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

IN RE DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	§ § § § §	MDL Docket No. 1203
THIS DOCUMENT RELATES TO ALL ACTIONS	§ § §	
SHEILA BROWN, et al v. Wyeth	§	CIVIL ACTION NO.99-20593

CERTAIN CLASS MEMBERS' MOTION FOR PROTECTIVE ORDER AND TO COMPEL CLAIMS PROCESSING, AND OBJECTIONS TO MEDICAL PRACTICES QUESTIONNAIRES

TO THE HONORABLE U.S. DISTRICT JUDGE:

Come now certain class members represented by undersigned counsel,[1] and respectfully submit this their Motion for Protective Order and to Compel Claims Processing, and Objections to Medical Practices Questionnaires, seeking this Court's protection from the Medical Practices Questionnaire Policies of the AHP Settlement Trust:

1. As part of its Claims Integrity Program, the Trust issued Medical Practices Questionnaires ("MPQ") relating to thousands of claims for Matrix benefits, and demanding that Green Form Attesting Physicians personally complete hundreds of eighteen page, boiler-plate forms.

2. The Trust had seemingly asked this Court to approve the Claims Integrity Program in an August 2003 motion regarding the Trust's Operations Plan. Undersigned counsel thereafter moved to stay

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[1] Movants herein who submitted matrix claims and are clients of Baron & Budd, P.C., the Slakter Law Firm and/or the Law Offices of Tim Bates are listed on an attachment hereto. The AHP Settlement Trust has issued "Medical Practices Questionnaires" with regard to these claimants and has threatened to deny their claims, as explained more fully in these motion papers. In addition, movants include the clients of the law firms appearing on the signature block hereto. These firms object to the Medical Practices Questionnaires on behalf of their clients.

the Claims Integrity Program, after which time the Trust amended its original request for court approval, deleting such statement from its amended proposed pretrial order (*see* Docket No. 2500 in MDL 10-1203 (09/17/2003)).

3. At the subsequent hearing on the suspension motion, the Trust agreed to change its MPQ cover letter to delete the statement that claims denial was the penalty for failure to submit an MPQ (9/23/03 Hearing Transcript, *In re Diet Drugs,* at p. 50:5-10).

4. The suspension motion was thereafter denied in PTO 3048, and this Court's opinion discussed challenges to the program hotline (Mem. & PTO 3048, p. 7 (denying the "motion to suspend the Claims Integrity Program Hotline of the AHP Settlement Trust")). In PTO 3185, this Court also ruled on motions associated with the Trust's August 2003 Operations Plan, but did not discuss the MPQs.

5. Given that the Trust withdrew its request for approval of the Claims Integrity Program and that the undersigned's motion was to suspend rather than permanently enjoin the Program, this Court has never actually "approved" the MPQ policy. Further, when the policy was addressed in the September 2003 hearing, the Trust had agreed to delete the denial threat announced in the MPQ cover letter.

6. Since the September 2003 hearing, the Trust has modified its MPQ policy twice, once in November 2003 and recently this month. In contrast to its acknowledgment at the September 2003 hearing, however, the Trust continues to threaten denial of claims.

7. As explained in greater detail in the Memorandum filed herewith, the Trust has amended the MPQ policy to include alternative demands to the MPQ: a deposition under draconian (and potentially

impossible) terms or the payment of a $1,250.00 "deposit" and submission of new claims forms that could then be subjected to new MPQs, leaving the claimants back where they started *sans* $1,250.00. Because the Trust has no authority to deny claims for non-submission of the MPQs, it has no authority to demand cash payments and depositions as substitutions.

8. Further, the claimants have offered the Trust reasonable substitutions that the Trust's Special Counsel has refused to accept. For example, after having answered many of the medical practices questions in an opt-out deposition, Dr. Waenard Miller answered all of them to his present recollection in an affidavit that was submitted to the Trust. However, the Trust refuses to accept the answers in this form.

9. To undersigned's knowledge, the Trust continues to issue MPQs and has expanded the list of targeted doctors beyond the original thirteen. The Trust appears to be wielding its MPQ power to bolster its other motions, as for example issuing MPQs to doctors who have spoken up for EchoMotion shortly after the filing of the Trust's anti-EchoMotion motions.

10. Movants object to the Trust's MPQ Policy for the following reasons, which are more fully addressed in the memorandum of law filed herewith:

    a. The MPQs are duplicative in that the Trust already has received answers, to the best of the cardiologists' present recollections, in the form of deposition testimony and/or affidavits.

    b. The Trust only has the authority to request existing medical records, the court-approved Physician Verification for Matrix A payment, documents or information (Settlement Agreement § VI.E.3.c, p. 118 & CAP No. 4, p. 3, ¶ 7). However, the MPQ Policy

demands affirmative acts such as the creation of new documents and forms, the taking of new oaths, cardiologists' submission to depositions, and/or the payment of money.

c. The Trust has no authority to demand documents or information unless it is within the claimants' custody, possession, or control (Settlement Agreement § VI.E.3.c, p. 118 & CAP No. 4, p. 3, ¶ 7). The cardiologists' acquiescence with the MPQ Policy is not a document or information within the claimants' custody, possession, or control.

d. The Trust does not have the reasonable grounds required by CAP No. 4, p. 3, ¶ 7.

e. The claimants' failure to comply with the MPQ Policy is not unreasonable, and therefore the Settlement Agreement forbids the Trust from denying the claims on this ground (Settlement Agreement § VI.E.3, p. 118).

f. The claimant's failure to present the MPQ answers in the precise form demanded by the Trust is not material, and therefore the Settlement Agreement forbids the Trust from denying the claims on this ground (Settlement Agreement § VI.E.3, p. 118).

g. Answers to the MPQ questions are neither material nor relevant, and therefore the Trust lacks the authority to issue the MPQs or to deny claims on this ground (Settlement Agreement § VI.E.3, p. 118 & CAP No. 4, p. 3, ¶ 7).

h. The MPQ Policy deprives claimants of the benefits of the bargain promised to them when the settlement was approved and the settlement class was certified. The opinion approving the settlement explains that the Trust does not have the authority to go beyond the information in the claims forms in an effort to deny claims on subjective grounds. Thus, claimants were misled into believing that they would not need to create and maintain

records of answers to extra-Settlement form questions.

i. The information requested in the MPQs is not medically necessary and not pertinent to clinical practice, as that practice has been described by some of Wyeth's and the Trust's own experts.

j. The MPQs are misleading as to the requirements for claims benefits, and the MPQ Policy seeks to change the terms of the Settlement Agreement in this regard. Among other things, the Settlement Agreement does not require a physician-patient relationship, a treating physician relationship, the taking of blood pressure, or review of medical records or examination as a prerequisite to signing the Green Forms. The Trust has no authority or grounds for interrogating doctors regarding facts that are not material or relevant to the claims requirements promulgated in the Settlement Agreement.

k. These cardiologists at one point were hired by the Trust, which never instructed them as to any of the medical practices that are the subject of the present inquisition. Indeed, cardiologists called the Trust virtually begging for guidance and the Trust refused to answer their questions. It is unjust, unreasonable, and a violation of fundamental tenets of notice to spring extra-Settlement requirements long after the fact, particularly after the Trust refused to provide contemporaneous notice.

