

1 THE HONORABLE BARBARA J. ROTHSTEIN

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5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9  
10 IN RE: PHENYLPROPANOLAMINE (PPA)  
11 PRODUCTS LIABILITY LITIGATION

MDL No. 1407

12 This document relates to the actions listed on  
13 Attachment A

FINAL MDL PRETRIAL ORDER FOR  
CASES INCLUDING EPHEDRA  
CLAIMS

14  
15 **FINAL MDL PRETRIAL ORDER**

16 This Final MDL Pretrial Order describes the events that have taken place in MDL 1407  
17 and those items that require further action by the transferor court. A copy of this Final MDL  
18 Pretrial Order, along with the case file and materials, will be provided to the transferor court.

19 **I. INTRODUCTION**

20 On August 28, 2001, the Judicial Panel for Multidistrict Litigation ("JPML")  
21 designated this Court as the transferee court for all individual, consumer class and other  
22 federal cases arising out of the sale or use of over-the-counter cough/cold and appetite  
23 suppressant products containing phenylpropanolamine ("PPA") for pre-trial consolidation

24  
25 FINAL MDL PRETRIAL ORDER FOR CASES INCLUDING  
EPHEDRA CLAIMS-1  
(MDL 1407)

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1 and coordination. *In re: Phenylpropanolamine ("PPA") Products Liability Litigation*, MDL  
2 No. 1407.

3 The proceedings in this MDL 1407 began in earnest with the Order re: Initial  
4 Conference dated November 1, 2001, requiring plaintiffs and defendants to submit proposed  
5 committee rosters, and scheduling the initial conference for November 16, 2001. Since then:  
6 (1) generic fact discovery has been completed or substantially completed as to most MDL  
7 defendants (including written discovery, document production and review, discovery  
8 depositions and requests for admissions); (2) a procedure for case-specific fact discovery in  
9 each case has been implemented, and discovery has been underway since 2002; (3) Rule 26  
10 disclosures of generic experts have been made, the discovery depositions of those experts  
11 have been completed, and a process to permit the adoption of those experts' opinions in other  
12 cases transferred or being transferred to this MDL has been adopted; (4) trial preservation  
13 depositions of several of plaintiffs' and defendants' generic experts are underway or have  
14 been taken; (5) and the Court has resolved *Daubert* motions challenging plaintiffs' expert  
15 opinions solely as to general causation.

16 Given the foregoing, the Court is satisfied that the PPA aspects of this MDL have  
17 sufficiently matured and the Court has issued a Suggestion of Remand for the cases listed on  
18 Attachment A to facilitate their remand by the JPML to their transferor courts. All case-  
19 specific PPA fact discovery is complete, and such discovery cannot be reopened without  
20 permission of the transferor court. Although the case-specific PPA fact discovery is  
21 complete, there are Ephedra aspects of the case remaining that make it a candidate for  
22 transfer to the MDL No. 1598 *In re Ephedra Products Liability Litigation* ("Ephedra MDL  
23 No. 1598"). Ephedra MDL No. 1598 was established on April 13, 2004, in the Southern  
24 District of New York before Judge Jed S. Rakoff. Given that Ephedra discovery has not been

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1 conducted in the PPA MDL, the cases listed on Attachment A would benefit from the  
2 coordinated discovery proceedings in the Ephedra MDL No. 1598 that is overseeing  
3 coordinated discovery in cases such as these alleging product injuries as a result of Ephedra  
4 ingestion. The cases listed on Attachment A involve common questions of fact with actions  
5 previously transferred under 28 U.S.C. § 1407 to the Ephedra MDL No. 1598, and  
6 consequently, a tag-a-long notice should be filed with the Clerk of the JPML upon remand.  
7 If transferred to the Ephedra MDL, the cases listed on Attachment A will once again return to  
8 the transferor court when the Ephedra discovery is complete for further case-specific  
9 proceedings, including designation and discovery of case-specific experts, independent  
10 medical examinations, pre-trial motion practice and final disposition. Below is a more  
11 detailed overview of the proceedings in MDL 1407 to date concerning the PPA aspects of the  
12 cases listed on Attachment A.

