositions been conducted in New York, regardless whether those objections were made in the non-New York deposition. No other depositions of such defendants shall be taken in these cases except pursuant to the next two paragraphs of this Order.

6. Counsel for each Product Defendant may, for upcoming depositions of such Product Defendant in diet drug litigation in other jurisdictions, cross-notice such depositions in the cases subject to this Order; provided, however, that such cross-notices shall be without prejudice to noticed parties asserting appropriate objections. In this regard, the parties reserve the right to move (or oppose a motion) for a protective order with respect to any such cross-notice on any applicable grounds including, without limitation, that the party would be subjected to a fee or surcharge for participating in the deposition for which the cross-notice was served.

7. If depositions of any Product Defendant are noticed and conducted in these actions, the questions shall not be repetitive of any deposition questions of such defendants, and any questions not expressly repetitive shall not seek to elicit testimony previously elicited, in any other action in this State or in any other jurisdiction in the country (to the extent that such testimony may be used in this State without imposition of a fee or surcharge). Any party desiring to take a non-repetitive deposition of any Product Defendant pertaining to issues which were not covered by prior depositions of that defendant shall so notify counsel for that Product Defendant by letter, setting forth in reasonable detail the reasons why the deposition would not be repetitive of deposition testimony already elicited. Objections, if any, to conducting such deposition shall

be served within twenty (20) days of service of such notice. Such objections shall set forth in reasonable detail the basis upon which the objections are made. Counsel shall discuss such objections and attempt to reach a good faith resolution of any differences. In the event a resolution of all objections cannot be achieved by agreement of counsel, any party by motion may seek leave of Court to conduct a non-repetitive deposition of such Product Defendant pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant.

8. Notwithstanding anything set forth above, this Order shall neither expand nor limit the rights of counsel for plaintiffs subject to this Order to participate in joint discovery proceedings conducted in New Jersey or Pennsylvania diet drug litigation.

IV. Deposition Procedures

1. Location of Depositions — Plaintiffs

(a) Unless otherwise agreed, depositions of plaintiffs who commenced their action in any county in New York City shall be conducted in New York City.

(b) Unless otherwise agreed, depositions of plaintiffs who commenced their action outside New York City, but in New York State, shall be conducted in New York City unless plaintiffs' counsel in a particular case requests otherwise, in which case the deposition of such plaintiff shall be conducted in the county where the action was commenced.

(c) Notwithstanding the foregoing, for plaintiffs residing outside New York City, if a plaintiff's medical condition prevents him or her from traveling to New York City, the deposition of such plaintiff may be conducted in the county where the plaintiff resides.

2. **Location of Depositions — Defendants**

Unless otherwise agreed, depositions of defendants and their representatives whose place of business is in New York, New Jersey, Connecticut or Pennsylvania shall be conducted in the State and County of their principal place of business or of their residence. The parties reserve their respective rights with respect to the location and form of depositions of defendants and their representatives whose place of business is not in New York, New Jersey, Connecticut or Pennsylvania.

3. **Location of Depositions — Non-Parties**

Unless otherwise agreed, depositions of non-parties and their representatives shall be conducted in the State and County of their principal place of business or of their residence.

4. **Space Requirements**

Counsel for plaintiffs who intend to attend a Product Defendant's deposition shall notify the deponent's counsel no later than 10 days after receipt of the notice of deposition or three days prior to the deposition, whichever is earlier.

5. **Videotaped Depositions**

(a) Deposition notices shall state whether the deposition is to be videotaped and, if so, the name, firm, and address of the videographer or videography firm shall be set forth in the notice. All videotaped depositions shall proceed pursuant to the CPLR and Section 202.15 of the Uniform Rules for the Trial Courts of the State of New York and Orders of this Court.

(b) Cameras and microphones shall accurately reproduce the appearance of the deponent and assure clear reproduction of the deponent's testimony and the statements of counsel. The camera shall at all times remain focused only on the deponent. The video technician shall not use any zoom or wide angle lens feature on the camera.

(c) The deponent, or any party, may place upon the record any objection to the video technician's handling of the video recording procedures. Such objections shall be considered by the Court in ruling on the admissibility of the video record.