l. The terms set for the deposition "substitute" are draconian and impossible. Specifically, a cardiologist cannot reasonably be expected to stipulate in advance that his or her answers will apply to each and every claim; to literally comply with this unrealistic stipulation would require perfect recall. Further, the cardiologists should not be required

to stipulate in advance that they will answer questions beyond the MPQs, and this feature of the policy is over broad, unduly burdensome, harassing, and indicates that the MPQs are a pretext for the Trust's plan to conduct unauthorized discovery. Finally, the policy is vague in its failure to reasonably limit the document request to which the cardiologists must acquiesce.

m. The "substitute" announced in March 2004 is an *ultra vires* demand. The Trust has no authority to require the payment of a $1,250.00 deposit for each claim. Moreover, the policy punishes claimants by failing to place them in their proper position in the audit queue. Worse still, the substitution appears to be an exercise in futility in that the policy statement threatens that the Trust could simply defeat the substitution by issuing new MPQs. Further, the policy is over broad, unduly burdensome, irrelevant, and immaterial. The Policy demands, among other things, replacement Green Forms Parts I and III notwithstanding that the original MPQ policy raised no challenge with regard to these Green Form parts and signatures.

n. The MPQ Policy is a pretext for pre-litigation discovery without granting the cardiologists, claimants, or counsel a concomitant opportunity for such discovery.

o. This Court has not ruled on Class Members' Emergency Motion in Support of Approval of CAP 6, Docket No. 599 in 99-20593 (11/19/03). Claimants participating in the plan proposed in said motion will be relieved of any obligation to submit a completed MPQ. Class members should not be compelled to needlessly expend substantial financial resources in the form of payments to cardiologists and/or the Trust when this proposed

cure is pending before this Court. In that this Court is still considering the motion, the Trust should not deny claims on purported MPQ grounds.

p. The MPQ Policy violates fundamental principles of fairness in that the cardiologists have been condemned without providing them or the class with notice and an opportunity to be heard as to the purported grounds for targeting these doctors.

q. The MPQs place the cardiologists in an untenable position.

r. The MPQs are part of a concerted improper attempt by the Trust, in complicity with Wyeth, to improperly deny or slow the payment of legitimate claims, and to change the "rules of the game," in order to suppress and detract from the facts that Wyeth significantly under-projected the number of potential claimants and under-funded the Trust, and that the Trust has consistently bungled its duties to administer benefits as required under the terms of the Settlement Agreement.

s. The Trust has not articulated any purpose to which it will put the information, nor has the Trust assured claimants that their efforts to comply with the policy will prompt the Trust to commence processing of their claims.

t. The court-approved method for assessing the legitimacy of claims is for the Trust to complete the 100% audits ordered by this Court in PTO 2662.

u. The MPQs are over broad and vague.

v. The MPQ Policy is unduly burdensome and harassing.

w. By targeting physicians without prior Court approval, the Trust effectively achieved an end-run around Settlement Agreement § VI.E.8.b, p. 120. Pursuant to the Agreement, the

Trust cannot use an Attesting Physician's identity as a basis for subjecting claims to additional audits unless the Trust first succeeds in a show cause proceeding, a hearing is conducted, and this Court issues an order specifically granting the Trust this relief.

x. The MPQ policy requires the class members to expend substantial resources in the form of payments to their present or new cardiologists, and potentially a $1,250.00 "deposit" to the Trust. This financial burden is an unreasonable departure from the matrix benefits promised to the class.

y. The MPQ policy violates the rights that Federal Rule of Civil Procedure 23 accords absent class members.

z. The MPQ policy imposes improper, disparate treatment of class members.

11. It has been shown in the six months since the policy was enacted that the Trust is not following the Settlement Agreement. It is therefore clear that the Trust cannot succeed on the dubious merits of this endeavor and should be enjoined from further harassment and delays perpetrated under the guise of the MPQ policy. The Trust's recalcitrance in refusing to process and pay claims pursuant to the Settlement Agreement and this Court's audit orders is causing irreparable injury to the class. The extra-Settlement MPQ machinations require the needless expenditure of Trust resources, thereby reducing the pool of resources available to pay legitimate matrix claims. The harm faced by Movants outweighs the harm, if any, that would be sustained by the Trust. Policy interests sharply disfavor allowing a court-approved and court-supervised Trust to spend the corpus settled for beneficiaries on hostile attacks against them, particularly where, as here, the order approving the settlement purports to protect the claimants from this very fate.

WHEREFORE, for the reasons more fully elucidated in the Memorandum filed herewith, Movants pray for a protective order preventing the AHP Settlement Trust from denying and/or further delaying their claims payment and processing on the grounds of failure to comply with the Trust's MPQ "Policy," and an order compelling the Trust to audit and process the claims without further prejudice to the claimants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been electronically filed with the Court and forwarded via facsimile and/or electronic transmission to the attached service list on this the 31st day of March, 2004.

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Henry, Asana Mae
Henson, Deborah A.
Herman, John E.
Hernandez, Lisa L.
Hernishin, Irene
Herrera, Christine
Herrman, Shelley
Herron, Kim
Hersh, Fred
Hershey, Mary Jo
Hibbard, Nancy J.
Hibler, Johnnie M.
Higbee, James Milton
Higuera, Bonnita M.
Hill, Tina M.
Hillam, Raihi J.
Hinderlider, Agnes
Hines, Debra
Hints, Kristen
Hire, Thomas
Hoerz, Anna M.
Hoesly, Michael R.
Hoffman, Candace J.
Hoggard, Betty Lou
Holcomb, Steven
Holland, Marjorie
Holland, Richard
Hollingsworth, Janice E.
Hooten, Joan
Horton, Mary E.
Hoskinds, Michelle T.
Howell, Doyle C., Jr.
Hubbard, Silves Jean
Hudson, Jean
Humphries, Dorothea G.
Hunter, Ana

