

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:

REZULIN PRODUCTS LIABILITY  
LITIGATION (MDL No. 1348)

MASTER FILE  
00 Civ. 2843 (LAK)

This Document Relates to: All Cases

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**PRETRIAL ORDER NO. 12**  
(Corrected)  
(Deposition Protocols and Administrative Matters)

LEWIS A. KAPLAN, *District Judge.*

Pursuant to paragraph 2.3.3. of Pretrial Order No. 2 and agreement of Plaintiffs' Executive Committee ("PEC") and defendants, it is hereby

ORDERED, as follows:

1 **Deposition Protocols.** The following protocols are to be followed in all depositions taken with respect to these MDL proceedings:

1.1 **Deposition Notices.** All depositions in MDL-1348 will be noticed pursuant to Fed. R. Civ. P. 30, and the specific provisions of this Order. Pursuant to Pretrial Order No. 2 at paragraph 2.3.4, all depositions may be cross-noticed in any Rezulin action, including any Rezulin action or coordinated proceeding pending in a state court.

1.1.1 **Notice of Deposition Procedures.** A copy of this Order shall be attached to each notice of deposition and/or any non-party subpoena issued or served in these MDL proceedings.

1.1.2 **Contents of Notice.** In addition to the information required by Fed. R. Civ.

P. 30(b), each deposition notice shall include the name and, if known, the general occupational description of each deponent, a general description of the topic(s) for examination, the name of the primary examiner designated by PEC, defendants or other party noticing the deposition, and the date, time and place of the deposition. If the examiner cannot be identified at the time the notice of deposition is served, a “1-800” number will be set forth in the notice so that interested counsel may obtain information regarding the deposition. If the deposition is to be videotaped, the notice shall state the name, firm and address of the videotape recorders.

- 1.1.3 **Attendance by Other Counsel.** Counsel should exercise self-restraint by not attending depositions that fairly can be conducted by others having a similar interest. Unnecessary attendance by counsel is discouraged. In order for counsel to make arrangements for adequate deposition space, counsel who intend to attend a deposition shall provide notice of their intention to attend to Charles Mathis, Jr., Chairman of the PEC, 100 Peachtree Street, Suite 1400, Atlanta, Georgia 30303, telephone (404) 523-5000, fax (404) 827-9894 and to Glenn Pogust, Kaye, Scholer, Fierman, Hays & Handler, L.L.P., 425 Park Avenue, New York, New York, 10022, for MDL deposition scheduling only by telephone at (212) 836-7251, by fax at (212) 836-6450 or by e-mail at “MDLDepositionScheduling@Kayescholer.com.”

- 1.2 **Designated Examiners.** One or two attorneys are to be designated by the PEC and

defendants to conduct the principal examinations of each deponent. While other counsel may seek answers to additional questions pursuant to the procedure outlined herein, these should be limited to matters not already covered, and it is preferable that these additional questions be asked by the designated counsel. Periodic recesses will be permitted during a deposition for designated counsel to consult with their colleagues about additional lines of examination, but such recesses should not be used to “coach” the deponent.

1.2.1 **Conference with Other Counsel.** The attorney(s) designated to conduct the principal examination by the PEC shall confer with other counsel for plaintiffs reasonably in advance of the date of the deposition to discuss potential additional examination sought by other counsel on non-redundant matters. In addition, any counsel in any related federal or state action and/or state court coordinated proceeding may suggest matters for inquiry in any deposition noticed in MDL-1348, by providing to the PEC designated counsel a written list and brief explanation of such matter or matters.

1.2.2 **Examination by Other Counsel.** Any party or parties to actions or coordinated proceedings that are not a part of MDL-1348, who believes that, due to a divergence of interest, it may be necessary to examine a deponent on non-redundant matters shall select one attorney to conduct such non-redundant examination pursuant to the procedures set forth in paragraph 1.7 of this Order after the PEC designated counsel has concluded the principal examination. The non-redundant requirement will be strictly construed.

1.2.3 **Expert Depositions.** The Court will consider proposed modifications to this paragraph 1.2 with respect to depositions of experts at the time that the PEC provides expert disclosure pursuant to paragraph 4.1 of Pretrial Order No. 2 (Pretrial Schedule).

