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

ORDER WITH NOTICE OF ENTRY

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PLEASE TAKE NOTICE that the attached is a true and correct copy of Case Management Order No. 12 which was signed by the Honorable Helen E. Freedman on November 23, 1999 and entered in the Office of the New York County Clerk on November 30, 1999.

Dated: New York, New York
December 3, 1999

SIMPSON THACHER & BARTLETT

By: _____
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Defendants' Liaison Counsel

To: All Counsel of Record on the Master Service List in effect as of December 1, 1999.

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

IN RE: NEW YORK DIET DRUG LITIGATION — Index No. 700000/98

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

CASE MANAGEMENT ORDER NO. 12
November 22, 1999

EXPERT DISCOVERY

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 discovery in these cases. The Plaintiffs' and Defendants' Discovery Subcommittees have reached agreement regarding certain procedures to be followed in conducting discovery of expert witnesses. This Order and the procedures contained herein apply to all diet drugs cases that are presently or hereafter assigned to the undersigned.

I. Definitions

a. "Expert material" as used herein means the qualifications of the witness, including a list of all publications authored or co-authored by the witness within the preceding ten years (which may be satisfied by production of a current *curriculum vitae*); a list of any other cases in which the witness has testified at trial or by deposition within the preceding four years; and a list of all medical records, medical or scientific literature and all other documents or data upon which the expert has relied in formulating his or her opinion.

b. "Health care defendant" as used herein means physicians, hospitals, clinics and any other health care provider, other than pharmacies.

II. Discovery of Experts in Cases for Which Expedited Treatment has been agreed to or ordered by the Court

For all cases in which expedited treatment has been agreed to by the parties or ordered by the Court pursuant to CMO No. 10 and unless extended by stipulation of the parties or order of the Court,

(a) Plaintiff shall designate all of his or her experts no later than the last day of the fifth month following the date on which it was agreed or ordered that the case be expedited. Such date on which plaintiff designates all of his or her experts shall be referred to hereinafter as the "Expedited Designation Date". Plaintiff shall serve upon each defendant in the case, by facsimile transmission or by personal delivery, a CPLR 3101(d) statement and expert material for each expert retained to testify as to the alleged liability of any non-health care defendant at the time the expert is designated. For any expert retained to testify as to the alleged liability of a health care defendant, plaintiff shall serve a separate CPLR 3101(d) statement in accordance with paragraph IV(a) hereof. Under no circumstances may a plaintiff refuse to identify expert witnesses retained to testify at trial as to the alleged liability of any non-health care defendant, even if that expert also will serve as plaintiff's expert with respect to the alleged liability of a health care defendant.

(b) By the later of (1) the date that is 21 days after the Expedited

Designation Date or (2) the date that is 21 days after service of plaintiff's CPLR 3101(d) statements, defendants shall designate all of their expert witnesses and shall serve upon plaintiff and each co-defendant in the case a CPLR 3101(d) statement (which states, inter alia, whether the expert is going to opine on any medical malpractice issues (e.g. standard of care)) and expert material for each expert so designated. Designation of expert witnesses by a health care defendant shall be made in accordance with the provisions of paragraph IV(a) hereof.

(c) By no later than 14 days after designation by any defendant of an expert, any defendant may serve, upon plaintiff and each co-defendant in the case, further CPLR 3101(d) statements in response to the expert disclosure made by any other defendant. If any such further CPLR 3101(d) statement that is served pursuant to this paragraph is that of a previously undisclosed expert witness, the party serving the report shall serve expert material along with such further CPLR 3101(d) statement.

(d) Depositions of plaintiffs' and defendants' experts in an expedited case shall be completed within 60 days after the date of service of plaintiff's CPLR 3101(d) statement(s) in a given case, or within 60 days after the Expedited Designation Date, whichever is later.

III. Discovery of Experts in Non-Expedited Cases

In a case that has not been expedited pursuant to CMO No. 10 and unless extended by stipulation of the parties or order of the Court,

(a) Plaintiff shall designate all of his or her experts no later than

the end of the 11th month following the Cluster Date (as defined in CMO No. 11) of a given case, and shall serve upon each defendant in the case, by facsimile or by personal service, a CPLR 3101(d) statement and expert material for each such expert retained to testify as to the alleged liability of any non-health care defendant at the time the expert is designated. For any expert retained to testify as to the alleged liability of a health care defendant, plaintiff shall serve a separate CPLR 3101(d) statement in accordance with paragraph IV(a) hereof. Under no circumstances may a plaintiff refuse to identify expert witnesses retained to testify at trial as to the alleged liability of any non-health care defendant, even if that expert will also serve as plaintiff's expert with respect to the alleged liability of a health care defendant.