## 13 **II. ADMINISTRATION OF CASES**

### 14 **A. Lead and Liaison Counsel.**

15 By order entered on November 20, 2001, this Court appointed and assigned certain  
16 responsibilities to Lead and Liaison Counsel for Plaintiffs and Defendants. (Order  
17 Appointing Lead and Liaison Counsel (signed Nov. 19, 2001, entered Nov. 20, 2001). The  
18 responsibilities of each are delineated in Memorandum in Support of Proposed Language  
19 Ordered by the Court in its November 1, 2001, "Order re: Initial Conference" (Nov. 14,  
20 2001) (hereinafter, "Memo Nov. 14, 2001").

### 21 **B. Committees.**

22 The Court approved and appointed members to various committees designed to manage  
23 and advance the litigation, including the Plaintiff's Steering Committee ("PSC"). (Order  
24 Appointing Members to Plaintiffs' and Joint Committees (Jan. 17, 2002) (hereafter "Order

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1 Jan. 17, 2002"). As part of its duties and responsibilities, the PSC assists all plaintiffs in  
2 MDL 1407 by overseeing discovery (including conducting extensive discovery of each  
3 defendant), by communicating with plaintiff lawyers, by appearing before this Court, by  
4 attending status conferences and by preparing motions and responses regarding case-wide  
5 discovery matters. The PSC acts on behalf of or in consultation with Plaintiffs' Lead  
6 Counsel in the management of the litigation. (Order Jan. 17, 2002; Plaintiffs' Lead  
7 Councils' Status Report No. 1 (Nov. 30, 2001)); Memo Nov. 14, 2001).

8 **C. Common Benefit Fund.**

9 In order to provide for costs and attorneys' fees that the PSC (and its appointed  
10 subcommittees) may be entitled to receive for providing case-wide services over the last  
11 several years, the court provided for sequestration of four (4%) percent of all payments made  
12 by defendants in settlements or in satisfaction of judgments of cases transferred to MDL  
13 1407, to be placed in escrow into the common benefit fund (a/k/a MDL 1407 Fee and Cost  
14 Trust Account). Similarly, in those state court cases where plaintiffs have agreed to  
15 coordinate with and use the MDL 1407 work product, the court provided for sequestration of  
16 three (3%) percent of all such payments. (The 4% and 3% payments are referred to  
17 collectively herein as "MDL Assessment"). The MDL Assessments are to be deposited by  
18 defendants into the common benefit fund and the total dollar amounts of these assessments  
19 are confidential. The common benefit fund will provide payment to PSC members and other  
20 common benefit attorneys for the PSC's work product to the extent that the court ultimately  
21 determines that the service was authorized, necessary and beneficial to plaintiffs. The MDL  
22 Assessment requirement applies to all MDL 1407 payments made by defendants to plaintiffs,  
23 regardless of whether a plaintiff's case is disposed of while on the MDL 1407 docket or  
24 following remand to the transferor court.

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1 The Common Benefit fund is governed by Amended CMO 8 (Establishing Plaintiffs'  
2 Litigation Expense Fund to Compensate and Reimburse Attorneys for Services Performed  
3 and Expenses Incurred for Common Benefit), CMO 16 (Establishing MDL 1407 Fee and  
4 Cost Trust Account and Procedures) and CMO 20 (Establishing Common Benefit Fee  
5 Committee, Procedures, and Standards to Determine Compensable Fees and Costs). CMO  
6 16 effectuates CMO 8 and details the procedures for (1) assessing and depositing these funds  
7 into the account; (2) protecting the confidentiality of the information submitted to and from  
8 the Trustee; (3) insuring the accuracy of the information provided; (4) reporting by the  
9 Trustee to Liaison Counsel; and (5) resolving assessment disputes. (CMO 16). CMO 20  
10 establishes the Common Benefit Fee Committee, and sets forth (1) procedures for the review  
11 of common benefit fee and cost applications and subsequent responsibilities, and (2)  
12 standards for the review of common benefit fees and costs. (CMO 20).