1.3 **Attendance.**

1.3.1 **Who May Be Present.** Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended only by the parties, the deponent, the deponent's counsel, counsel designated under paragraph 1.2 of this Order, counsel of record in MDL-1348 or related federal or state cases and members and employees of their firms, in-house counsel for the parties, court reporters, videographers and any person who is assisting in the litigation and whose presence is reasonably required by counsel. Upon application, and for good cause shown, the Court may permit attendance by a person who does not fall within any of the categories set forth in the previous sentence. While a deponent is being examined about any document that the parties have agreed, or the Court has ordered, is confidential or if there is confidential information contained therein, attendance by persons to whom disclosure is not authorized under Pretrial Order No. 3 (Confidentiality Order) shall be prohibited unless there is an express agreement otherwise, on the record, by the party that produced the subject document. Any portion of the deposition transcript containing confidential information shall be sealed, so as not to waive confidentiality when the transcript, disk, and/or videotape is placed in

the Document Depository.

- 1.4 **Cooperation.** Counsel are expected to cooperate with, and be courteous to, each other and to deponents. There shall be no smoking or use of other tobacco products or eating in any room in which a deposition is being conducted, including before, during or after a deposition, or in the deposition room during deposition recesses. Beverages will be permitted. Counsel shall recess from time to time during the deposition to allow opportunities for snacks, as reasonably requested by any of the designated principal examining attorneys, the deponent or deponent's counsel.
- 1.5 **Scheduling.** Counsel shall consult in advance with opposing counsel and proposed deponents and attempt to schedule depositions at mutually convenient times and places in the locations set forth in paragraph 1.6 below.
- 1.5.1 The depositions of defendant's present and former employees and agents, and others under defendants' control, and non-parties ("Generic Fact Depositions") shall be scheduled and conducted pursuant to the terms of this Order.
- 1.5.2 It is expected that Generic Fact Depositions will be conducted on two simultaneous tracks. It is expected that also case-specific depositions will proceed on additional multiple tracks. The parties, however, shall use their best efforts to ensure that depositions involving fact witnesses in a single case are scheduled on a single track, and to ensure that the scheduling of case-specific discovery does not impose an undue burden on any law firm.

- 1.5.3 Generic Fact Depositions will be held for four consecutive weeks, with the fifth week being an “off” week on both tracks.
- 1.5.4 A comprehensive schedule of Generic Fact Depositions shall be prepared for each consecutive two-week period and the deposition schedule for each two-week period shall be completed and circulated at least twenty-one (21) days prior to the first deposition day of that two-week period.
- 1.5.5 In no circumstances may the depositions of more than two (2) Generic Fact Depositions be scheduled on the same day absent the express written agreement of the PEC, defendants and if applicable, other interested parties.
- 1.5.6 Formal notices of deposition shall not be required for the purposes of establishing agreement on the deposition schedule. If there is disagreement as to a proposed deposition schedule, a conference call shall be scheduled with the Court and the Court will resolve any deposition scheduling issues the parties are unable to resolve.
- 1.5.7 All depositions, except those held pursuant to Court order, must be noticed pursuant to Fed. R. Civ. P. 30 at least twenty-one (21) calendar days prior to the scheduled deposition date unless there is express written agreement among all affected parties to proceed without formal notice or to shorten said twenty-one-day time period.
- 1.5.8 Pursuant to paragraph 2.3.4 of Pretrial Order No. 2 (Pretrial Schedule), Plaintiffs’ Liaison Counsel shall give at least two weeks’ notice of each scheduled Generic Fact Deposition, or of any deposition that is otherwise

expected to deal with material common to other Rezulin cases, to counsel of record in and judges presiding over Rezulin cases and coordinated proceedings pending in state courts.

- 1.5.9 Except with respect to former officers of defendants, nothing in this Order shall prohibit any party from subpoenaing a non-party witness for a Generic Fact Deposition. Regardless of the date specified on any such subpoena, however, that deposition will only proceed on a date agreed to and scheduled pursuant to this Order, upon a date agreed to by the parties and the deponent, or upon the separate Order of this Court. No former officer of any Defendant shall be subpoenaed for a deposition in these MDL proceedings unless a written request has been made to the defendants that that former officer be produced voluntarily and the defendants have responded that the former officer will not appear voluntarily pursuant to that request.
- 1.5.10 Given the large number of attorneys involved in this litigation, the unavailability of counsel shall not be grounds for postponing a deposition if another attorney from the same firm who is familiar with the case or an attorney who represents a party with similar interests is available to attend. Any motion to permit rescheduling of a deposition due to the unavailability of counsel, must include a certification by the moving party that neither an attorney from the same firm who is familiar with the case nor an attorney who represents a party with similar interests is available to attend the scheduled deposition.