(b) By the later of (1) the last day of the 13th month following the Cluster Date or (2) the date that is 30 days after the designation by plaintiff of his or her experts in a given case, defendants shall designate all of their experts and shall serve, upon plaintiff and each co-defendant in the case, a CPLR 3101(d) statement (which states, inter alia, whether the expert is going to opine on any medical malpractice issues (e.g. standard of care)) for each such expert and expert material. Designation of expert witnesses by a health care defendant shall be made in accordance with the provisions of paragraph IV(a) hereof.

(c) By no later than 15 days after designation by any defendant of an expert, any defendant may serve, upon plaintiff and each co-defendant in the case, further CPLR 3101(d) statements in response to expert disclosure made by

any other defendant. If any such further CPLR 3101(d) statement that is served pursuant to this paragraph is that of a previously undisclosed expert witness, the party serving the report shall serve expert material along with such further CPLR 3101(d) statements.

(d) Depositions of plaintiffs' and defendants' experts in a non-expedited case shall be completed within 90 days after the date of service of plaintiff's CPLR 3101(d) statements in that case, or by the last day of the 14th month following the Cluster Date for that case, whichever is later.

IV. General Provisions

(a) Discovery of expert witnesses retained by plaintiffs and defendants to testify at trial as to medical malpractice claims that may be asserted in any action, shall proceed in accordance with the provisions of CPLR 3101(d) and CMO No. 9, provided however that the parties shall state expressly in any CPLR 3101(d) statement served on behalf of any such expert witness whether the expert will affirmatively testify at trial as to any issue imputing liability to any defendant other than a health care defendant (e.g. causation or adequacy of product labeling) and, if so, the opinion the expert intends to express and the basis for the opinion.

1. On the basis of such disclosure, any party desiring to take a deposition of said expert, limited to opinions expressed insofar as they relate to any issue imputing liability to any defendant other than a health care defendant (e.g. causation or adequacy of product labeling), shall notify counsel for the party who has designated the expert by letter.

Objections, if any, to conducting such depositions shall be served within twenty (20) days of service of such notice. 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 may seek leave of court to conduct a deposition of such expert witness limited to his or her opinion on issues imputing liability to any non-health care defendant. In addition, such motion will specify which, if any, additional and/or expert materials and documents are requested.

2. The non-health care defendants reserve their rights to supplement any of their previously-served CPLR 3101(d) statements in response to any disclosure made pursuant to this paragraph.

3. To the extent that an expert witness retained by a plaintiff or a defendant to testify at trial as to medical malpractice claims has been separately designated as an expert who will testify on the alleged liability of a defendant other than a health care defendant, discovery of said expert shall proceed in accordance with Sections II and III of this Order. A plaintiff may not refrain from identifying or refuse to identify expert witnesses retained to testify at trial as to the alleged liability of any non-health care defendant on the basis that expert will also serve as plaintiff's expert with respect to the alleged liability of a health care defendant.

(b) The party seeking a deposition of any expert shall pay the expert a reasonable fee for time spent in responding to any subpoena that may issue in connection with such a deposition and shall pay the reasonable fee for the time spent by the expert at deposition. If the expert resides or has an office in or near New York City, the deposition will be held in New York City at the offices of the attorneys offering the expert. If the expert does not reside or have an office in or near New York City, the parties will seek to have the witness come to New York City for the deposition (at the expense of the party seeking to depose the expert). If agreement cannot be reached, the deposition shall take place within the State and City in which the expert maintains his or her office or, if he or she does not maintain an office, in the State and City of the expert's residence.

(c) 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 of expert witnesses. In this event, plaintiffs and defendants may each supplement a previously-served CPLR 3101(d) statement for any previously designated expert witness in an expedited case no later than 30 days after the filing of a note of issue and, in a non-expedited case, no later than 90 days after the filing of a note of issue. The opposing parties have the right to depose such expert witness on the terms provided herein no later than 30 days after receipt of such a supplemental CPLR 3101(d) statement, provided, however, that such depositions shall be limited to new material or opinions contained therein.