13 **D. State/Federal Coordination.**

14 It became evident in the beginning of MDL 1407 that the extensive parallel state and  
15 federal PPA litigation, involving many of the same defendants and the same plaintiffs'  
16 counsel in both state and federal courts, warranted particular emphasis on coordinated  
17 discovery. To this end, the parties in state and federal court have jointly succeeded in  
18 reducing costs and expenses to themselves and the court system by coordinating most generic  
19 discovery proceedings. For example, depositions of defendant representatives and  
20 employees were all cross-noticed and, with few exceptions, witnesses were deposed only  
21 once for purposes of all cases in the country. Such was also the case during expert discovery.  
22 Finally, the parties' presentation of expert testimony under *Daubert* (*see infra* Part III.C.)  
23 was coordinated with many state court judges overseeing state court coordinated  
24

1 proceedings. Overall, serious efforts were made by the parties and this Court to achieve  
2 meaningful coordination, which were met with considerable success.

3 **E. Denial of Class Certification.**

4 The Court denied class certification in eight nationwide and one Louisiana statewide  
5 personal injury actions and in seven economic injury actions. (Order granting Defendants'  
6 Motion to Strike Class Allegations and Deny Class Certification (Jan. 5, 2002); Order  
7 Extending Court's June 5, 2002 Order Denying Class Certification to Additional Cases (Feb.  
8 24, 2003); Order Denying Plaintiffs' Motion for Class Certification Pursuant to Rule  
9 23(B)(3) for Economic Injury Claims (Sept. 4, 2003); (Order Denying Plaintiffs' Renewed  
10 Motion for Class Certification Pursuant to Rule 23(B)(3) for Economic Injury Claims (Feb.  
11 7, 2003); Order Denying Certification of Kentucky Economic Injury Class (Nov. 5, 2003)).

12 **III. DISCOVERY**

13 This MDL has proceeded in a relatively quick and stream-lined fashion, thanks in large  
14 measure to the cooperation of the parties. Shortly after commencing this case in the winter  
15 of 2001, the court began issuing Case Management Orders ("CMOs") to govern most case-  
16 wide issues, as well as case-specific orders. The Court entered 20 CMOs, as well as  
17 supplements to them. Some of the specific CMOs are discussed, *infra*, expanding on their  
18 specific subject matter. All CMOs are accessible at the Court's website,  
19 ([www.wawd.uscourts.gov/wawd/mdl.nsf/main/page](http://www.wawd.uscourts.gov/wawd/mdl.nsf/main/page).) The primary orders that governed the  
20 pretrial management of the discovery in this litigation are CMO Nos. 1, 2, 3, 6, 6A, 10 and  
21 19.

- 22 • CMO 1: established a protocol for generic fact discovery (governing, *inter alia*,  
23 written discovery, document production and depositions of defendants' corporate  
24 representatives and employees);

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- 1 • CMO 2: set forth a confidentiality order;
- 2 • CMO 3: provided a document preservation order; and
- 3 • CMO 6, 6A, 10 & 19: established a protocol for case-specific fact discovery  
4 (governing, *inter alia*, written discovery (including a Fact Sheet and Records  
5 Authorizations, document production and depositions of plaintiffs and case-specific  
6 fact witnesses).

7 **A. Generic Fact Discovery.**

8 1. **Document Discovery.** Extensive fact discovery was conducted against  
9 defendants and was substantially completed against most defendants by mid-2003. In an  
10 effort to attain consistency and to avoid undue duplication, the parties negotiated and agreed  
11 substantially upon master sets of requests for production and interrogatories ("Master Set of  
12 Written Discovery") which are attached to CMO 1. No further general document requests or  
13 interrogatories were allowed to be propounded on defendants without leave of Court. To the  
14 extent that any defendant had previously produced documents and/or made responses to  
15 document requests or interrogatories also contained in the Master Set of Written Discovery  
16 prior to January 21, 2002, those productions and/or responses were deemed responsive to the  
17 same requests contained in the Master Set of Written Discovery. (CMO 1 Parts V.E., V.F.).

18 Discovery was also conducted by the parties from Yale University and the various  
19 hospitals participating in the Hemorrhagic Stroke Project, from the trade association, the  
20 Consumer Healthcare Products Association, and from the U.S. Food and Drug  
21 Administration.