1.5.11 Depositions shall commence at 9:30 AM and end no later than 5:30 PM, local time. There may be a one hour and fifteen minute (1¼ hour) lunch break, one short break during the morning session, and two short breaks during the afternoon session. Modest variations in this schedule may be made by agreement of counsel who noticed the deposition and counsel for the witness, but may not be otherwise changed without the approval of the Court.

1.5.12 After the first month of Generic Fact Depositions conducted pursuant to this Order, the parties may apply to the Court for a modification of the terms of this Order, including a modification of paragraph 1.5.5 limiting the scheduling of Generic Fact Depositions to two simultaneous tracks. Any such application shall identify the additional witnesses the applicant seeks to depose before the conclusion of fact deposition discovery as specified in paragraph 2.3 of Pretrial Order No. 2 (Pretrial Schedule) and, for each such witness, specify the need for that deposition with sufficient particularity to enable the Court to rule. Within ten (10) days of any such application, the other parties shall submit any objections to the application and advise the Court of the extent to which they consent to the application.

## 1.6 **Locations for Depositions.**

1.6.1 **Plaintiffs.** Unless otherwise agreed, any deposition of a plaintiff shall take place within the federal district in which that plaintiff resides.

- 1.6.2 **Experts.** Unless otherwise agreed, any deposition of an expert witness shall take place within the federal district in which that expert witness resides.
- 1.6.3 **Defendants.** Unless otherwise agreed, depositions of defendants and defendant's current employees and officers will take place in either New York, NY or Ann Arbor, MI, at locations to be designated by the PEC. Defense counsel will make reasonable efforts to obtain the agreement of former employees of defendants to appear at either of the two designated locations. Absent such agreement, that deposition will take place either within the federal district in which the former employee resides or at a location mutually agreeable to the former employee and the parties.
- 1.6.4 **Consistent Location.** The location of a deposition or depositions taken in sequence shall be as consistent as possible within a particular city, so that videotape equipment, if being used, made be left in place.
- 1.6.5 **Postponements.** Once a deposition has been scheduled, it shall not be taken off calendar, postponed, rescheduled, or relocated less than five (5) calendar days in advance of the date it is scheduled to occur, except upon agreement or by leave of Court for good cause.

## 1.7 **Conduct.**

- 1.7.1 **General Method of Examination.** When taking depositions for potential use in a number of cases, the designated counsel shall: (A) conduct full examination (direct, cross and redirect) on the matters of general interest

before proceeding into any additional interrogation that is plaintiff-specific; (B) avoid identifying statements such as “I’m Mary Smith and I’m representing Jane Doe” that could be confusing when the deposition is used in other cases; and (C) avoid repetitious examination merely to make it specific to particular cases. For example, if Dr. Don Jones testifies that he didn’t tell any of his patients that there was a risk X might happen, do not ask him whether he told each individual plaintiff there was a risk X might happen to them.

**1.7.1.1 Consultation with the Witness.** The deponent may consult with counsel during a deposition, but not while a question is pending. If a question is pending, the deponent must answer the question before consulting with counsel. Nothing in this paragraph is intended to prohibit questions pursuant to paragraph 1.8.4 of this Order concerning the assertion of a privilege with respect to a deponent’s consultation with counsel.

**1.7.2 Sequence of Examination: Depositions Noticed by Plaintiffs.**

Questioning at the depositions noticed by Plaintiffs will be conducted in the following sequence: 1.) the designated counsel selected by the PEC; 2.) the designated counsel selected by defendants; 3.) the designated counsel selected by the PEC, on matters not previously covered and suggested by other counsel in attendance or submitted by other counsel under paragraph 1.2.1; 4.) the designated counsel selected by defendants; 5.) any other attorney on

non-redundant matters pursuant to paragraph 1.2.2; 6.) any redirect and recross by 1-5.

