

Nos. 02-4378, -4502, -4614, -4615, -4617, 03-1007, -3740

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**IN RE DIET DRUGS (Phentermine/Fenfluramine/Dexfenfluramine
Products Liability Litigation)
(Concerning 100% Audit of Fund B Claims)**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Sheila Brown v. American Home Prods. Corp.

Civil Action No. 99-20593

MDL Docket No. 1203

Hon. Harvey Bartle, III

PTO 2640, 2662

**APPELLANTS' MOTION TO SUPPLEMENT RECORD AND
FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX**

The Court has notified the parties that this consolidated set of appeals is currently under consideration for listing on the merits during May 2004 in Philadelphia. Appellants respectfully move this Court to supplement the record in the appeals and for leave to file a supplemental appendix¹, so that this Court may consider recently available materials that are integral to issues before the Court and

¹ Copies of the proposed supplemental appendix are being filed with this motion and served on the parties' counsel.

which have also been provided to the District Court from which the orders appealed arise.

This set of appeals involves, *inter alia*, Pretrial Orders No. 2640 and 2662 in the “diet drug” products liability litigation (MDL-1203), the settlement of which continues to be pending before the District Court in the Eastern District of Pennsylvania. The appeals present the question of whether the District Court committed a clear error of judgment in finding “good cause” to order a seven-fold increase in audits of matrix claims. In so doing, the District Court harmed class members with legitimate claims by denying them the benefit of the bargain on which they relied in deciding whether to opt out.

The National Class Action Settlement Agreement with American Home Products, Inc. (“Settlement Agreement”) was presented as a way to ensure prompt payment of matrix claims based on the verified diagnosis of individual cardiologists. The 100% audit rule imposed in PTO 2640, and subsequently expanded to include the entire class by PTO 2662 has changed the settlement completely, by bringing the claims payment process to a standstill and by causing the denial of claims with reasonable medical bases simply because echocardiogram interpretations vary from doctor to doctor.

The instant motion is brought to permit this Court to consider a letter recently sent to the District Court in response to an issue raised in PTO 2640 (03-

4378). In PTO 2640, referring to the payments made by appellants' counsel Hariton & D'Angelo, LLP, to Dr. Richard Mueller for performing and attesting to class members' echocardiograms, the District Court stated that:

This highly questionable practice by Mario D'Angelo and the Hariton firm seems to violate a lawyer's ethical obligation not to compensate a witness on a contingent fee basis. See New York DR 7-109(c) and PA Rule of Professional Conduct 3.4(b). [footnote omitted here]. We will refer the matter by separate order to the New York Disciplinary authorities for further review and consideration.

See Memorandum to Pretrial Order 2640, at pp. 27-28.

Following the entry of PTO 2640, the District Court entered PTO 2641 (not appealed here) directing that:

- (1) the AHP Settlement Trust shall promptly forward on behalf of the court to the appropriate disciplinary authorities in the State of New York a copy of the Memorandum and Pretrial Order no. 2640, together with the relevant portions of the record, including exhibits which pertain to the compensation arrangement entered into by the New York law firm of Hariton & D'Angelo, LLP with Richard L. Mueller, M.D.; and
- (2) the firm of Hariton & D'Angelo, LLP shall promptly advise this court of any orders or decisions of said disciplinary authorities or any court with respect thereto.

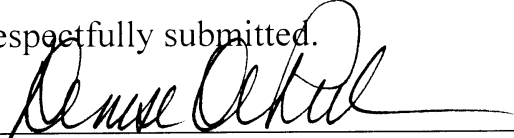
On March 19, 2004, Mr. D'Angelo wrote to the District Court as directed in part (2) of Pretrial Order 2641, advising that the Grievance Committee for the Tenth Judicial District of the State of New York "has informed by that they have concluded that there was no breach of the Code of Professional Responsibility and the complaint has been dismissed." It is that letter to Judge Bartle that is here submitted for inclusion in the Supplemental Appendix on Appeal from PTO 2640 and PTO 2662 (the actual correspondence from the Disciplinary Committee, upon information and belief, is confidential and privileged.)

Because the District Court's referral of Hariton & D'Angelo, LLP to the Disciplinary Committee of the New York State Supreme Court, 10th Judicial District, and the alleged misconduct the District Court sought to have investigated was a significant issue in PTO 2640, and further, because appeals from MDL 1203 all draw upon a common record in the District Court dating back to 1999 and because the record in the District Court continues to develop, Appellants submit that this Court will find this additional exhibit useful in adjudicating the instant set of appeals.

Appellants have supplied class counsel and counsel for Wyeth with copies of the within additional exhibit. We do not anticipate opposition of this addition to the record, but in any case, believe that this Court will agree it is essential to answer a specific question raised on appeal.

Dated: Great River, New York
March 22, 2004

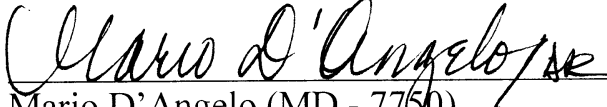
Respectfully submitted.



