

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. 8
February 4, 1999

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**Uniform Requests for Bill of Particulars for Affirmative Defenses
of Product Defendants**

A. The Uniform Demand

1. Pursuant to Case Management Order 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 develop uniform pleadings and discovery requests to be used in these cases. These committees have developed a Uniform Demand for Verified Bill of Particulars as to Affirmative Defenses of Product Defendants which is annexed hereto as Exhibit A (the "Demand").

2. The Demand, filed as a part of this Order under the index number 700000/98, is applicable to each and every case that is or becomes subject to this Order.

B. Responding to the Uniform Requests

1. Defendants shall serve their responses to the Demand within the time provided for in this Order upon each party in the individual actions to which the responses pertain, providing the particulars demanded, if applicable, and the verification as indicated.

2. Defendants' responses to the Demand shall be served no sooner than thirty

(30) days from the completion of plaintiff's deposition and no later than thirty (30) days after the filing of a Note of Issue.

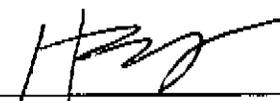
3. Any plaintiff may seek additional discovery from the defendant relating to the Bill of Particulars of Affirmative Defenses upon leave of Court for good cause shown pursuant to Case Management Order ("CMO") No. 5 or CMO No. 7, as applicable.

C. Other Matters

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

Dated: New York, New York
February 4, 1999

SO ORDERED:



Helen E. Freedman, J.S.C.

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

EXHIBIT "A"
CASE MANAGEMENT
ORDER NO. 8

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**PLAINTIFFS' UNIFORM DEMAND FOR A VERIFIED
BILL OF PARTICULARS AS TO AFFIRMATIVE DEFENSES**

Plaintiff's Demand for a Uniform Verified Bill of Particulars as to Affirmative Defenses,
must be completed by each of the Product Defendants governed by Case Management Order No.

8.

1. With respect to any affirmative defense contained in the Answer of the defendant,
which alleges culpable conduct on the part of the plaintiff, set forth the:

- (a). Basis for the assertion of said affirmative defense,
including, without limitation, a statement of each and every
act of negligence, commission, or omission which you will
claim as the basis of the alleged culpable conduct of the
plaintiff herein and,
- (b). The injuries you allege plaintiff suffered as a result of the
alleged culpable conduct by plaintiff.

2. With respect to any affirmative defense alleged in the Answer of defendant, which
alleges assumption of risk, set forth the basis for such affirmative defense including:

- (a). The dangerous condition or conduct that the plaintiff allegedly knew.
- (b). The statutory rule and section, if any, upon which defendant relies in the assertion of said defense.
- (c). The manner in which plaintiff voluntarily exposed himself to the risk or danger.

3. With respect to any affirmative defense contained in the Answer of the defendant, which alleges that this Court lacks in personam jurisdiction over the defendant, set forth the basis for said affirmative defense.

4. With respect to any affirmative defense contained in the Answer of the defendant, which alleges that the damages suffered by plaintiff (and the putative class members) were caused or proximately caused by some person or third party other than the answering defendant or its agents, servants, employees and/or assigns, set forth the basis upon which you allege said affirmative defense, including the identity of the person or third party you allege caused Plaintiff's injury.

5. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that a reasonable purchaser and/or consumer would have been aware of the risks of any diet drug at issue in the case, the basis for your alleging said affirmative defense.

6. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that the damages suffered by Plaintiff resulted from causes unrelated to any conduct of, or product placed in the stream of commerce by the answering defendant, set forth the basis for your assertion of the affirmative defense, including, without limitation to what defendant alleges and set forth:

- (a). The precise statutory rule and section, if any, upon which defendant relies in the assertion of said defense; and
- (b). The cause of Plaintiffs' injuries.

7. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that the damages suffered by Plaintiff were the result of pre-existing conditions which were unrelated to any conduct of, or product placed in the stream of commerce, by the answering defendant, set forth the basis for your affirmative defense, including the nature of the pre-existing condition(s).

8. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that the damages suffered by the Plaintiff were the result of an idiosyncratic reaction which the answering defendant could not reasonably foresee, set forth your basis for said affirmative defense, including the nature of said idiosyncratic reaction.

9. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that the Plaintiffs were not foreseeable users of the product, set forth your basis for said affirmative defense, including who the intended and/or foreseeable users of the product were.

10. With respect to any affirmative defense contained in the Answer of the defendant, which alleges that Plaintiffs' damages were caused, in whole or in part by misuse or unintended use of the product, set forth your basis for said affirmative defense, including:

- (a). The intended use of the product.
- (b). A statement of each and every act of misuse or unintended use which you will claim as the basis of the alleged conduct of the plaintiff herein.

11. With respect to any affirmative defense contained in the Answer of the defendant,

which alleges that Plaintiffs' damages were not caused by any failure to warn on the part of the answering defendants, set forth your basis for said affirmative defense.

12. With respect to any affirmative defense contained in the Answer of the defendant, which alleges that Plaintiffs' causes of action are barred under the learned intermediary doctrine, set forth your basis for said affirmative defense.

13. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs' causes of action are barred in whole or in part because the product ingested by Plaintiffs was prepared properly in accordance with the applicable standard of care, set forth your basis for said affirmative defense, including:

- (a). The applicable standard of care.
- (b). The manner in which said product was prepared in accordance with the applicable standard of care.

14. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs' causes of action are barred in whole or in part by Plaintiffs' failure to assert a safer design for the product complained of herein, set forth your basis for said affirmative defense.

15. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs' causes of action are barred because the benefits of the product complained of herein outweighed its risks, set forth your basis for said affirmative defense, including:

- (a). The risks associated with the product; and
- (b). The benefits associated with the product.

16. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that based on the state of scientific, medical, and technological knowledge at the time the products complained of herein were marketed, that they were reasonably safer for their normal

and foreseeable use or in light of existing reasonably available medical scientific and technical knowledge that the defendants could not know of the propensity for the product herein to be dangerous or cause harm, set forth your basis for said affirmative defense, including:

- (a). The allegedly normal and foreseeable use of the products complained of herein;
- (b). The scientific, medical and technological knowledge pertaining to the products complained of herein that contributed to the determination that the products complained of herein were reasonably safe for said normal and foreseeable use.

17. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that based Plaintiffs' causes of action are barred, in whole or in part, because the answering defendants, complied with all applicable statutes and with the requirements and regulations of the Food and Drug Administration, set forth your basis for said affirmative defense, including:

- (a). The applicable statutes and requirements of the FDA allegedly complied with by the answering defendants.
- (b). The manner in which such statutes and requirements of the Food and Drug Administration were allegedly complied with by the answering defendants.

18. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs' causes of action are barred by the doctrine of Federal Preemption, set forth your basis for said affirmative defense.

19. With respect to any affirmative defense alleged in the Answer of defendant, which

alleges that Plaintiffs' causes of action are barred by Section 402A, comment K of the *Restatement (Second) of Torts* and/or the *Restatement (Third) of Torts* at section 4, et seq., set forth your basis for said affirmative defense, including:

- (a) The manner in which it is alleged the *Restatement (Second) of Torts* and/or the *Restatement (Third) of Torts* bars Plaintiffs' claims.

20. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs' strict liability causes of action cannot be maintained against a prescription drug manufacturer, set forth your basis for said affirmative defense, including:

- (a) If, as part of the answering defendant's affirmative defense, it is asserted that the answering defendant is not a manufacturer, marketer, seller, provider or entity that somehow places a product in the stream of commerce, set forth what type or form of entity answering defendant maintains itself to be.

21. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs' causes of action are barred by the Uniform Commercial Code, set forth your basis for said affirmative defense, including:

- (a) The specific statutes, rules, codes, regulations or ordinances upon which said affirmative defense is based

22. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs did not rely on any express or implied warranty, set forth your basis for said affirmative defense.

