

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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

MDL Docket No. 1203

THIS DOCUMENT RELATES TO:  
SHEILA BROWN, SHARON GADDIE,  
VIVIAN NAUGLE, QUINTIN LAYER,  
and JOBY JACKSON-REID,  
individually and all others similarly  
situated,

CIVIL ACTION NO. 99-20593

Plaintiffs,

v.

AMERICAN HOME PRODUCTS  
CORPORATION,

Defendant.  
-----

**MEMORANDUM OF LAW IN REPLY AND FURTHER SUPPORT  
OF CLAIMANT JOHN BACON, III'S MOTION  
TO COMPEL THE AHP SETTLEMENT TRUST TO PAY HIS  
CLAIM AND TO LIMIT THE SCOPE OF DISCRETION  
PERMITTED TO THE TRUST, TRUSTEES AND THEIR  
COUNSEL IN CLAIMS ADMINISTRATION**

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**PRELIMINARY STATEMENT**

Responding to the Opposition papers filed by the AHP Settlement Trust, Class member John Bacon, III renews and continues his request that this Court enter an order compelling and directing the AHP Settlement Trust and the Trustees thereof to issue this claimant payment for Matrix A, Level II benefits, in accordance with the NATIONWIDE CLASS ACTION SETTLEMENT AGREEMENT WITH AMERICAN HOME PRODUCTS CORPORATION, INC. [the "Settlement Agreement"] and the revised audit rules approved by this Court's Pretrial Order 2807.<sup>1</sup> Mr. Bacon and other claimants who are beneficiaries of the Settlement Agreement also reiterate his request for this Court's Order limiting the scope of discretion permitted to the Trust, its Trustees and their counsel in subjecting claims under the Settlement Agreement to repeated levels of audit, review and scrutiny with the ultimate aim being the denial of claims.

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<sup>1</sup> Opposing the motion, the Trust argues, in pertinent part, that Mr. Bacon's motion is superfluous, as his remedy lies in the contest procedures that are part of the audit program. Mr. Bacon respectfully disagrees. Where, as here, the audit procedures are being so blatantly subverted and corrupted by the very entity charged with administering the audits, there is no reasonable basis to expect the contest procedures will be administered in any less biased and improper a fashion.

## ARGUMENT

### POINT I.

**NOTABLY, THE TRUST OFFERS NO EVIDENCE OF FURTHER  
MEDICAL REVIEW NOR EXPERT COMMENT BY A PERSON  
WITH TECHNICAL EXPERTISE RELATED TO  
ECHOCARDIOGRAM MACHINERY TO SUPPORT THEIR  
CLAIM OF “INTENTIONAL” TAMPERING WITH THE  
CLAIMANT’S ECHOCARDIOGRAM.**

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Opposing the instant motion, the Trust and its counsel have taken the novel step of conceding that they have simply disregarded the opinion of their own auditor and substituted their own discretion to deny this claim. Doing so, they argue that same single-note response this Court has heard again and again throughout the tortuous history of this Settlement Agreement: “the Trust owes a duty not to pay a claim that does not qualify under the Settlement Agreement...If the Trust is receiving illegitimate claims, they must not be paid.”

There is a fatal flaw to the argument. Quite simply, the Trust has not demonstrated that Mr. Bacon’s claim does not qualify under the Settlement Agreement. Much the opposite, their own auditing cardiologist has agreed that Mr. Bacon’s claim is medically reasonable, based (we must assume) on his years of clinical practice, training, and medical judgment. The Trust has alluded to information that was mysteriously made available, but never identifies *the source* of the information, *the nature* of the information or *the steps*, if any, that the Trust took to determine *whether that information was credible* before they took the drastic step of withdrawing the offer made to Mr. Bacon after their own auditor deemed his claim medically reasonable. All that is set forth in explanation is:

After the issuance of the November 21, 2003 Post-Audit Determination, the Trust received information indicating that Claimant’s Claim may involve a material misrepresentation of fact. ...The Trust reviewed this additional information [including information regarding source of echo and a full digital recording from which the echo tape was made], along with Claimant’s GREEN Form, echocardiogram tape and other materials previously submitted by Claimant, and found “substantial evidence of an intentional and material representation in connection with [Claimant’s] claim.”

See AHP Opposition Memo, at p. 3.