(d) The stenographic transcript shall constitute the official transcript of the deposition. In the event of any material discrepancy between the video record and the stenographic transcript, there shall be a presumption that the stenographic transcript shall control unless the Court rules otherwise.

6. Scheduling of Depositions

(a) Counsel for plaintiffs and defendants (including Defense Coordinating Counsel) shall consult in advance in an effort to schedule depositions at mutually convenient times and places.

(b) Unless otherwise agreed, all depositions of any party witness shall be on no less than thirty (30) days written notice; provided, however, that a cross-notice of deposition served pursuant to paragraph III.6 of the Order shall be on at least twenty (20) days notice.

(c) Unless otherwise agreed, a deposition day shall commence at 9:30 a.m. and terminate no later than 5:30 p.m., with reasonable times for a lunch break and other periodic breaks.

(d) Defendants shall be entitled to a discovery deposition of plaintiff prior to the conduct of any preservation deposition noticed by counsel for the plaintiff. Counsel for a plaintiff seeking a preservation deposition shall meet and confer with counsel for the defendants in an effort to resolve any issues regarding a proposed preservation deposition such as the location of the deposition, projected length of examination and other administrative issues. In the event counsel are unable to reach agreement on such issues amicably, counsel for any party

may apply to the court for a protective or other applicable order. The foregoing is not a concession by any party as to the appropriateness of a request to take a preservation deposition in any case, nor is it a concession as to the length of the discovery deposition to be taken. Such matters shall be dealt with by agreement of the parties, by a future CMO (if practicable) or by future order of the Court.

7. Attendance

Unless otherwise agreed, depositions may be attended only by the parties to the particular case or cases in which the deposition has been noticed or cross-noticed (including cross-notices served in other jurisdictions) and their respective counsel (including employees of such counsel), court reporters, and videographers. Additional persons may be permitted to attend upon the consent of all parties present at the deposition or upon order of the Court pursuant to a motion demonstrating good cause.

8. Questioning

Questioning of witnesses shall not be unnecessarily repetitive. Reasonable efforts shall be made to conduct each deposition efficiently and to avoid the unnecessary expenditure of time. Attorneys in cases which are cross-noticed shall have a reasonable opportunity to question the deponent.

9. Documents

Any party wishing to question a witness shall identify the documents the party intends to use in the questioning of such deponent no later than ten (10) days prior to the date of the deposition and shall provide copies of the documents to counsel for the party to be examined. To the extent a document has been previously produced in the case the document may be identified by its production Bates number in lieu of providing a copy. Notwithstanding the

foregoing, failure to identify a document in accordance with this provision shall not preclude a party from using a document at a deposition if upon a reasonable and diligent effort it failed to identify such document in advance of the deposition.

10. Stipulations

In addition to the provisions of the CPLR, the following shall serve as the "usual stipulations" for depositions governed by this Order:

> It is hereby stipulated and agreed by and among counsel for the respective parties that the deposition may be signed before any notary, that filing and certification of the transcript are waived, and that all objections, except as to the form of the questions, are reserved until the time of trial.

V. Other Matters

1. This Order does not deal with discovery in purported class actions.

2. This Order also does not deal with expert discovery. For example (and without in any way limiting the generality of the foregoing statement), if a plaintiff designates as one of plaintiffs' trial experts a physician or other health care provider of whom fact discovery has been taken pursuant to subsection I.4(d) of this Order, this Order does not in any way affect the discovery that may be taken of that physician or health care provider *as a testifying expert*. The parties expect to deal with the issue of expert discovery in a future CMO.

3. This Order is without prejudice to the right of any party to seek other or further discovery or relief from discovery for good cause shown.

4. The entry of this Order shall not constitute an admission of the parties, or any one of them, as to the admissibility at trial of any discovery conducted pursuant to this Order.

5. Defendants' Liaison Counsel is hereby directed to serve a copy of this Order with notice of entry on all counsel listed on the Master Service List filed in these cases pursuant to CMO No. 1.

SO ORDERED.

Dated: May 3, 1999
New York, New York

Helen E. Freedman, J.S.C.