Hush, Ruby
Ibarra, Veronica
Illis, Tonja L.
Imamoto, Beatrice
Ingalls, Dea
Inzerilla, Gina
Israel, Yolanda
Ivy, Flordie
Jacks, Alysa L.
Jackson, Geraldine
Jacuinde, Ana
Jaeger, Teresa R.
James, Bobbie S.
James, Ellen M.
James, Pamela
Jasper, Susan
Jeffries, Essie M.
Jensen, Debbie J.
Jerricks, Antionette
Jezowski, Elva Z.
Johansen, Carol
Johnson, Barbara A.
Johnson, Carol
Johnson, Carolyn
Johnson, Christina K.
Johnson, Evelyn
Johnson, Iris
Johnson, Joyce
Johnson, Karen
Johnson, Lesley A.
Johnson, Margo
Johnson, Richard A.
Johnson, Rosetta
Jones, Barbara A.
Jones, Courtney Lee
Jones, Deborah E.
Jones, Dorothy A.
Jones, Karen S.
Jones, Mary Jack
Jones, Merna
Jones, Patricia
Jones, Pauline
Jones, Sarah W.
Jones, Shirley J.
Jones, Susan P.
Jordan, Doretha
Julian, Laura Lynn
Jung, Pamela
Kaaiawahia, Alison M.
Kahley, Patricia
Kalajian, Faye
Katz, Madeline Jeannie
Keller, Constance H.
Kemp, Kathleen L.
Kempton, Linda
Kennedy, Barbara F.
Kenner, Joyce
Ketchum, Carolyn
Kibbe, Jennifer L.
Kieler, Shannon D.
Kimari, Henry
Kimari, Kelly
Kindall, Beverly
King, Janet Sue
King, Maurica A.
Kinsale, Carolyn R.
Kirkpatrick, Janet
Klepczyk, Gail V.
Knight, Sharon D.
Knisely, Janice
Knowles, Pamela
Kokoszynski, Lani
Kolody, Kathleen
Kotsonis, Shirley A.
Kovacs, Kathleen V.
Krieg, Linda G.
Kronquist, Caren
Krueger, Cory
Kruger, Donna
Kucera, Susan M.
Kukla, Colette S.
Kurutas, Aysun
LaCour, Monica L.
Lagorio, Sharon
Lally, Mary
Lamantia, John Charlton
LaMarr, Joann G.
Langford, Linda
Langley, Mona K.
Larkin, Norma
Laux, Gracemary
Lawley, William Alma
Lee, Cora
Lee, Karen M.
Lee, Twyla D.
Leos, Sylvia
Lerner, Henrietta
Lewis, Clevurn M.
Liberman, Susan
Lippman, Debra
Little, Toni E.
Littleton, Sandra E.
Lloyd, Marie
Loftis, Rodney
Lollis, Theresa
Long, Ginger
Looysen, Bebe B.
Lopez, Beverly
Lopez, Denice R.
Lopez, Zona M.
Love, Cherry Elaine
Lowenberg, Glenn E.
Lucas, Helen
Luckett, Linda M.
Lund, Beverly
Lyles, Karen M.
Lynes, Judy
Lyon, Lois Lynne
Mabile, Ameline H.
MacDonald, Nancy K.
Machnij, Carolyn
Macias, Teresa
Mackey, Beverly A.
Madden, Robin
Maese, Linda
Magpayo, Carlos K., Jr.

Maisel, Rozalia A.
Maloof, Rebecca
Mandell, Larry
Mangum, Kimberly C.
Manning, Carrie
Manzo, Margaret R.
Marallo, Lorraine
Marchetti, Joyce
Mardis, Edith K.
Maropoulos, Carolyn
Marquez, Felicia M.
Marshall, Corinna A.
Marshall, Melvin J.
Marshall, Sheryl H.
Martin, John W.
Martin, Marie F.
Martin, Rhonda
Martindale, Patricia A.
Martinez, Adolfo
Mastowski, John, III
Mattheis, Monica
May, Brenda A.
Mayhall, Ana M.
McBride, Anita L.
McCain, Elizabeth
McCallister, Leslie S.
McCaron, Judy
McCarty, Lillian Ann
McClendon, Lesley Ann
McCoin, Laura E.
McCombs-Henley, Michelle
McCoy, Toi
McCrary, Polly A.
McDonald, Sean
McFarland, Geraldine
McFarland, Marcia R.
McFarlane, Ruby
McGill, Darlene
McGowan, Wynema A.
McGuire, Vicki S.
McIlMoil, Harriett
McIntosh, Lorraine F.
McKeehan, Tanya J.
McKinnon, Janet
McLaughlin, Connie S.
McMahan, Lisa Michelle
McNeal, Brookie
McNeil, Cathy
McQuarn, Dena
McQuown, John C.
McRae, Jennie
Mead, Susan A.
Meade, Sherri D.
Meads, Maxine A.
Mears, Novella Dean
Medel, Carol
Meintzer, Sharon
Meisner, Sharon E.
Melco, Patricia Anne
Melendez, Elida B.
Mendias, Yolanda V.
Mendoza, Terry
Mercready, Patricia
Mergiotti, Carol A.
Merrill, Deborah C.
Meyer, Laura Tiffany
Miceli, Felicia
Middleton, Kathryn L.
Migdal, Ronald J.
Milillo, Claire
Miller, Charlotte A.
Miller, Christy M.
Miller, Deanna W.
Miller, Susan C.
Millford, Mary E.
Miranda, Stephanie
Miss, Cheri L.
Mitchell, Lelah R.
Molinari, Michael A.
Moncada, Maria R.
Mondero, Judy
Monteith, Ronda
Moore, Carmenta R.
Moore, Mary S.
Moore, Rebecca F.
Moore, Sara E.
Moreno, Lydia
Moreno, Mary Ann
Morris, Helen L.
Morris, Lila
Moses, Alethia C.
Mosley, Marla J.
Moss, Barbara R.
Moss, Peggy A.
Mostert, Leslye E.
Mowry, Kay
Moxley, Marion T.
Muir, Sandra S.
Mulholland, Connie Sue
Mulligan, Dan J.
Mumby, Laverne
Murdica, Tami L.
Murray, Dianne V.
Musso, Jeri A.
Naas, Lana O.
Nayebi, Jaleh
Neal, Tracie
Neill, Amy A.
Nelson, Jean C.
Nelson, Shirley
Nevins, Sonja S.
Newell, Robert
Niland, Virena D.
Nkwocha, Chizoma Ije
Noakes, Bradley L.
Nolder, Marjorie
Norton, Geni
Novel, Lisa Elsie
O'Keefe, Jerelyn P.
O'Malley, Shannon M.
O'Neal, Valerie
Oddo, Jewel
Odle, Kenneth R.
Olden, Monicka
Olgin, Fernondo R.
Olley, Emeria