1.7.3 **Sequence of Examination: Depositions of Witnesses Noticed by Defendants.** Questioning at the depositions noticed by defendants will be conducted in the following sequence: 1.) the designated counsel selected by Defendants; 2.) the designated counsel selected by the PEC; 3.) the designated counsel selected by the PEC, on matters not previously covered that are suggested by other counsel in attendance or submitted by other counsel pursuant to paragraph 1.2.1; 4.) the designated counsel selected by defendants; 5.) any other attorney on non-redundant matters pursuant to paragraph 1.2.2; 6.) any redirect and recross by 1-5.

1.8 **Objections.** Even in depositions taken for potential use at trial, it is rarely necessary to state objections to questions during the deposition. Most objections can--and should--be made for the first time at trial when a deposition is offered. Any objections that are made during the deposition must be stated concisely and in a non-argumentative and non-suggestive manner, such as would be appropriate if the examination were conducted before a judicial officer. A party may instruct a deponent not to answer a question only when necessary to preserve a privilege, to enforce a limitation on evidence imposed by the Court, or to present a motion under Fed. R. Civ. P. 30(d).

1.8.1 **Speaking Objections.** No speaking objections shall be allowed. All objections as to relevance and admissibility shall be preserved until later

ruling of the Court or time of trial. Objections as to the form of the question shall be made by any one opposing counsel, who shall simply state, “Objection.” The objecting counsel shall not speak any additional words concerning the basis of the objection unless the examining counsel requests a clarification. Any clarification as to the basis of the objection shall be stated as succinctly as possible, e.g., “Argumentative,” or “Ambiguous.”

- 1.8.2 **Objections to answers.** Objections to the responsiveness of the answer shall be made by the examining counsel, or by counsel for parties other than the deponent, who shall simply state, “Objection.” The objecting counsel shall not speak any additional words concerning the basis of the objection, unless deponent’s counsel requests a clarification.
- 1.8.3 **Objections Preserved for All Counsel.** Once counsel representing any party states, “Objection” following a question, then all parties have preserved all possible objections to the form of the question. Counsel for other parties need not repeat their objections to preserve them for the record. Similarly, if examining counsel or counsel for any party other than the deponent states, “Objection” following an answer, then all parties have preserved all possible objections to the responsiveness of the answer. Thus, counsel are instructed not make additional, unnecessary objections on the record if another counsel has already stated an objection.
- 1.8.4 **Directions Not to Answer.** Directions to the deponent not to answer a question are improper except on the ground of privilege, on the ground that

the Court has ordered that such information is not subject to discovery, or to enable a party or deponent to present a motion to the Court for termination of the deposition on the ground that it is being conducted in bad faith, or in such a manner as to unreasonably annoy, embarrass, or oppress the moving party or deponent. Instructions not to answer a question given to a witness by counsel shall be kept to a bare minimum. Counsel providing such instruction may be assessed the entire cost of any resulting second deposition, including attorneys' fees and expenses for all other counsel, if the instruction is found by the Court to be unreasonable. All grounds for an instruction not to answer a question must be stated at the time the instruction is given, or be waived. When a privilege is claimed, the deponent must answer questions relevant to the existence, extent and/or waiver of the privilege, including questions addressing the date of privileged communication, who made the privileged communication, and the identity of other persons to whom the contents of the statement have been disclosed.

- 1.8.5 **Suspension of Depositions.** If a deposition is suspended on the ground that it is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress a party or deponent, the person who suspended the deposition shall file and serve a motion for a protective order under Fed. R. Civ. P. 26(c) within ten (10) days of suspension of the deposition. If no motion for a protective order is filed within ten (10) days of the suspension of the deposition, a motion to compel and for sanctions under Fed. R. Civ. P.

37 may be filed and served. Prior to the suspension of any deposition the procedures regarding disputes during depositions, set forth in paragraph 1.13 of this Order must be followed.

1.8.6 **Objections to Documents.** All objections to the relevance of documents are not waived, and are reserved for later ruling by the Court or by the trial judge. All parties shall cooperate as necessary so that the Court may issue a ruling on any objection to a document prior to trial or prior to any remand of cases for trial.