(d) For experts designated in a case subject to this order, the parties

shall make every effort to use depositions taken of said experts in other diet drug cases throughout the country, including other New York State cases subject to this Order, 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 of experts to the extent that (1) the party has been unable to obtain the transcript (including any signature or errata sheet) and exhibits; or (2) 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 or reproducing the transcript and associated exhibits for such use). 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 parties shall be entitled to preserve and make objections they otherwise would have been entitled to make had the deposition been conducted in New York, regardless whether those objections were made in the non-New York deposition.

(e) Counsel for each party may, for upcoming depositions of their experts in this coordinated litigation, 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. This provision is not

intended to permit a party to cross-notice the deposition of an opposing party's expert.

(f) If depositions of any experts are noticed and conducted in these actions, the questions shall not be repetitive of any deposition questions of such expert witnesses and any questions not expressly repetitive shall not seek to elicit testimony previously elicited, in any other action in this State or any other jurisdiction in the country (to the extent that the use of such testimony does not impose upon the party seeking to use it as a fee other than court reporters' or copying fees). Any party desiring to take a non-repetitive deposition of any expert pertaining to issues that were not covered or not covered adequately by prior depositions of that witness, shall so notify counsel for the party that has designated that expert witness by letter. Objections, if any, to conducting such depositions shall be served within 20 days of service of such notice. 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 expert witness pertaining to issues that were not covered or not covered adequately by prior depositions of that expert witness.

(g) 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.

(h) 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.

(i) Counsel for the party whose expert witness has been noticed for a deposition agrees to accept service of a subpoena *duces tecum* that lists those documents that the witness is to produce. Production of such documents shall be made ten (10) business days prior to the deposition, if the subpoena is served on thirty (30) days notice or seven (7) business days prior to the deposition if the subpoena is served on twenty (20) days notice.

(j) Any party wishing to question an expert witness shall identify the documents the party intends to use in the questioning of such witness (other than published medical or scientific literature authored by the expert witness) no later than five (5) business 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 this coordinated litigation, 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 reasonable and diligent effort he, she or it failed to identify such document in advance of the deposition, provided however, that counsel for the witness has an opportunity to obtain a ruling from the court as to whether the document may be used at the deposition given the lack of adequate notice.

(k) In any case for which expedited treatment has been agreed to or ordered pursuant to CMO No. 10, a note of issue may not be filed earlier than the 60th day after the Expedited Designation Date. In a case for which expedited treatment has not been agreed to or ordered pursuant to CMO No. 10, a note of issue may not be filed earlier than the last day of the 13th month following the Cluster Date or 60 days after service of plaintiff's expert disclosure, whichever is later. Notes of issue shall be filed in New York County. Any dispositive motions shall be made before Justice Helen E. Freedman or such other Justice who has responsibility for this coordinated litigation and shall be made no later than 120 days after the filing of a note of issue for the case (that is not thereafter vacated) and, in an expedited case, no later than 90 days after the filing of a note of issue for the case (that is not thereafter vacated).

(l) In the event any defendant or defendants move for partial or summary judgment as to generic causation, all experts whose affidavits are presented either in support of or in opposition to such a motion, may be deposed prior to the hearing. If any such expert already has been deposed in this coordinated litigation at the time he or she makes his or her affidavit, the expert may be re-deposed in those areas on which he or she has not previously been

questioned and in those areas in which his or her opinions have either changed or been modified. Plaintiffs agree that they shall not interpose as a defense to any such motion a claim that insufficient factual or expert discovery has occurred in any given case.

(m) Notwithstanding anything to the contrary set forth in CMO No.11, any physical examinations of plaintiffs provided for in CMO No.11 may be taken at any time prior to the close of expert discovery in any given case.

(n) In addition to the provisions of the CPLR, the following shall serve as the "usual stipulations" for depositions governed by the 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.

(o) If any party wishes to have a deposition conducted or defended by an attorney who is not admitted to the bar of this State, but who is a member in good standing of the bar of another state, that party shall notify the other parties to the action no later than five (5) days prior to the deposition, of the name of the attorney it wishes to conduct the deposition. The attorney so designated shall be deemed admitted to the bar of this State for purposes of the case in question, unless a party, upon motion made on notice in the case, obtains an order preventing that attorney from conducting said deposition.

V. 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.

VI. Scheduling of Depositions

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

(b) Unless otherwise agreed, all depositions of any expert witness shall be on no less than 30 days written notice; provided, however, that a cross-

notice of deposition served pursuant to paragraph IV(e) of this Order shall be on at least twenty (20) days notice.

VII. Other Matters

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

b. 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.

c. 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.

d. 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.

Dated: New York, New York
November ___, 1999

SO ORDERED,

Helen E. Freedman, J.S.C.