Olson, Linda D.
Ontiveros, Mary
Opland, Catherine E.
Orlando-Jacobsen, Judith K.
Orlik, Joseph J., Sr.
Orlik, Linda
Osborn, Laura Jean
Oskroba, Louise E.
Owens, Barbara
Pabis, John L.
Pace, Gloria Jean
Page, Mary Ann
Pal, Sangeeta
Palacios, Cynthia
Palafox, Arcelia
Palmer, Elois
Pami, Mirra
Paris, Maria
Parish, Dorthea Reetta
Parker, Carole
Parker, Diane K.
Parker, Ramona
Parker, Regina C.
Parker, Sheila
Patania, Palmera
Patterson, Roger
Patterson, Sandy
Patton, Don J.
Patton, Emily G.
Pavone, Maria
Pavy, Sarah Elizabeth
Payanes, Sara
Pearson, Judith M.
Pena, Tina
Pentolino, Jill
Perez, Lusero
Perez, Magdalena
Perryman, Louise
Pescatore, Tracy A.
Peterson, Dianne S.
Peterson, Janet Parker
Pettway, Dolores D.
Pfaeffli, John M.
Philips, Donna L.
Phillips, Diana
Piel, Lizabeth
Pierce, Billie J.
Pierce, Frances C.
Pierce, Paulma K.
Pierre, Karla K.
Pina, Robert A.
Piohia, Susanne C.
Pippet, Janet
Pitcher, Sally Joann
Plaice, Diane J.
Plattner, Jane
Plummer, Marlene
Plunk, Sherry Kay
Plunkett, Marian A.
Poniewaz, Ron F.
Poore, Linda
Powell, Ora
Pownall, Stanley
Priaulx, Beatrix
Provo, Beverly E.
Prudhomme, Melonie S.
Pruitt, Janice
Pryor, Maria
Puia, Nicole
Raabe, Laura M.
Rakestraw, Estella
Ralston, Jamie
Ramirez, Jeffrey
Ramirez, Kelly
Rand, Marvin L.
Rapka, Jessie M.
Rashid, Zayna
Raskin, Linda L.
Rasmussen, Karen D.
Raty, Irene
Razo, Victoria
Reader, Don
Redding, Dawn
Redmon, Katherine
Reeves-Kernan, Monique
Rehers, Mary
Rehfus, Mary J.
Reilly, Carole A.
Reis, Sally L.
Revelle, Sherree K.
Reynolds, Melody A.
Rezk, Peter D.
Rhodes, Deborah
Rhodes, Merle A.
Rhyne, Judith A.
Ricca, Margaret C.
Ricca, Tobi
Rice, Diane J.
Rice, Douglas T.
Richmond, Helen B.
Rickman, Charles T.
Riddle, Yvonne
Rivas, Mary Ann
Roberts, Betty
Roberts, Elaine M.
Roberts, Judy
Roberts, Phil
Roberts, Raymond C.
Robertson, Carolyn E.
Robertson, Catherine C.
Robinson, Patricia L.
Robinson, Tomiko S.
Robison, Edith Arlene
Robles, Gloria
Rockwell, Germaine
Rodriguez, Martha
Rodriguez, Palu V.
Rogers, Leticia
Rogers, Sandra L.
Rojas, Yolanda C.
Rolnick, Betty M.
Romero, Lilly A.
Rose, Gregory
Rose, Margaret A.
Rose, Ramona
Rossi, Gregory C.

Rothwell, Doris U.
Rowland, Barbara J.
Rozsi, Virginia
Rundell, Nancy
Rush, Barbara M.
Sadlowski, Audrey
Salerno, Linda L.
Sanchez, Elizabeth A.
Sandeman, Carole F.
Sanders, Donna M.
Sanders, Mary E.
Sawyers, Shirley A.
Sayers, Cindy L.
Scales, Carol A.
Schartung, Ann Jeanette
Schioppo, Carol
Schlechter, Christine
Schlifkin, Lynda S.
Schlund, Victoria
Schmaltz, Shayla
Schmid, Johanna
Schuessler, Rhonda
Schulz, Peggy
Schumaker, Sandra
Schuman, Bonnie
Scott, Deborah
Scott-Fox, Loretha
Scroggins, Michael C.
Seely, Judith C.
Sefcik, Kathleen Y.
Selinger, Robert D.
Sember, Karen
Setter, Joseph
Seymour, Nancy L.
Sharamitaro, Anastasia
Shaw, Sherry
Sheppard, Davalyn I.
Sheridan, Donna
Sherman, Cheryl
Shields, Patricia
Shirk, William E.
Shoemaker, Kim
Shumake, Antoinette
Shumake, Terry
Siemers, Jacqueline A.
Siegel, Barbara
Silberman, Denise
Silver, Mary R.
Simmons, Joyce A.
Simon, Donna G.
Simpson, Vickie L.
Singer, Maxine
Singer, Stuart
Singman-Rutkoskie, Toni H.
Siri, John C.
Sitman, Joan M.
Siufanua, Maurine
Skelton, Ben
Skiba, Mary B.
Skulick, June A.
Small, Lollie, J.
Smith, Audrey
Smith Bonnie
Smith, Catherine Delores
Smith, Donna M.
Smith, Frank E.
Smith, Kenneth E.
Smith, Linda L.
Smith, Lorraine
Smith, Maria
Smith, Maudiebell
Snelson, Diane
Snijdewind, Teresa S.
Snow, Blake
Sohanaki, Nahid
Solakian, Harry
Sorrell, Emma
Southgate, Genevieve B.
Sparer, Marcy
Speaker-McBee, Sara
Spearman, Mae
Spencer, Elizabeth
Spinelli, Barbara
Spitz, Susan
Sprecher, Sara
Sprotte, Jane
St. Cyr, Diane B.
Stedman, Marilyn
Steinmann, Jackie A.
Sterling, Brenda
Stewart, Savanna L.
Stiver, Diane J.
Stockman, Roberta H.
Stodghill, Kerry Lea
Stoller, Tamara J.
Stoper, Susan L.
Stout, Jeanne G.
Sullivan, Isabel
Susral, Sharon
Suter, Novalla R.
Sweet, Noelle A.
Swenson, Joan
Swiney, Dorschreal Carlice
Sykes, Sandra L.
Sylvain, Marla R.
Tackett, Donna
Tadey, Lawrence
Tardif, Guy
Tarlow, Barbara
Tarpey, Kathie
Taylor, Barbara
Taylor, Elouise
Terry, Debbie A.
Terry, Chrystene A.
Terry, George, Jr.
Thiel, Violet L.
Thielhard, Cynthia
Thigpen, Judy
Thomas, Carolyn
Thomas, Janet V.
Thompson, Deborah S.
Thompson, Gloria W.
Thompson, Penelope
Thompson, Thelma
Thomson, Susan
Threadgill, Marjorie