1.9 **Documents.** Deponents requested to produce documents as well as testify shall be noticed and served with the subpoena and/or deposition notice and document request at least twenty-one (21) days prior to the scheduled deposition. Documents responsive to the document request that are identical to those already produced in the Document Depository shall not be separately produced by the deponent.

1.9.1 **Copies of Documents.** Extra copies of documents about which counsel expect to examine the deponent should ordinarily be provided to the deponent and to primary counsel for the deponent by designated counsel for the examination during the course of the deposition. Deponents and their counsel should be shown a copy of the document at the deposition before being examined about it, except when counsel seek to impeach or test the deponent's recollection. However, when counsel seek to impeach or test the deponent's recollection the deponent need not be shown the document.

1.9.2 **Marking of Deposition Exhibits.** All documents previously produced to

the Document Depository and used as exhibits in depositions shall be referred to by the number used for indexing in the Document Depository. Documents that have not been submitted to the Document Depository shall have sequential exhibit numbers. The first time such a document is introduced as an exhibit at a deposition, it shall be marked with the deponent's surname and a number. For example, if the deponent's name is "John Smith" the first document used as an exhibit without a Document Depository number shall be marked as "Smith No. 1." To the extent that a document not previously submitted to the Document Depository already has been marked as a deposition exhibit in MDL-1348, counsel should avoid marking that document with a different exhibit number at a subsequent deposition. If "Smith No. 1" is used again at the deposition of "Harry Jones," it will still be referred to as "Smith No. 1."

- 1.10 **Depositions of Witnesses Who Have No Knowledge of the Facts.** An officer, director, or managing agent of a corporation or government official whose deposition is requested or noticed and/or who is served with a notice of deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party within ten (10) days before the date noticed an affidavit so stating and identifying a person within the corporation or government entity believed to have such knowledge. Notwithstanding such affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order or other appropriate relief.

1.11 **Videotaped Depositions.** Generic Fact Depositions and depositions of expert witnesses designated by either party pursuant to paragraph 4 of Pretrial Order No. 2 (Pretrial Schedule) shall be both videotaped and recorded stenographically. In all other depositions the noticing party may request videotaping, however, it is not required. In addition to the other provisions of this Order, any videotaped deposition must comply with the following terms and conditions:

1.11.1 **Stenographic Recording.** In addition to the videotape recording, a certified court reporter shall stenographically record all deposition proceedings and testimony. The court reporter shall administer the oath or affirmation to the deponent on camera. The stenographic transcript shall constitute the official record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to the witness) and 30(f) (filing, exhibits). The noticing party shall be responsible for providing computer disks in text readable form and a hard copy in Min-U-Script format, as well as the videotapes, to the Document Depository.

1.11.2 **Cost of Deposition.** The noticing party shall bear the expense of both videotaping and stenographic recording. Requests for taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

1.11.3 **Videotape Operator.** The video recording shall be made by an experienced video camera operator. The operator shall be subject to the provisions of Fed. R. Civ. P. 28(c).

- 1.11.4 **Identification of Attendees.** Before commencement of the deposition, the deponent, each attorney, and any other person attending the deposition shall submit to the court reporter in writing his or her name, the name of his or her firm or employer, his or her business address, and the name of the client he or she represents (as appropriate). A list of this information shall be included at the beginning of the deposition transcript. In addition, at the commencement of the deposition, each witness, attorney, and any other person attending the deposition shall be identified on camera.
- 1.11.5 **Interruptions.** No attorney or party shall instruct the video camera operator as to the method of operating the equipment. Videotaping will be suspended during the deposition only upon stipulation of counsel. Nevertheless, discussions conducted “off the record” shall not be videotaped. The video camera operator shall note on camera the time of suspension and any subsequent reconvening of the deposition.
- 1.11.6 **Standards.** Depositions will be conducted in a manner designed to replicate, to the extent feasible, the appearance of a presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the

natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent.

1.11.7 **Index.** The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which any interruption of continuous tape recording occurs, whether for recesses, “off the record” discussions, mechanical failures, or otherwise.

1.11.8 **Filing.** After the completion of the deposition, the video camera operator shall certify, on camera, as to the correctness, completeness and accuracy of the videotape recording in the same manner as a stenographic court reporter. The video camera operator shall also file a true copy of the videotape and index with Liaison Counsel for whomever noticed the deposition and simultaneously submit a copy to the Document Depository.