22 The PSC created a document depository located in Minneapolis, Minnesota, where  
23 millions of documents produced by defendants were stored, reviewed and digitized for use in  
24

1 discovery and for purposes of creating "trial packages" for all plaintiffs who were interested  
2 and who agreed to the set-aside percentage.

3       **2. Depositions of Common Fact Witnesses.** The basic principles governing the  
4 taking of depositions of defendants' non case-specific (generic) fact witnesses were set forth  
5 in CMO 1. Cross-notices between state court proceedings and the MDL proceedings were  
6 encouraged. (CMO 1 Part V.G.). In the interest of efficiency and federal-state coordination,  
7 several defendants cross-noticed the depositions of company witnesses, HSP Investigators  
8 and CHPA employees in their respective state court proceedings.

9       **B. Case-Specific Fact Discovery.**

10       The basic principles of governing the taking of fact discovery of plaintiffs were set  
11 forth in CMO 6 (case-specific fact discovery procedure and plan). Under CMO 6, later  
12 modified by CMO 10, cases docketed in the MDL by February 12, 2002, had case-specific  
13 discovery cut-off dates of February 28, 2003. Cases docketed after February 28, 2003,  
14 were to have case-specific discovery completed within 12 months of the docket date.  
15 (CMO 6 Part VI.). As discussed further below, however, due to numerous delays many of  
16 these case-specific discovery cut-off dates were extended.

17       **I. Case-Specific Fact Discovery of Plaintiffs.**

18       **a. Plaintiff Fact Sheets (PFSs).** Under CMO 6, plaintiffs in every case  
19 transferred to MDL 1407 were ordered to complete a plaintiff fact sheet (PFS). (CMO 6  
20 Part II.A.). Plaintiffs were required to complete and serve on defendants' liaison counsel  
21 fact sheets. In the event of a plaintiff's failure to serve a completed PFS, defendants'  
22 liaison counsel was to send a warning letter to that plaintiff. If, within 30 days of a  
23 warning letter, the plaintiff had still failed to serve a completed PFS, defendants were able  
24

1 to seek appropriate relief from the Court if a meet and confer did not otherwise resolve the  
2 issue. (CMO 6 Part III.A.).

3 Under CMO 10, entered seven months after CMO 6, the Court ordered that no case  
4 would be considered for remand if any plaintiff had not completely complied with the  
5 discovery requirements of its prior orders, including the completion of a PFS. (CMO 10 ¶ 1).  
6 Failure to provide complete PFS responses tolled the period for completion of fact discovery,  
7 which would not run until one year after defendants' receipt of a completed PFS and its  
8 accompanying authorizations. (CMO 10 ¶ 3).

9 Finally, CMO 19 provides for the issuance of a Show Cause Order why the Court  
10 should not dismiss a case for failure to prosecute, based on a plaintiff's failure to timely file a  
11 PFS or cure a PFS that is not complete in all respects within fifteen days of notice of  
12 deficiencies.

13 **b. Other Written Discovery.** In addition to the PFS, defendants were  
14 entitled to propound ten (10) interrogatories and ten (10) requests for production (non-  
15 duplicative of any issue raised via PFS) on each plaintiff during the case-specific fact  
16 discovery time period. (CMO 6 Parts III.B.-III.C.). Plaintiffs were to serve responses to  
17 each type of request within 45 days of service of them. Upon remand, the parties may  
18 obtain updated medical records.

19 **c. Depositions.** Defendants were entitled to conduct ten (10) depositions  
20 of fact witnesses ("fact witnesses" include plaintiffs' treating physicians) as part of their  
21 case-specific discovery. (CMO 6 Part III.D.). Defendants were allowed to take additional  
22 depositions upon a showing of good cause. Upon remand, the parties may move the  
23 transferor court to take additional depositions including newly identified fact witnesses  
24 regarding plaintiff's current medical condition for good cause and necessity. In the event

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1 good cause and necessity is shown to update the plaintiff's deposition, shortened time limits  
2 may be imposed, depending on the circumstances.