Thurmond, Enedina
Thurston, Kathleen
Tianio, Mila V.
Tillery, Bernadette J.
Tillman, Toinette M.
Tingley, Sydney
Tipton-McNeely, Joy N.
Tobias, Carolyn G.
Todd, Lori A.
Tolbert, Carrie
Toler, Denese
Tolmasoff, Dora A.
Tomei, Connie M.
Tomsett, Jeffery L.
Torregano, Mercedell M.
Torres, Michelle T.
Trammer, Wendy O.
Trask, Jamie L.
Trinkle, Joanne
Triplett, Lora Marlene
Trumbette, Patricia
Tryon, Tamra R.
Tumbocon, Eleanor
Turner, Lee S.
Twomey, Judith M.
Ueltschy-Poole, Stacey
Underwood, Sally B.
Ungar, Nancy
Usher, Azalea J.
Valverde, Connie
Van Der Lubbe, Mary E.
Velador, Nancy N.
Velekei, Eleanor A.
Vetter, Dennis
Villanueva, Mary H.
Voss, Carrie L.
Wachnin, Janet
Wahe, James
Walker, Sandra Jean
Walker-Crouch, Judy Catherine
Wallace, Mary Lou
Wallace, Tracy Leah
Walters, Julianna
Wareham, Valerie
Warren, Georgia Ann
Warren, Janie M.
Washington, Bessie L.
Washington, Miriam D.
Washington, Roseana
Watson, Deborah
Watson, Donald
Watson, Noreen V.
Way, Shelby Jean
Weathers, Carlis Michelle
Webb, Angelia J.
Webb, Gary
Webb, Keith
Webb, Linda D.
Webb, Marguerite
Weide, Marcia
Weidemann, Monika
Weintraub, Barbara
Weisbond, Carole A.
Weissman, Doris
Wendland, Sandra
Wesley, Elinda
Wessman, Robin
Weston, Jennifer R.
White, Roberta R.
White, Rosie
Whitford, Barbara J.
Wiacek, Donna
Wight, Joanne
Wilkerson, Jamie
Wilkins, An Marie
Wilkins, Catherine
Wilks, Thomas P.
Williams, Barbara
Williams, Barbara H.
Williams Christine
Williams, Connie M.
Williams, Donnie
Williams, John C.
Williams, Laurie
Williams, Marquita C.
Williams, Regina C.
Williams, Tamiko
Williamson, Leanna
Willis, Candice
Wilson, Dolly
Wilson, Janis D.
Wilson, Joyce M.
Wimberly, Sheri
Winans, Russell L.
Wingo, Kathleen R.
Woiken, Doreen
Wolcott, James
Womack, Brenda
Wong, Kathryn H.
Wonzer, Theressa
Wood, Denise J.
Wood, Margaret J.
Wortham, Aimee Joyce
Wozniak, Patricia D.
Wright, Gladys Ann
Wright, Imogene
Wright, Ken
Wyman, Phyllis R.
Yarberry, Tracy K.
Yates, Maria
Yates, Pamela Kay
Young, Ramona
Young, Sharon
Young, Sherry R.
Zacarias, Scolastica M.
Zaccagnino, Tara D.
Zax, Sandy
Zimmer, Kay F.
Zornizer, Phyllis F.
Zurek, Sandra L.
Zurek, Thomas J.

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

IN RE DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	§ § § §	MDL Docket No. 1203
THIS DOCUMENT RELATES TO ALL ACTIONS	§ § §	
SHEILA BROWN, et al v. Wyeth	§	CIVIL ACTION NO.99-20593

CERTAIN CLASS MEMBERS' MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO COMPEL CLAIMS PROCESSING, AND OBJECTIONS TO MEDICAL PRACTICES QUESTIONNAIRES

TO THE HONORABLE U.S. DISTRICT JUDGE:

Come now certain class members represented by undersigned counsel,[1] and respectfully submit this their memorandum of law in support of Certain Class Members' Motion for Protective Order and to Compel Claims Processing, and Objections to Medical Practices Questionnaires, seeking this Court's protection from the Medical Practices Questionnaire "policies" announced by the AHP Settlement Trust:

I. INTRODUCTION

"And things are not what they seem."[2] This Court did not prevent the Trust from seeking information when the Trust pledged to amend its MPQ policy to something more reasonable and represented its course of action to be within the confines of the Settlement Agreement. Yet what was presented six months ago as an investigation consistent with the Settlement Agreement is now revealed as

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[1] Movants are listed on an attachment to the motion. Movants additionally include clients of the undersigned law firms, which object to the Medical Practices Questionnaires on behalf of their clients.

[2] Henry Wadsworth Longfellow, A Psalm of Life, verse 1 line 4, *printed in* SELECTED POEMS: HENRY WADSWORTH LONGFELLOW 333 (Lawrence Buell ed., Penguin Books 1988) (1839). A similar sentiment, "Things are not always what they seem," has been attributed to Phaedrus, Book iv., Fable 2, 5.

a free-wheeling assumption of power to conduct litigation discovery in a settled case and to do so with the boldly announced aim[3] of changing the rules – not just the rules for matrix benefit qualification established in the Settlement Agreement and order approving it, but also the rules that the Trust itself followed and communicated to the physicians it now accuses.[4]

The Trust can institute reasonable, Agreement-compliant methods to prevent the payment of fraudulent matrix claims. But it is one thing to investigate fraud, and another thing to indiscriminately accept the one-sided vitriol of a defendant whose litigation agenda is diametrically opposed to the Trustees' fiduciary duties. The Trust's adopted "grounds" for the MPQs was *opt-out* discovery, in particular, the version of it presented in Wyeth's briefing.[5] If the echocardiograms and interpretations used in opt-out

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[3] The Trust's recent declaration to the effect that it has and is exercising a purported power to unilaterally change the matrix processing procedures articulated in the Settlement Agreement and the Court-Approved audit rules is quoted *infra* at Section III.A.

[4] Also attributed to Phaedrus, Book i., Fable 26, 12, is the adage, "Every one is bound to bear patiently the results of his own example." That the Trust's supervision theories constitute an attempt to change the rules followed by the Trust itself was addressed in previous briefing that is incorporated herewith by reference. *See* Docket Nos. 204599 & 204616, Certain Class Members' Response in Opposition to AHP Settlement Trust's Motions to Disqualify EchoMotion Echocardiograms and to Stay Payment of Claims Supported by EchoMotion Echocardiograms (12/19/2003). Section II.B and the exhibits cited therein describe the Trust's Screening Program.

[5] *See* Exhibit 1, excerpts from 9/23/03 Hearing Transcript, at p. 58:4 (the Trust's reasons for going forward were outlined in Wyeth's brief filed 9/19/03). Wyeth's 9/19/03 brief addressed discovery in opt-out cases. Many of Wyeth's distortions of the opt-out deposition testimony have been rebutted in subsequent briefing by Class Members. *See, e.g.,* Docket Nos. 204599 & 204616, Certain Class Members' Response in Opposition to AHP Settlement Trust's Motions to Disqualify EchoMotion Echocardiograms and to Stay Payment of Claims Supported by EchoMotion Echocardiograms (12/19/03); Docket Nos. 205089 & 205103, Certain Class Members' Response in Opposition to Wyeth's Motions for a Court-approved Procedure and for a Stay of Processing and Payment of Matrix Claims (3/1/04). Further, Wyeth's 9/19/03 Brief in part relies on a reading of the Settlement Agreement that this Court has since rejected. In Memorandum and PTO 3376, this Court determined that "diagnosis" pursuant to Settlement Agreement § I.22.a does not require a treating physician relationship.

cases and in matrix filings are the same, then there is no vast and sprawling fraud particular to matrix claims. The plaintiffs' lawyers were not employing these medical personnel to "get away" with anything in the settlement; these are the same cardiologists and echocardiographers who diagnosed opt-out claimants who are litigating against Wyeth in court. Wyeth has a great motive and a lot of energy to attack them, as it has in serial briefs before this Court. But the issue here is not "fraud," rather, it is a not uncommon, heated disagreement between plaintiffs and defendants in litigation regarding medicine, diagnosis, and injury – issues that Wyeth agreed *to settle* with class members who submitted matrix claims to the "AHP *Settlement* Trust."

Through its MPQ Policy, among other things, the Trust would metamorphose from a Settlement Trust to a Litigation Trust. The Trust is attacking claimants en masse, using the corpus settled for their benefit to perpetrate elaborate investigations and launch unsupported motions engineered to raze the mountain of matrix claims,[6] all in violation of the Settlement Agreement's promises. The disconnect between the Trust's stated goals and its purely adversarial endeavors has become apparent as the MPQ policy has unfolded.