Apparently, the Claimant and this Court are asked to take *on faith alone* that the information that mysteriously found its way to the Trust was not only “substantial,” but indeed, that the evidence was credible, correct and of a nature that was sufficient to render the opinions of not only the attesting physician, but indeed, of the Trust’s own auditing physician, untrustworthy. This evidence was also apparently so stealthy as to evade detection by the auditing cardiologist who neither noted it in deeming the claim meritorious nor supported the Trust’s opposition to the instant motion with an affirmation. This Court is asked to believe that the phantom “deep throat” providing information to the Trust about the techniques used in obtaining Mr. Bacon’s echocardiogram is more experienced or more insightful than two highly credentialed cardiologists, neither of whom could tell, in reviewing the same echocardiogram, that there was evidence of improper settings or, as the Trust alleges, “material misrepresentation of fact(s)...substantial evidence that the settings on a Cypress machine had been manipulated to produce the appearance of moderate mitral regurgitation that in fact did not exist.” See Trust Opp. Memo at pp. 3-4.

Notably, the last time the Trust relied on extraneous information to allege wrongdoing by this claimant’s attorneys was in July of 2002, when the Trust, relying on the allegations of nurse Compton Shaw, claimed that the law firms had conducted seminars to train technicians and nurses to defraud the Trust and this Court. When that witness was deposed as to his claims, it became immediately and excruciatingly clear that the Trust’s source was utterly lacking in credibility. Given that track record, the Trust must assume a very short memory span on the part of the claimants’ attorneys and this Court in traveling the same road with this claim.

More to the point, in ratifying the Settlement Agreement in PTO 1415, this Court specifically alluded to the objective nature of the claims procedures, and the fact that the claimants would not be at the mercy of subjective determinations by claims administrators:

Class members do not have to demonstrate that their injuries were caused by ingestion of Pondimin and Redux in order to recover Matrix Compensation Benefits. Rather, the Matrices represent an **objective system of compensation whereby claimants need only prove that they meet objective criteria** . . .

. . . . .

Under the Settlement Agreement, the determination of a Matrix benefit ***is not subject to the exercise of discretion by the administrators of the Settlement*** or by any court . . . [but] . . . are based on the sworn certification of a board certified physician . . .

See Memorandum to PTO 1415, at §I.F.2.a., pp. 51-52 (emphasis added). This Court also noted,

These procedures are fair and reasonable for two reasons. First, they precisely define the criteria necessary for a member to qualify for benefits. . . . ***With respect to Matrix benefits, claims administrators are essentially bound to accept the certification of a qualified board certified physician regarding a claimant's medical condition when that certification is accompanied by appropriate information on the claim form.*** These provisions serve to protect against the insertion of subjective judgment on the part of the claims administrators in making benefits determinations. Second, the audit and appeals procedures protect against fraud and misuse of settlement funds.

See Memorandum and PTO 1415, at p. 143 (emphasis added).

## POINT II.

### **THE TRUST HAS NOT FOLLOWED THE PROCEDURES REQUIRED BY THE SETTLEMENT AGREEMENT TO ADDRESS ALLEGATIONS OF FRAUD.**

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Indeed, the Trust's reliance on the contest and show-cause procedures is wholly misleading in the face of their withholding of this vital information regarding the motivation for withdrawing approval of this claim. How can Mr. Bacon contest the Trust's findings where he and his counsel are not afforded the benefit of knowing the evidence that the Trust relied on in reaching its determination? In the contest procedure, the claimant has the Trust auditor's report and opinions; these can be submitted to the attesting physician or to another expert for comment and specific refutation. Such response is not possible here, and that fact, combined with the Trust's refusal to follow the audit rules and accept the stated opinion of its own auditing cardiologist, is demonstrable proof that any contest procedure on this claim is going to be a sham, and that the Trust will treat Mr. Bacon's contest of their position with the same cynical arrogance as they have treated his claim thus far.

