

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

-----  
IN RE: DIET DRUGS (Phentermine/ : MDL Docket No. 1203  
Fenfluramine/Dexfenfluramine) :  
PRODUCTS LIABILITY LITIGATION :  
-----  
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, :  
: :  
Plaintiffs, :  
v. :  
: :  
AMERICAN HOME PRODUCTS :  
CORPORATION, :  
Defendant. :  
-----

**CLAIMANTS' MEMORANDUM OF LAW AND FACTS IN REPLY  
ON THEIR MOTION FOR DISCOVERY OF EXPERT REVIEWS  
CONDUCTED AT CLASS COUNSEL'S BEHEST**

**NAPOLI KAISER BERN & ASSOCIATES, LLP**  
*Attorneys for Claimants/Plaintiffs*  
3500 Sunrise Hwy., Suite T-207  
Great River, New York 11739  
(212) 267-3700

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
PRELIMINARY STATEMENT .....	2
POINT I.	
THERE IS NOTHING IN CLASS COUNSEL’S OPPOSITION PAPERS SUPPORTING THEIR REFUSAL TO DISCLOSE EXPERT REVIEWS TO THE CLASS MEMBERS’ INDIVIDUAL COUNSEL .....	3
POINT II.	
CLASS COUNSEL HAS ESSENTIALLY CONCEDED THAT THEIR EXPERT REVIEWS HAVE FOUND AT LEAST SOME OF THE NAPOLI/HARITON CLAIMANTS’ SUBMISSIONS PRESENTED MATRIX-LEVEL CONDITIONS. THEY CANNOT WITHHOLD THAT INFORMATION FROM THE CLAIMANTS WITHOUT VIOLATING THEIR DUTY AS CLASS COUNSEL. ....	4
CONCLUSION .....	6

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

-----  
IN RE: DIET DRUGS (Phentermine/ : MDL Docket No. 1203  
Fenfluramine/Dexfenfluramine) :  
PRODUCTS LIABILITY LITIGATION :  
-----  
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, :  
Plaintiffs, :  
v. :  
AMERICAN HOME PRODUCTS :  
CORPORATION, :  
Defendant. :  
-----

**PRELIMINARY STATEMENT**

Responding to the lengthy opposition papers filed by Class Counsel in Opposition to the pending motion for discovery of the expert medical reviews of Napoli Kaiser Bern & Associates, LLP's and Hariton & D'Angelo LLP's clients, the movants respectfully offer the within Memorandum of Law and Facts in Reply.

**POINT I.**  
**THERE IS NOTHING IN CLASS COUNSEL'S  
OPPOSITION PAPERS SUPPORTING THEIR REFUSAL  
TO DISCLOSE EXPERT REVIEWS TO THE CLASS  
MEMBERS' INDIVIDUAL COUNSEL**

---

As a starting point, it is notable that Class Counsel can find no more compelling argument or authority to support their ongoing refusal to comply with discovery demands by the class members' individual counsel than to spend some twenty six pages going over, once again, the long and tortured story of the 2640 hearings held before this Court in September of 2002. That the matter is currently on appeal to the Third Circuit appears of little moment; what is important, apparently, is that Class Counsel not miss any opportunity to paint class members' counsel, Napoli Kaiser Bern & Associates, LLP and Hariton & D'Angelo, LLP, in as unflattering a light as possible.

In so doing, however, Class Counsel never actually explains how, even if this Court accepts their premise that these law firms are driven by ulterior motives in seeking the discovery of the expert reviews, they do not have an obligation to share any information, particularly an expert medical review, with the class member whose submission was so reviewed. Why should the information not be submitted in support of a contest letter or in opposition to a show-cause hearing if, indeed, the expert review supports the class member's claim under the Settlement Agreement?

Class counsel erroneously argues that the expert reviews will be used in some attempt to avoid the audit process. That contention is utterly insupportable. Even if counsel so desired, the fact remains that the audit process will go forward under the Trust's auspices, and that each and every claim is being audited. Nonetheless, we have seen incident after incident where the auditor's findings were remarkably close to the attesting physician's findings, and in several cases, where the auditor deemed the claims appropriate for payment of Matrix benefits. Nonetheless, in those cases, the Trust has denied payment of the claims or withheld payment

while arguing that the attesting physician is under investigation and the claims may not be paid until those investigations are resolved. If, in such a case, there is another expert review extant that supports the claimant's submission, why would Class Counsel want to deny the claimant the use of that report? Can Class Counsel's animosity toward these law firms have grown so uncontrolled that they have lost sight of their obligations to each and every one of the class members?

## POINT II.

**CLASS COUNSEL HAS ESSENTIALLY CONCEDED THAT THEIR EXPERT REVIEWS HAVE FOUND AT LEAST SOME OF THE NAPOLI/HARITON CLAIMANTS' SUBMISSIONS PRESENTED MATRIX-LEVEL CONDITIONS. THEY CANNOT WITHHOLD THAT INFORMATION FROM THE CLAIMANTS WITHOUT VIOLATING THEIR DUTY AS CLASS COUNSEL.**

---

At page 22 of their opposition brief, Class Counsel argues that the claimants are wrong in their stated concern that Class Counsel is coordinating their efforts with those of the AHP Settlement Trust to deny Napoli/Hariton clients' claims, notwithstanding the merit of their submissions. In so stating, however, counsel has essentially conceded our position:

...while Class Counsel's experts may have concluded that for a small percentage of the claims reviewed from the Napoli/Hariton inventory, some appeared, based only upon a review of the echocardiogram tape, to present a Matrix-Level condition, whatever finding Class Counsel's experts have made on any specific claim has NOT been published to either the Trust or to Wyeth. That information has remained confidential to Class Counsel and Class Counsel has done nothing more than to present generic information in a statistical fashion, without disclosure of the names of the class members.