As revealed in Section II below, the Trust's MPQ policies are manifestly unreasonable. The Trust already has the lion's share of answers to the MPQ questions in sworn deposition testimony or affidavit form. But the Trust does not want the information. It is instead angling for an opportunity to squander the corpus on litigation discovery, to force claimants to replace their claims packages without the Trust ever proving any defect in the original submissions, and to extract money from the very claimants that the Trust is duty bound to pay - not the other way around.

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[6] *See* Robert Lenzner and Rob Wherry, Bad Medicine, FORBES, Sept. 1, 2003, at pp. 48-49.

It does not appear that claimants' compliance with the policy will prompt the Trust to audit claims. In stark contrast, the Trust's most recent pronouncement portends that the Trust will simply issue a new round of MPQs after the claimants have done everything to comply with the Trust's demands. As explained *infra* at Section III, the Trust's adoption of *ultra vires* MPQ "substitutes" only reveals that the MPQ policy is founded on the belief that the Settlement Agreement does nothing to fetter Special Counsel. There is no end in sight to this inquisition and no real hope that the Trust will voluntarily recommence the processing and payment of claims per the Settlement Agreement's terms.

II. WHAT THE DOCTORS HAVE TO SAY.

The movants' Green Forms Part II have been attested by one of four cardiologists, discussed below.[7] All four physicians were once hired by the Trust.[8] The purported "medical practices" omissions the Trust belatedly complains of might have been avoided had the Trust instructed these doctors that the Trust requires the taking of blood pressure and imposes particular definitions of supervision, to name just a few examples. Instead, the Trust never issued these instructions.[9] Worse still, if a cardiologist called the

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[7] This is true of each movant named on the list attached to the motion hereto, with eleven exceptions. Eleven claimants' Green Forms were attested by Dr. Bradley Leonard, who previously has been deposed on these issues. *Compare* Docket No. 204165, Wyeth's Opp. to Certain Class Members' Expedited Mot. for an Order Suspending the Claims Integrity Program and MPQs Deadline (9/19/03), at exhibit 9, Deposition of Bradley Leonard, M.D., F.A.C.C., *In re Diet Drugs, Hazelwood v. Wyeth,* MDL No. 1203, Civ. A. 02-20208 (6/26/03).

[8] Exhibit 2, Defendant and Counterclaim Plaintiff Linda J. Crouse, M.D.'s Answer, Additional Defenses and Counterclaims to Plaintiffs' Complaint, *Castle v. Crouse,* Civ. No. 03-5252, United States District Court, Eastern District of Pennsylvania ("Crouse Counterclaim"), at p. 17, ¶ 23; Exhibit 3, Deposition of Stephen A. Bloom, M.D., *Brinkley v. Wyeth,* Nos. 3637, 0422, December Term 2002, Court of Common Pleas, Philadelphia County, Pennsylvania (7/26/03) ("Bloom Dep."), at p. 48:23; Exhibit 4, Deposition of Waenard Miller, M.D., *In re Diet Drugs,* U.S.D.C., N.D.Tex. (6/27/03) ("W. Miller Dep."), at p. 11:2-8, p. 12:1-9, pp. 149:18 - 150:5; Exhibit 5, Deposition of George G. Miller, M.D., *In re Diet Drugs,* U.S.D.C., S.D.Tex. (7/11/03) ("G. Miller Dep."), at pp. 12:14 - 13:2, pp. 15:16-17.

[9] *See infra* at § III.E; Docket No. 204599, at § II.B.

Trust to request information regarding what the Trust wanted, the Trust refused to answer the cardiologist's question.[10] Years after hiring the four doctors and failing to direct them per the Trust's present inquisition, the Trust demands that they complete hundreds of forms, lording over them (in both bold and italics) "***the penalty of perjury***," demanding (in bold, caps, and underlined) that they "**PERSONALLY**" complete each and every page of the repetitive eighteen page form over and over again.[11]

It is no surprise, then, that the cardiologists question the Trust's motives in issuing the MPQs and are cautious in how they respond. As to each physician, the Trust has received the responsive information that is within the movants' ability to provide. However, movants seek protection from the wrongful claims denial threatened by the Trust out of concern that these cardiologists have not abided by all of the Trust's rigid restrictions on how it wishes to receive the information. Further, to the extent that movants *have* abided by the Trust's demands, the Trust still is not processing and paying the claims.

A. Dr. Stephen Bloom, M.D.

Among the ever-increasing ranks of those subjected to the MPQ Policy are class members whose Green Forms Part II were attested by Dr. Stephen Bloom, M.D. Through his lawyer, Dr. Bloom has told class members that he refuses to sign the Medical Practices Questionnaires or to submit to a Trust

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[10] Dr. Polukoff called the Trust more than once and asked for guidance, and the Trust refused to answer his questions. Exhibit 6, excerpts from Deposition of Gerald Polukoff, *In re Diet Drugs,* MDL No. 1203 (8/26/03), at p. 101:13-21 ("I contacted the trust several times for guidelines and guidance and was never once given an answer as to how to fill out ejection fraction or whether to use the same frame or a different frame or what technique do you want to use for evaluation of regurgitant jet areas. It was a complete lack of feedback from the AHP Settlement Trust...."); *see also* Exhibit 2, Crouse Counterclaim, at pp. 28-29, ¶ 71 (Dr. Crouse "and her staff repeatedly contacted the Trust to seek guidance on how the Trust wanted the studies to be done.... Despite numerous such requests for information from the Trust, the Trust never provided any meaningful information to Dr. Crouse or her staff which would have directed them to perform their services as now advanced by the Trustees.").

[11] Exhibit 7, sample MPQ, p. 1, p. 18 (on this copy a cardiologist, presumably under the advice of counsel, struck through ***"the penalty of perjury"*** language with a black line).

deposition.[12] Among his many objections, Dr. Bloom contends that neither the claimants' attorneys nor this Court have the authority to compel him to complete the Questionnaires. "We submit the Court is without jurisdiction to compel Dr. Bloom to fill out MPQ's on your motion or the motions of other claimants' attorneys," his counsel contends.[13] Dr. Bloom's counsel also has authored three pages and twelve paragraphs of objections, which espouse Dr. Bloom's numerous pointed criticisms of the MPQs:

1. The MPQs seek to impose a physician-patient relationship and duties not contemplated by the Settlement or Green Form.[14]

2. The MPQs "seeks to change the terms of the Nationwide Class Action Settlement Agreement...and the methodology for screening claimants...."[15]

3. The MPQs are premature.[16]

4. The MPQs violate fundamental fairness in that the Trust already has condemned Dr. Bloom without providing him or claimants counsel "with any information about the Trust's concerns – let alone evidence – why the Trust audit program reached such a conclusion for each Green Form. Basic fairness requires that Dr. Bloom be advised why the Trust determined each Green Form he prepared is defective...."[17]

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[12] Exhibit 8, Letter from Eisenbrandt to Bates of 3/8/04; *see also* Exhibit 9, Letter from Eisenbrandt to Frenkel of 1/30/04, at p. 2; Exhibit 10, Letter from Eisenbrandt to Frenkel of 10/29/03, p. 2 ("Based on the circumstances as they now exist, we cannot advise Dr. Bloom to undertake the significant commitment of time and effort to complete the Questionnaires.").