1.11.9 **Objections.** In addition to the provisions of paragraph 1.8 of this Order concerning objections, if any objection involves matters particular to videotaping, then a copy of the videotape and equipment for viewing the tape shall be provided to the Court.

1.11.10 **Technical data.** Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be indicated on

each copy of the videotape.

1.11.11 **Multiple Camera System.** During the videotaping of a deposition, the examiner may use a two or three video camera system with monitors available for use by counsel.

1.11.12 **Editing of Videotaped Depositions.** Any party editing a videotape deposition for use at trial will be permitted to use split screen technology to show portions of any exhibit used at the deposition that has also been admitted for use at trial, whereby the image of the exhibit appears on the same screen as the image of the deponent, while the deponent is discussing the exhibit. Counsel representing the deponent (and counsel representing the party being deposed, if different from counsel for the deponent) will have an opportunity prior to trial to review and object to matters relating to the editing, use of split screen technology and other issues relating the editing and/or replay of a videotaped deposition.

1.11.13 **Transcript Copies.** Any party may, at its own expense, obtain a copy of the videotape and the stenographic transcript of any deposition by contacting Liaison Counsel for the party who noticed the deposition.

1.12 **Supplemental Depositions.** Any party not present at a deposition may obtain, as provided in paragraph 1.11.13 of this Order, a copy of the transcript or videotape of that deposition from Liaison Counsel for the party who noticed the deposition.

Within ninety (90) days after a deposition transcript is placed in the Document Depository, any party not present at that deposition may, upon a good faith determination that further examination of the deponent is necessary, notify the other parties and move in this Court for an order allowing resumption of the deposition of that deponent. In addition, any party in an action transferred subsequent to the date of a deposition may obtain within sixty (60) days of the transfer order a copy of the transcript of any deposition, as provided in paragraph 1.11.13 of this Order, and within sixty (60) business days after receiving that transcript and upon a good faith determination that further inquiry of the deponent is necessary, notify the other parties and move in this Court for an order allowing resumption of the deposition of that deponent.

**1.12.1 Motion to Resume Deposition.** Any motion made under this paragraph 1.12 shall identify areas where the moving party believes further examination is necessary, state how the previous deposition failed to adequately develop or address these areas, and indicate why the proposed further examination would be relevant. Within ten (10) days of the filing of any such motion, any party may file an opposition to the motion and seek a protective order prohibiting the supplemental deposition on the grounds that the previous deposition fully covered the area(s) identified in the motion or that the additional examination sought would not be relevant.

**1.12.2 Supplemental Depositions by Parties Receiving Notice.** No supplemental deposition by any party having received notice of the original deposition will

be permitted, except upon order of this Court for good cause shown. A showing by any such party that a supplemental deposition is reasonably calculated to lead to the discovery of admissible evidence necessary to protect the interests of that party shall constitute good cause.

1.12.3 **Timing and Procedure for Supplemental Depositions.** If the Court grants any party's motion for a supplemental deposition, that deposition may be taken within such time as may be authorized by the Court. Any supplemental deposition shall be treated as the resumption of the deposition originally noticed. During a supplemental deposition, any party may conduct further examination of the deponent, however, such examination shall be limited to the subject areas authorized by the order allowing the supplemental deposition. The supplemental deposition shall be taken at the same location as the initial deposition unless otherwise agreed by the parties and the deponent.

1.13 **Disputes During Depositions.** Counsel should attempt to resolve disputes arising during depositions without need for court intervention. In the first instance, the parties are directed to negotiate disputes in good faith. Disputes that cannot be resolved by negotiation and that, if not immediately resolved, will significantly disrupt the discovery schedule or require either a rescheduling of the deposition or a supplemental deposition may be presented by telephone to the undersigned. Any party seeking a ruling from the Court shall arrange through chambers a telephone conference with the Court at its earliest convenience and shall provide facilities so

that counsel attending the deposition and the deposition reporter can hear the proceedings, which shall be transcribed immediately and bound separately. During these proceedings, counsel will have the opportunity to argue to the Court and the Court will, whenever possible, resolve the dispute during the conference call proceedings. Alternatively, the parties may present the dispute to the Court in writing. Each side must submit on one (1) page a summary of its position and any authority relevant to the dispute. The Court will issue a prompt ruling, as its schedule permits.