3       2.     Case-Specific Fact Discovery of Defendants. Plaintiffs were allowed to  
4 propound on defendants no more than ten (10) case-specific interrogatories and ten (10) case-  
5 specific document requests. (CMO 6 Part IV.A.-IV.B.). Plaintiffs were also allowed to  
6 conduct case-specific depositions of witnesses affiliated with defendants. (CMO 6 Part  
7 IV.C.).

8     **B.    Expert Discovery.**

9       1.     Generally. Expert discovery was divided into two main categories: generic  
10 experts (testifying regarding issues of general applicability, including general causation)  
11 and case-specific experts (testifying on behalf of a specific plaintiff). The Court ordered  
12 that only generic expert discovery would be conducted in the MDL, leaving case-specific  
13 expert discovery for completion upon remand. Under the process established by the MDL  
14 Court, experts were disclosed by certain members of the PSC and by defendants.  
15 Individual plaintiffs could then adopt those expert disclosures or disclose their own experts.  
16 If a plaintiff adopted the experts disclosed by certain members of the PSC with respect to  
17 any issues of widespread applicability, that plaintiff may nevertheless later designate  
18 different experts to testify at trial on the same issues provided: (1) the later-designated  
19 experts rely upon the same or substantially the same evidence, opinions and/or theories  
20 relied upon by the PSC expert(s) adopted by that plaintiff; and (2) such opinions, evidence  
21 and/or theories have not been previously determined by the MDL to be scientifically  
22 unreliable or otherwise inadmissible. Similarly, a defendant may later may later designate  
23 expert(s) different from the generic expert(s) disclosed by defendants to testify at trial on  
24 the same issues provided that the later-designated expert(s) rely upon the same or

1 substantially the same evidence, opinions and/or theories relied upon by defendants'  
2 previously disclosed generic expert(s). Expert-specific challenges, such as to the  
3 qualifications or specific causation opinions to the later-designated experts, are preserved.  
4 These issues are addressed more specifically in prior MDL Orders, including without limit  
5 MDL Order entered September 9, 2002.

6 Numerous general causation experts on behalf of both plaintiffs and defendants  
7 testified at their depositions. Discovery as to these experts was to be completed by March  
8 10, 2003, with subsequently transferred cases subject to the provisions of CMO 9 which  
9 provides for the adoption of, or designation of experts on issues of general applicability.  
10 (Order re: Expert Discovery Schedule (Mar. 22, 2002) and CMO 9). Several general  
11 causation experts also testified at the *Daubert* hearing. A copy is attached hereto.

12 2. Daubert. On April 28 - May 1, 2003, the Court conducted hearings  
13 regarding the admissibility of plaintiffs' expert opinions as to general causation pursuant to  
14 Federal Rules of Evidence 702 and 703 and *Daubert v. Merrell Dow Pharms., Inc.* 509  
15 U.S. 579 (1993). The Court entered its findings in its Order Granting in Part and Denying  
16 in Part MDL Defendants' Motion to Preclude Plaintiffs' Expert Opinions as to General  
17 Causation Pursuant to Fed. R. Evid. 702 and 703 and *Daubert*, on June 18, 2003.

18 3. Case-Specific Expert Discovery. Upon remand of the cases back to the  
19 transferor courts, case-specific expert discovery must be conducted. This will include  
20 scheduling of plaintiffs' and defendants' designations of case-specific experts, service of  
21 reports by the case-specific experts, depositions of case-specific experts and motion  
22 practice relating to those experts. Case-specific experts consist of experts rendering  
23 opinions about the medical condition of specific plaintiffs, life-care planners, economists  
24 and other case-specific experts rendering non-medical opinions. This discovery may

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1 include independent medical examinations of plaintiffs. In contrast to the expert discovery  
2 in the MDL relating solely to general causation, case-specific experts will opine among  
3 other things on specific causation with regard to individual plaintiffs as well as damages.