[13] Exhibit 8, Letter from Eisenbrandt to Bates of 3/8/04, at p. 2.

[14] Exhibit 8, Letter from Eisenbrandt to Bates of 3/8/04, at attachment, Stephen A. Bloom, M.D.'s Responses and Objections To Medical Practices Questionnaires and Proposed Deposition, p. 1, ¶ 1.

[15] *Id.* at p. 1, ¶ 2.

[16] *Id.* at ¶ 3.

[17] *Id.* at pp. 1-2, ¶ 4.

5. The MPQs are overly broad, burdensome, and confusing. They also are duplicative of the deposition of Dr. Bloom taken by Wyeth on July 26, 2003.[18]

6. The Trust is apparently attempting to take discovery in advance of a lawsuit against Dr. Bloom.[19]

7. The MPQs imply service beyond what Dr. Bloom agreed to in signing the Green Forms.[20]

8. In contrast to authorizing the MPQs, this Court ordered audits in PTO 2662.[21]

9. "The Trust's option that cardiologists submit to a deposition further illustrates that the MPQ is a discovery device rather than a legitimate inquiry into the medical reasonableness of the work performed by cardiologists on behalf of a claimants' counsel." That the answers were already provided in a prior deposition of Dr. Bloom supports this conclusion.[22]

10. The MPQ is misleading in implying standards not required by the Settlement and the Green Form, and Dr. Bloom's objections provide specific examples.[23]

11. "[T]he Trust did not clearly establish the parameters for conducting or interpreting echocardiograms under the Settlement and Green Form as it is subsequently being interpreted."[24]

12. The MPQs place Dr. Bloom in an "untenable position."[25]

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[18] *Id.* at p. 2, ¶ 5.

[19] *Id.* at ¶ 6.

[20] *Id.* at ¶ 7.

[21] *Id.* at ¶ 8.

[22] *Id.* at pp. 2-3, ¶ 9.

[23] *Id.* at p. 3, ¶ 10.

[24] *Id.* at ¶ 11.

[25] *Id.* at ¶ 12.

Undersigned have no ability to dissuade Dr. Bloom from these firmly articulated objections. Indeed, the Trust has ensured, through its secrecy, that claimants cannot even provide Dr. Bloom with the information he requests.[26]

And, Dr. Bloom's counsel is correct in his observation that the MPQs are redundant of Dr. Bloom's deposition testimony – testimony that has been in the Trust's possession for some time.[27] The following chart illustrates that, as observed by Dr. Bloom's counsel, the MPQ questions could have been cribbed from an outline of Wyeth's queries in an opt-out deposition,[28] and therefore already have been asked and answered to Dr. Bloom's ability:

MPQ Question Number	**Citation from Deposition of Dr. Stephen A. Bloom, M.D., *Brinkley v. Wyeth*, December Term, 2002, Nos. 3637 & 0422, Court of Common Pleas, Phil. Co. , PA (7/26/03), Exhibit 3 hereto.**
1 (whether opinion was "to a reasonable degree of medical certainty")	(entirely redundant of Green Form, which states on page 7, "to a reasonable degree of medical certainty")
2 through 9 (the source of information reviewed)	Dep. at pp. 64:9 - 67:21. Indeed, Dr. Bloom explained that his reliance on medical histories was consistent with his clinical practice, in which he relies on questionnaires answered by patients. p. 67:14-21.

[26] Undersigned counsel's efforts to learn why the doctors were subjected to the MPQs in the first instance have been ongoing since the Fall of 2003. Motions to compel and a Motion for Access to Courts are still pending (*see* Docket Nos. 204600, 204601, 204164).

[27] *See* Exhibit 3, Bloom Dep. Undersigned counsel received this document from the Trust; it bears the Trust's bates stamp in the lower right hand corner.

[28] *See* Exhibit 8, Letter from Eisenbrandt to Bates of 3/8/04, at attachment, Stephen A. Bloom, M.D.'s Responses and Objections to Medical Practices Questionnaires and Proposed Deposition, p. 2, ¶ 5 ("In short, the questions put to Dr. Bloom by Wyeth's counsel tracked the questions in the MPQ.").

10 (identification of cardiac sonographer)	Dep. at p. 29:5-22, p. 30:14-16, p. 31:6-8, p. 32:7-15 (identifying sonographers but unable to specify percent by known sonographer).
11 (address of echocardiograms)	Dep. at p. 34:6-16 (some in his office but otherwise he does not know).
12 (whether he relied on sonographers in clinical setting)	Dep. at p. 28:18-19, p. 29:5-22, p. 30:21-23, p. 46:16-23 (discussing clinical relationship with certain sonographers).
13 (make and model of machine)	Dep. at p. 38:15 (Acuson Cypress).
14 & 15 (who if anyone filled out forms other than you)	Dep. at p. 64:4 (no one).
16 & 17 (ambiguous questions regarding who/what he relied upon).	Dep. at p. 20:13-22 (the MPQ question is too ambiguous to really say, but there is a discussion of his review of echocardiogram recordings here); *see also* p. 40:4-13 (discussing work sheets), pp. 40:24 - 41:12 (describing his review), p. 44:16-22 (follow up questions regarding his regurgitation measurement corrections).
18 (time of review)	Dep. at p. 17:7-14 (answering question to best of his general recollection).
19 & 20 (whether and what portion of tape/disk he reviewed)	Dep. at p. 38:8-19 (he reviews echoes from the machine); *see also supra* at answers to Questions 16 &17.
21 & 22 (regarding blood pressure)	Dep. at p. 82:6-8, p. 82:16-17 (explaining that in his clinical practice, blood pressures are not taken before echocardiograms).
23 (regarding direct communication with claimants)	Dep. at p. 68:10-16 (he did not meet patients except for the ones in his office or who came to Kansas City); p. 121:12-13 (he had patients coming to him with echo reports "all the time").
24 (records)	Dep. at p. 73:12-15, p. 73:19 - 74:10 (he has a copy of the final echo report and most of the worksheets).
25 through 28 (medical treatment and patient-physician relationship)	Dep. at p. 69:6-19 (he felt that he had a physician-patient relationship), p. 70:1-3 (following up on patient seeing a cardiologist), p. 70:16-17 (disclaiming legal knowledge regarding line of questioning), p. 121:12-13 (patients came to him with echo reports "all the time").
29 & 30 (medical license)	Dep. at p. 9:11-16.

31 through 33 (reaffirming)	(duplicative of Green Form).
34 (fees)	Dep. at p. 49:6 (charge for echo read); p. 81:2 (no charge for Green Forms); p. 81:13-16 (no other kind of compensation or reimbursement).
35 (contingency fees)	*Id.; see also id.* at p. 126:11-15 ("Absolutely not.").
36 & 37 (about not being paid in full)	Dep. at p. 125:2-5 (he has been paid).
38 & 39	(questions about who filled out MPQ).