See Opposition Brf. at p. 22. The statement begs the obvious question: if, as Class Counsel, these attorneys have come into possession of information that supports a class member's claim, how can they possibly justify withholding that information from the Trust, the Claimant, and the Claimant's attorney? Class members and their counsel have never sought to avoid the audit

process, and there is no basis for the allegation that we will attempt to do so once discovery of the expert reviews at issue has been had.

That Class Counsel has not offered the reviews had as evidence in any matter is of no moment. Whether the expert at issue was Dr. Karalis, or one of the three doctors whose names were later presented as the actual experts involved, is similarly a red herring. All that this Court needs to know, and all that is of relevance in this matter, is that Class Counsel retained some expert or experts to conduct expert medical reviews of class members' submissions to the Trust, and that the results of those reviews, at least some of which supported the claimants' positions, is being wrongfully withheld from the class members and their counsel by the very attorneys, Class Counsel, who exist for no purpose other than to protect the class members' rights.

Class counsel states unequivocally that they have no objection to producing the materials sought that relate to the 12 class members at issue on this motion. They argue that their objection is to the Napoli firm's intent to use any information supportive of our clients before the Trust:

Napoli intends to argue that since Class Counsel's experts may have found a particular claim to appear to be Matrix eligible, that finding should trump the requirement that the Trust perform an audit of the Claim under Pretrial Order 2807.

See Opp. Brf. at p. 23. Again, there is plainly no support for that contention in the record before this Court. Rather, we have argued, and continue to argue, that expert reviews supporting our clients' submissions are and should be considered as some evidence in support of the submission, before the Trust, on the contest letter, and in the Show-Cause proceeding. Indeed, would not this Court have some interest in knowing that a medical expert retained by Class Counsel found one or more of these claimants' submissions meritorious? Or is Class Counsel to be permitted to keep this information just out of sight, as the continued basis of ongoing slurs against these law firms, their individual attorneys and principals, and the class members they

represent. There are two sides to every coin; if the evidence can be used to paint the class members and their counsel as dishonest and lacking in ethics, it should be similarly available to support their claims and reputations where the experts have found in favor of the submission.

### CONCLUSION

Class counsel has offered no reasonable or legally authoritative basis for continuing to withhold expert review information about Napoli/Hariton clients' submissions to the Trust. Under any reasonable argument and under all applicable rules of this Court and of discovery, Class Counsel must be compelled to disclose the information sought without further delay and without restrictions as to its use.

Dated :       New York, New York  
              January 23, 2004

NAPOLI KAISER BERN & ASSOCIATES, LLP  
Attorneys for Class Members

By: \_\_\_\_\_  
Denise A. Rubin (DR-5591)

3500 Sunrise Hwy., Suite T207  
Great River, NY 11739  
(212) 267-3700

*On the brief:*  
Paul J. Napoli

HARITON & D'ANGELO, LLP  
Attorneys for Class Members

By: \_\_\_\_\_  
Mario D'Angelo (MD-7550 )

3500 Sunrise Hwy., Suite T207  
Great River, NY 11739  
(631) 224-1133

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

-----X  
 IN RE: DIET DRUGS (Phentermine/ :  
 Fenfluramine/ Dexfenfluramine) :  
 PRODUCTS LIABILITY LITIGATION : CIVIL ACTION 99-20593  
 ----- :  
 THIS DOCUMENT RELATES TO: : **Hon. Harvey Bartle**  
 SHEILA BROWN, SHARON GADDIE, :  
 VIVIAN NAUGLE, QUINTIN LAYER, and :  
 JOBY JACKSON-REID, : **DECLARATION OF SERVICE**  
 Individually and all others similarly situated, :  
 :  
 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 January 23, 2003, I caused a true copy of the **CLAIMANTS’ MEMORANDUM OF LAW AND FACTS IN SUPPORT OF THEIR MOTION FOR CLASS COUNSEL’S DISCLOSURE OF EXPERT REVIEWS AND RELATED RECORDS, REPORTS AND DOCUMENTATION** to be served on the following person(s) by e-mail and electronically filed with the Court.

Peter L. Zimroth, Esq.  
Arnold & Porter, LLP  
399 Park Avenue  
New York, New York 10022  
Email: [Peter\\_Zimroth@aporter.com](mailto:Peter_Zimroth@aporter.com)

Andrew A. Chirls Esq.  
Wolf, Block, Schorr & Solis-Cohen, LLP  
1650 Arch Street, 22nd Floor  
Philadelphia, PA 19103  
Email: [achirls@wolfblock.com](mailto:achirls@wolfblock.com)

Michael Fishbein  
Levin Fishbein Sedran & Berman  
510 Walnut Street, Suite 500  
Philadelphia, Pennsylvania 19106  
Email: [mfishbein@lfsblaw.com](mailto:mfishbein@lfsblaw.com)

---

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.

Plaintiffs,

Docket No.: 99 CV 20593

-against-

AMERICAN HOME PRODUCTS  
CORPORATION, et al,

-----  
Defendants.  
-----

=====

CLAIMANTS' BRIEF IN REPLY ON  
THEIR MOTION FOR CLASS COUNSEL'S DISCLOSURE  
OF EXPERT REVIEWS AND RELATED RECORDS, REPORTS  
AND DOCUMENTATION

=====

=====

**NAPOLI KAISER BERN & ASSOCIATES, LLP**

*Attorneys for : Claimants*

*Office and Post Office Address, Telephone*

3500 Sunrise Hwy., Suite T-207

Great River, New York 11739

(212) 267-3700

=====

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