Denise A. Rubin (DR - 5591)

NAPOLI KAISER BERN & ASSOCIATES, LLP
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-and-



Mario D'Angelo (MD - 7750)

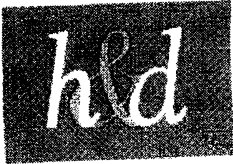
HARITON & D'ANGELO, LLP
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Exhibit A

Proposed Supplemental Appendix

Letter from
Hariton & D'Angelo to
The Hon. Harvey Bartle, III

In compliance with
Pretrial Order 2641, part (2)



Hariton & D'Angelo, LLP
Attorneys at Law

Ira M. Hariton

Mario D'Angelo

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March 19, 2004

VIA OVERNIGHT MAIL

The Honorable Harvey Bartle, III
United States District Court
Eastern District of Pennsylvania
601 Market Street, Room 16614
Philadelphia, PA 19106-1752

Re: *In re: Diet Drug (Fenfluramine/Phentermine/Dexfenfluramine)*
Product Liability Litigation
MDL 1203 -- Pretrial Order 2641

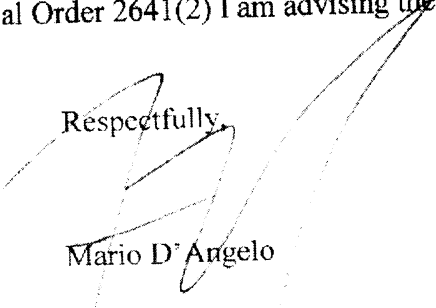
Dear Judge Bartle:

Pursuant to Pretrial Orders 2640 and 2641, the Court referred my firm to the State of New York disciplinary authorities.

The Grievance Committee for the Tenth Judicial District of the State of New York has informed me that they have concluded that there was no breach of the Code of Professional Responsibility and the complaint has been dismissed.

In compliance with Pretrial Order 2641(2) I am advising the Court of their decision.

Respectfully,


Mario D'Angelo

MD:dy

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN RE: DIET DRUGS (Phentermine/
Fenfluramine/Dexfenfluramine) :
PRODUCTS LIABILITY LITIGATION :

THIS DOCUMENT RELATES TO: :
SHEILA BROWN, SHARON GADDIE, : Nos. **02-4378, -4502, -4614, -4615, -4617,**
VIVIAN NAUGLE, QUINTIN LAYER, : **03-1007, -3740**
and JOBY JACKSON-REID, :
individually and all others similarly : DECLARATION OF SERVICE
situated, :
: :
Plaintiffs, :
v. :
: :
AMERICAN HOME PRODUCTS :
CORPORATION, :
Defendant. :

The undersigned hereby declares that on March 22, 2004, I caused the within motion papers and annexed proposed supplemental appendix in support of appellants' motion to Supplement the appendix record on the appeal(s) docketed as Nos.: **02-4378, -4502, -4614, -4615, -4617, 03-1007, -3740** to be served by e-mail upon the following persons at the addresses designated for service: (Copies are also being served via regular mail.)

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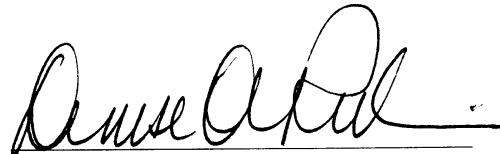
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DENISE A. RUBIN (DR-5591)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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IN RE: DIET DRUGS (Phentermine/
Fenfluramine/Dexfenfluramine) : MDL Docket No. 1203
PRODUCTS LIABILITY LITIGATION :
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THIS DOCUMENT RELATES TO: :
SHEILA BROWN, SHARON GADDIE, : CIVIL ACTION NO. 99-20593
VIVIAN NAUGLE, QUINTIN LAYER, :
and JOBY JACKSON-REID, :
individually and all others similarly :
situated, : Docket Nos. **02-4378, -4502, -4614, -4615, -**
: **4617, 03-1007, -3740**
:
Plaintiffs, :
v. :
:
AMERICAN HOME PRODUCTS :
CORPORATION, :
Defendant. :
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**APPELLANTS' MOTION TO SUPPLEMENT
THE APPENDIX RECORD**
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NAPOLI KAISER BERN & Associates, LLP
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(631) 224-1133

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To
Attorney(s) for
=====

Service of a copy of the within is hereby admitted.
Dated, _____

ATTORNEY(S) FOR

=====
PLEASE TAKE NOTICE:

NOTICE OF ENTRY

that the within is a (certified) true copy of an
duly entered in the office of the clerk of the within named court on 2003

NOTICE OF SETTLEMENT

that an order of which the within is a true copy
will be presented for settlement to the HON. one of the judges of the
within named Court, at on 2003, at M.

Dated,

Yours, etc.

NAPOLI KAISER BERN & Associates, LLP