1.13.1 **Continuation of Disputed Deposition.** In the event the Court is unavailable to resolve immediately disputes arising during the course of a deposition, the deposition shall continue to be taken as to matter not in dispute. None of the above provisions shall deny counsel the right to continue a disputed deposition, file an appropriate motion with the Court at the conclusion of the deposition and appear before the Court, if counsel deems it necessary.

1.13.2 **Extraterritorial Jurisdiction.** It is expected that, in depositions involving non-party deponents, this Court, rather than the district court in which the deposition is being conducted, will exercise the powers conferred by 28 U.S.C. § 1407(b) and deal with disputes.

1.14 **Correction and Signing Depositions.** The transcript of a deposition shall be submitted to the deponent for correction and signature within thirty (30) days after the end of the deposition, unless the Court allows a supplemental deposition pursuant

to paragraph 1.12 of this Order. If a supplemental deposition is allowed, the transcript shall be submitted to the deponent as soon as it is available for distribution. The deposition may be signed by the deponent before any notary within thirty (30) days after the transcript is submitted to the deponent. If no corrections are made during this time, the transcript will be presumed accurate.

**1.15 Use at Trial.**

1.15.1 A deposition taken pursuant to this plan (including, when filed in the document depository, depositions previously taken in these cases and depositions previously or subsequently taken in any other Rezulin litigation in federal or state courts) may be used at trial, under the conditions prescribed in Fed. R. Civ. P. 32(a)(1)-(4) or as otherwise permitted by the Federal Rules of Evidence, against any person or entity that: (1) at the time the deposition is taken is a party in any case then transferred or assigned to this Court as an MDL-1348 case; or (2) after the deposition is taken becomes a party in any case transferred or assigned to this Court as an MDL-1348 case, unless within 45 days after first becoming a party it files with this court a written request showing just cause why one or more specifically identified depositions should not be used in the case(s) in which it is a party. If such a request is filed, other parties wanting to use the deposition(s) in the case may thereafter notice the deponent for a supplemental deposition, including one by telephone or on written questions under Fed. R. Civ. P. 31. In such depositions, the deponent first must be asked whether he or she reaffirms the

testimony previously given. If the answer is “yes,” further examination of the deponent should be limited to issues and items not covered in the original deposition.

1.15.2 Upon their consent, the parties to this litigation are hereby enjoined from raising, with respect to any deposition usable against them in federal court actions, any objection in any state court action involving Rezulin to the use of the deposition based upon the fact that the deposition was not taken in the state court action. Any request for relief from this injunction must be filed with the court within 30 days from the date that the deposition is filed in the Document Depository or from the date it first becomes a party in this litigation.

1.15.3 These provisions do not preclude objections to use of a deposition premised upon the availability of the deponent to be called in person, nor do they preclude objections to the admissibility of particular items of testimony in a deposition on any applicable evidentiary grounds.

1.15.4 The discovery effect and use at trial in any state court proceeding of any discovery obtained under these Deposition Protocols is reserved to each individual state court .

1.16 **Effect of Guidelines on non-Warner-Lambert Defendants.** Notwithstanding the appearance or involvement in MDL-1348 of any non-Warner-Lambert Defendants, these Deposition Protocols are not intended to require the appearance or involvement of any non-Warner-Lambert Defendants not already named as a defendant in an

MDL-1348 case, and no waiver of any rights is intended if no such appearance or involvement occurs.

2 **Administrative Matters**

- 2.1 **Committees and Privileges Preserved.** The parties to this litigation, formally or informally, may create committees or other cooperative arrangements as they see fit. The parties have agreed that (a) communication among plaintiffs' counsel or among defendants' counsel shall not be deemed a waiver of the protections afforded by the attorney-client privilege, the attorney work product doctrine, or any other privilege to which a party may be entitled, and (b) cooperative efforts shall not be used in any way against any party, or be cited as purported evidence of conspiracy, wrongful action or wrongful conduct.

SO ORDERED.

Dated: March 2, 2001

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Lewis A. Kaplan  
United States District Judge