#### 4 **IV. PRODUCT IDENTIFICATION ORDERS**

##### 5 **A. Identification of Defendants and Products Ingested (CMO 13).**

6 There were numerous cases pending in MDL 1407 that assert claims of individuals who  
7 allege to have ingested one or more PPA-containing products. Certain cases and/or plaintiffs  
8 listed numerous manufacturing defendants but failed to state with specificity which products  
9 they allegedly ingested and failed to identify the manufacturers of the products that allegedly  
10 caused their injuries. On May 2, 2003, the Court entered CMO 13 which required each  
11 plaintiff in a multi-defendant case to file and serve (within 30 days of entry of the order) an  
12 affirmation setting forth the PPA product he/she allegedly ingested and the manufacturer of  
13 that product. Defendants could then seek dismissals under CMO 13 for the claims of any  
14 plaintiffs who failed to identify them in the PFS, if any, and in their affirmations. (CMO 13).

15 Because of the potentially burdensome and unnecessary filings of numerous pages and  
16 documents, the parties submitted a proposed CMO 13A to the Court to streamline the  
17 dismissal process and minimize the amount of filings to obtain dismissals. CMO 13A  
18 provided the defendants whose products are not identified in a plaintiff's affirmation a  
19 mechanism for getting dismissed from the claims made by that plaintiff. (CMO 13A).

##### 20 **B. Severance of Multiple-Plaintiff Cases (CMO 15).**

21 There were numerous cases pending in MDL 1407 that joined the unrelated claims of  
22 numerous plaintiffs who allege to have taken a PPA-containing product. The plaintiffs in  
23 these multi-plaintiff cases failed to specify which products they allegedly ingested and  
24 failed to identify the manufacturers of the products that allegedly caused their injuries. On

1 May 29, 2003, the Court entered CMO 15, which required each plaintiff in a multi-  
2 plaintiff<sup>1</sup> case to file and serve an individual new complaint within 30 days of entry of the  
3 order. Under CMO 15, plaintiffs' individual complaints were to provide specific  
4 allegations regarding: (1) the products allegedly ingested; (2) the dates on which the  
5 products were ingested; (3) the injury alleged; and (4) the dates of injury. (CMO 15).

6 CMO 15A served as an adjunct to CMO 15 to give the parties a mechanism to  
7 resolve "non-compliant" served complaints and dismissal of original multi-plaintiff  
8 complaints. CMO 15A allowed defendants to move to dismiss with prejudice the original  
9 case as to those plaintiffs who failed to properly file an individual new complaint and as to  
10 those plaintiffs who filed an individual new complaint which did not identify a product  
11 manufactured by the moving defendant. (CMO 15A).

## 12 V. PROCEDURES FOR REMAND

### 13 A. Discovery to be Conducted Prior to Remand.

14 The Court entered CMO 17C which details the procedures and conditions before a  
15 case will be considered "ripe for remand." (CMO 17C). The Court only considers a case  
16 ripe for remand if the discovery permitted by CMOs Nos. 1, 6, 6A, 10, 13, 13A, and 15  
17 ("and any additional orders" entered by the Court) has been completed. All other generic  
18 fact and expert discovery permitted by the Court is considered time barred. The remand  
19 process is initiated by defendants, on a monthly basis, filing a list of cases they believe  
20 have become ripe for remand during the preceding month. A plaintiff may also submit  
21 cases believed to be ripe. The Court then issues an Order to Show Cause why the cases  
22 listed on the Order should not be suggested for remand, setting dates for responses and  
23

24 <sup>1</sup> "Multi-plaintiff cases" refer to cases that involve more than one plaintiff who alleges that they ingested a product  
containing PPA. This term does not refer to plaintiffs with derivative claims.

1 replies. Once the Magistrate Judge has ruled on the objections to remand, the Court issues  
2 a Suggestion of Remand Order which is forwarded to the Judicial Panel On Multi-District  
3 Litigation. The Suggestion of Remand Order triggers the mediation requirements set forth  
4 in CMO 18C. The Court will subsequently designate this Final MDL Pretrial Order,  
5 along with any supplements and/or amendments thereto, as the Final Pretrial Order in all  
6 cases for which the Panel issues an Order for Remand. (CMO 17C).

7 **B. Remaining Discovery After Remand.**

8 Case-specific expert discovery has been deferred pending remand. The transferor  
9 court has jurisdiction over setting the case-specific expert discovery schedule, any other  
10 case-specific discovery and any other pre-trial matters not addressed by this Court. (*See*  
11 *supra* Part III.C.3.).