23. With respect to any affirmative defense alleged in the Answer of defendant, which

alleges that Plaintiffs did not notify the answering defendants of breach(es) of warranty within a reasonable time bars recovery, set forth your basis for said affirmative defense.

24. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs failed to mitigate damages, set forth your basis for said affirmative defense, including:

- (a). A statement of each and every act or omission which you will claim as the basis of the alleged failure to mitigate damages.

25. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs cannot maintain an action for medical monitoring because it is more likely than not that Plaintiff will not contract any illness from use of the product complained of herein, set forth your basis for said affirmative defense.

26. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that no class action designation is properly available to Plaintiffs, set forth your basis for said affirmative defense.

27. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs causes of action are or may be barred by the doctrine of res judicata and/or collateral estoppel, set forth your basis for said affirmative defense.

28. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs causes of action are barred in whole or in part by applicable statutes of limitation, and/or the doctrines of laches, waiver, and estoppel, set forth your basis for said affirmative defense, including:

- (a). The rules, regulations, statutes, ordinances, or codes which preclude Plaintiffs' claims, either in whole or in part by a

statute of limitation.

29. With respect to any affirmative defense contained in the Answer of the defendant, which reserve the answering defendants' right to assert any defense available under any of the laws of the several states, set forth your basis for said affirmative defense, including:

- (a). The specific law, statute, rule, code, regulation and/or ordinance, upon which said affirmative defense is based.

30. With respect to any affirmative defense contained in the Answer of the defendant, which alleges that Plaintiffs' claims for punitive damages are in contravention of the rights of the answering defendants under the United States Constitution and the Constitution of the State of New York, set forth your basis for said affirmative defense.

31. With respect to any affirmative defense contained in the Answer of the defendant, which alleges that Plaintiffs' claims for punitive damages are barred in that no act or omission of the answering defendants was or were malicious, willful, wanton, reckless, or grossly negligent, set forth the basis for said affirmative defense.

32. With respect to any affirmative defense contained in the Answer of the defendant, which alleges that Plaintiffs' recoveries should be reduced by comparative negligence, fault, responsibility, or causation attributable to each defendant, set forth your basis for said affirmative defense, including:

- (a). A statement of each and every act of negligence, commission, or omission which you will claim as the basis of the alleged culpable conduct of the individual defendants herein.

33. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs' causes of action are barred because the product complained of herein was

consistent with or exceeded consumer expectations, set forth your basis for said affirmative defense, including:

- (a). An explanation of how said product met or exceeded said consumer expectations; and
- (c). Each and every statute, rule, regulation, ordinance, code or official case law citation which precludes a plaintiff's recovery against a manufacturer of a product that meets or exceeds a consumer's expectation.

34. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs impermissibly seek to impose liability on conduct protected from liability by the First Amendment to the United States Constitution, set forth your basis for said affirmative defense, including:

- (a). What conduct of the defendant does answering defendant allege is protected by the First Amendment to the United States Constitution.

35. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that answering defendant reserves its right to amend its answer and assert additional defenses or to supplement, alter or change their answer upon ascertaining more definite facts, set forth your basis for said affirmative defense, including:

- (a). The statute, rule, regulation, ordinance or official common law citation, which permits such reservation of rights by answering defendant.

36. With respect to any affirmative defense alleged in the Answer of defendant, which alleges that Plaintiffs are barred and/or limited by any and all express warranties or disclaiming

upon warranties made at the time of the original sale, set forth your basis for said affirmative defense, including:

- (a). Set forth in what manner any implied or express warranties were disclaimed.

PLEASE TAKE FURTHER NOTICE, that upon your failure to comply with the foregoing demand, plaintiff will move for an Order of Preclusion herein, pursuant to the rules of the Court.

Dated: New York, New York
February , 1999