Moreover, the Trust, in making its unilateral determination that there had been "material misrepresentation" in connection with Mr. Bacon's claim, failed to follow the procedures the

court set out for such situations. In the Memorandum annexed to Pretrial Order 1415, this Court wrote:

If the auditing cardiologist makes the determination that there was a reasonable medical basis to support the class member's claim and there is no substantial evidence that fraud was committed in connection with the claim, the claim is to be allowed. [internal citations omitted]. ***If not, those responsible for the administration of the settlement are required to apply to the court for relief.***

Memorandum for PTO 1415, at §I. F.2.a. (emphasis added). There was no application to this Court made prior to the Trust's withdrawal of its offer to Mr. Bacon and subsequent denial of his claim. Even upon the implementation of the first 100% audit requirement, that applicable to only the claims brought by Napoli Kaiser Bern & Associates, LLP and Hariton & D'Angelo, LLP, this Court ***reiterated that promise*** to the class members in its Pretrial Order 2640:

When a claim is selected for audit, the Trust forwards relevant documentation, including the claimant's medical history and echocardiogram, to an independent board-certified cardiologist. After analyzing the information provided, the auditing cardiologist makes a determination as to whether there was "a reasonable medical basis for the representations made by any physician in support of the [c]laim." [Citation omitted]. If the auditing cardiologist answers this question in the negative, the Trust may not pay the claim and must apply for a show cause order with the court as to why the claim should be paid. [Citation omitted]. ***If the auditing cardiologist finds in favor of the claimant, he or she is paid without any further appeal.***

Memorandum and Pretrial Order 2640, at p. 30.

**CONCLUSION**

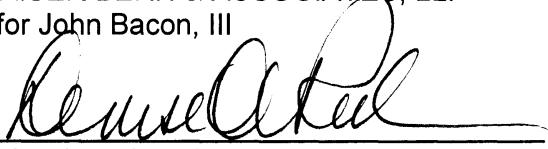
For the reasons set forth above, it is respectfully requested that this Court enter an order directing that the Trustees and the AHP Settlement Trust issue payment forthwith to John Bacon, III for Matrix A, Level II benefits and precluding the Trust and its counsel from subjecting claims under the Settlement Agreement to repeated levels of audit and review where the Trust auditors have deemed the claim medically reasonable.

Dated: Great River, New York  
April 13, 2004

Respectfully submitted,

NAPOLI KAISER BERN & ASSOCIATES, LLP  
Attorneys for John Bacon, III

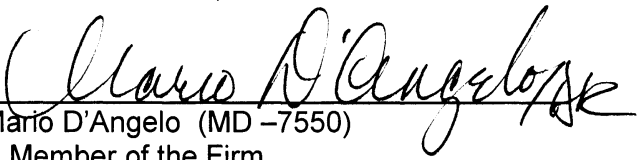
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UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

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

CIVIL ACTION 99-20593

THIS DOCUMENT RELATES TO:  
SHEILA BROWN, SHARON GADDIE,  
VIVIAN NAUGLE, QUINTIN LAYER, and  
JOBY JACKSON-REID,  
Individually and all others similarly situated,

**Hon. Harvey Bartle**

**DECLARATION OF SERVICE**

Plaintiffs,

-against -

AMERICAN HOME PRODUCTS  
CORPORATION,

Defendants.

-----X

DENISE A. RUBIN, an attorney duly admitted to practice in the State of New York and before the United States Court of Appeals for the Third Circuit, hereby declares that on April 13, 2004, I caused true copies of the within Reply Papers to be served on the following person(s) by e-mail and electronically filed with the Court:

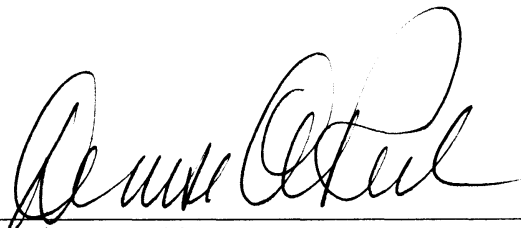
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Denise A. Rubin (DR-5591)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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

MDL 1203

SHEILA BROWN, et al.

-against-  
Plaintiffs,

Docket No.: 99 CV 20593

AMERICAN HOME PRODUCTS  
CORPORATION, et al,

Defendants.

REPLY PAPERS OF CLAIMANT JOHN W. BACON III  
ON HIS MOTION TO COMPEL PAYMENT OF HIS CLAIM

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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 a  
duly entered in the office of the clerk of the within name court on 20

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 20 at M.  
Dated,

Yours, etc.

**NAPOLI KAISER BERN & ASSOCIATES, LLP**