12 **C. MDL Mediation Requirement.**

13 Within seven (7) days of a case being named on the Court's Suggestion of Remand  
14 Order (*See supra* Part V.A.), the parties are to notify the Court whether they intend to  
15 mediate the case per CMO 18C in a submission entitled "Election Regarding Alternative  
16 Dispute Resolution." If the parties elect to mediate, the mediation is to be scheduled  
17 within 30 days and completed within 90 days of the date of the Suggestion of Remand  
18 Order. If the parties choose not to mediate, they are required to conduct a meet and confer  
19 conference with Special Master Professor Francis McGovern within 21 days of the Court's  
20 Preliminary Order. (CMO 18C). This Court appointed Professor McGovern as a Special  
21 Master to assist the Court in coordinating case management matters between the MDL  
22 litigation and the matters pending in state courts. (Order Jan. 17, 2002). Nothing in CMO  
23 18C prevents the parties from agreeing to mediate these, or any additional cases or groups  
24 of cases before or after remand.

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1 The parties have agreed upon a number of mediators from the following areas:  
2 California, Texas, Louisiana, Alabama, Mississippi, North Carolina, South Carolina,  
3 Tennessee, Northeast, Midwest and Northwest. Nothing in CMO 18C prevents the parties  
4 from agreeing to a mediator not on that list or agreeing to mediate any additional cases or  
5 groups of cases. (CMO 18C).

6 **VI. SUMMARY OF ACTIVITIES UPON REMAND**

7 The following activities remain to be completed upon remand of the cases from the  
8 Ephedra MDL listed on Attachment A and include but are not limited to:

- 9 • Case-specific expert designation and discovery;
- 10 • Independent medical examinations;
- 11 • Obtain updated medical records and, upon a showing of good cause and necessity,  
12 updating the plaintiff's deposition, and/or deposing additional or newly identified  
13 fact witnesses. In the event good cause and necessity is shown to update the  
14 plaintiff's deposition, shortened time limits may be imposed, depending on the  
15 circumstances;
- 16 • Any pending motions that the parties bring to the attention of the transferor court;
- 17 • Pretrial motion practice, including specific causation motions; and
- 18 • Final disposition.

19 **VII. DOCUMENTS TO BE SENT TO TRANSFEROR COURT**

20 The clerk of the transferee court will forward to the transferor court (electronically  
21 where feasible) a copy of: (1) this Pretrial Order and attachments; (2) the docket sheet for  
22 the particular case being remanded and all documents identified on that docket sheet; and  
23 (3) the docket sheet for MDL 1407. The docket sheet for each particular case being  
24 remanded will be deemed to include and incorporate all matters on the MDL 1407 docket

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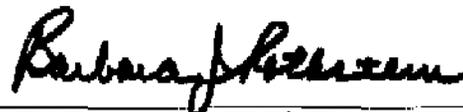
1 sheet that refer or pertain to "all cases" or that otherwise refer or pertain to the particular  
2 case being remanded.

3 In the event a party believes that the docket sheet for a particular case being  
4 remanded is not correct or complete for any reason, a party to that case may, with notice  
5 to all other parties to the action, file with the transferor court a Designation Amending the  
6 Record. Upon receiving that Designation, the transferor court will make any needed  
7 changes to the docket. If the docket is revised to include additional documents, the parties  
8 should provide those documents to the transferor court.

9 **VIII. CONCLUSION**

10 This MDL Pretrial Order does not expand or modify any prior order of the Court.  
11 The Plaintiffs' Steering Committee and defendants have agreed that, upon receipt from the  
12 Judicial Panel of a final remand order for a particular case, this Pretrial Order is to be  
13 provided to the appropriate transferor court without the necessity of a motion by any party  
14 to that case.

15 DATED at Seattle, Washington this 13<sup>th</sup> day of December, 2004.

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18 HON. BARBARA JACOBS ROTHSTEIN  
19 UNITED STATES DISTRICT JUDGE

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24  
25 FINAL MDL PRETRIAL ORDER FOR CASES INCLUDING  
EPHEDRA CLAIMS-16  
(MDL 1407)

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