Dr. Bloom's counsel has a point when he contends that the Trust is not seeking answers to the MPQs – information that the Trust already had – but is instead using the MPQs as a pretext.

B. Dr. Waenard Miller, M.D.

The pretextual nature of the MPQ exercise is further revealed by the Trust's treatment of Dr. Waenard Miller. Similar to Dr. Bloom, Dr. Miller already had answered many of the questions in deposition testimony available to the Trust. Cooperating further, Dr. Miller completed an Affidavit that answers the substantive questions to the extent he is able to provide answers so long after the fact.[29] This affidavit painstakingly cross-references the MPQ by question numbers.[30] Thus, to the extent that substantive, responsive information is available, it has been provided to the Trust.

But because the Trust's goal was never to obtain these answers in the first instance, the Trust refused to accept the affidavit as satisfactory of the MPQ requirement.[31] The Trust seeks to depose Dr.

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[29] *See* Exhibit 11, Letter from Spivey to Scheff of 2/20/04 (attaching Affidavit of Dr. Waenard Miller Addressing Medical Practices Questionnaire).

[30] *Id.*

[31] *See* Exhibit 12, Letter from Scheff to Spivey of 2/23/04, at p.1 ("Dr. Miller's affidavit does not comply with Trust policy relating to MPQ's and, therefore, is unacceptable.").

Miller, but Dr. Miller's recently retained counsel has refused this request.[32] In correspondence to claimants' counsel, Dr. Miller's attorney explains his reasoning for refusing to allow his client to succumb to the Trust's MPQ policy:

> I have recently been retained by Dr. Miller in regards to a request for Dr. Miller to complete numerous Medical Practices Questionnaires ("MPQ"). It appears from the contents of the MPQ, as well as the fact that a lawsuit has previously been filed against Dr. Richard L. Mueller and Dr. Linda Crouse, regarding services rendered in reviewing various echocardiograms and other records in relation to the Fen Phen class action settlements, that the numerous MPQ's requested to be completed by Dr. Miller are nothing short of proposed free pre-litigation discovery. I am not willing to submit Dr. Miller to such discovery, nor am I willing to produce Dr. Miller for a deposition at this time.
>
> As you are also aware, Dr. Miller has previously testified in a deposition regarding the services he has provided, the records he has reviewed in providing such services, the fact that there was not a physician-patient relationship, and the fees he has received for his services, among other issues. These are essentially the same issues sought in the MPQ's.[33]

The below chart demonstrates that, as claimed by Dr. Miller's attorney, the Trust already has received answers to the MPQs to the best knowledge of Dr. Waenard Miller and has no grounds for deposing him yet again.

MPQ Question Number	**Citation to Deposition of Waenard Miller, M.D., *In re Diet Drugs*, U.S.D.C., N.D.Tex. (6/27/03), Exhibit 4 hereto; or, Affidavit of Waenard Miller Addressing Medical Practices Questionnaire, attached to letter at Exhibit 11 hereto.**
1 (whether opinion was "to a reasonable degree of medical certainty")	(entirely redundant of Green Form, which states on page 7, "to a reasonable degree of medical certainty")

[32] Exhibit 13, Letter from Hunnicutt to Sims of 3/17/04.

[33] *Id.*

2 through 9 (the source of information reviewed)	Dep. at p. 48:2-10 (he reviewed medical questionnaires signed by claimant), p. 48:11-15 (does not know who "administered" the questionnaire), pp. 48:16 - 49:7 (discussing when he would request additional information after review of questionnaire), p. 50:4-6 (regarding procedure). Aff. at ¶ 6 (listing sources of information he reviewed).
10 (identification of cardiac sonographer)	Dep. at p. 14:6-16 (large majority of tapes through program set up by Sharon Lilley). Aff. at ¶ 7 (naming Sharon Lilley and stating that he otherwise does not know).
11 (address of echocardiograms)	Aff. at ¶ 8 (he does not presently know).
12 (whether he relied on sonographers in clinical setting)	Dep. at p. 14:6-16 (large majority of tapes through program set up by Sharon Lilley, who was his former colleague). Aff. at ¶ 7 (with the exception of Sharon Lilley, he does not know of any such reliance).
13 (make and model of machine)	Aff. at ¶ 9 (he does not presently know).
14 & 15 (who if anyone filled out forms other than you)	Dep. at p. 54:25 - 55:9 (nothing filled in other than name and address); p. 52:6-12 (not pre-filled). Aff. at ¶ 10 (completed by him with the exception of claimant's name and his name and office address).
16 & 17 (ambiguous questions regarding who/what he relied upon)	Aff. at ¶ 11 (explaining how he formed his medical opinions).
18 (time of review)	Dep. at p. 46:23-25 (varied), p. 47:7 - 47:15 (describing, generally, a time range), 47:23 - 48:1 (Green Form time variance). Aff. at ¶ 12 (explaining time variance).
19 & 20 (whether and what portion of tape/disk he reviewed)	Aff. at ¶ 13 (explaining review).
21 & 22 (regarding blood pressure)	Dep. at p. 51:6-15 (does not recall and does not recall asking for blood pressures). Aff. at ¶ 14 (cannot recall confirming that blood pressures were not taken).

23 (regarding direct communication with claimants)	Dep. at p. 56:15-17 (only on those occasions when a claimant would have gone to him for treatment after receiving Dr. Miller's initial echo report), p. 60:15-19 (this happened a couple of dozen times). Aff. at ¶ 15 (usually did not communicate directly, with exception of patients who came for treatment).
24 (records)	Dep. at pp. 55:24 - 56:3 (does not have). Aff. at ¶ 16 (he did not retain copy of reports).
25 through 28 (medical treatment and patient-physician relationship)	Dep. at p. 56:9-19 (explaining circumstances of follow-up), p. 60:15-19 (couple of dozen times), p. 131:18-21 (he raised issue of significant valvular disease but did not direct how to proceed). Aff. at ¶ ¶ 17 - 19 (discussing medical treatment and relationship).
29 & 30 (medical license)	Aff. at ¶ 20 (he had valid medical license).
31 through 33 (reaffirming)	(duplicative of Green Form)
34 (fees)	Dep. at p. 20:9-12 ($150 for interpretation and $250 for performance), p. 21:15 ($250 for completing Green Form), pp. 21:25 - 22:1 ($50 for completing gray forms). Aff. at ¶ 21 (disclosing fees).
35 (contingency fees)	Aff. at ¶ 21 (no contingency).
36 & 37 (about not being paid in full)	Dep. at p. 23:15-19 (paid in full). Aff. at ¶ 21 (paid in full).
38 & 39	(questions about who filled out MPQ)

The Trust had most of the answers to the hundreds of boiler-plate questionnaires directed to Dr. Waenard Miller, and to the extent any information is within his present ability to recall and was not answered in a prior deposition, the Trust now has his sworn statements in affidavit form. To the degree that the Trust needed answers to the MPQ questions in the first instance, it now has them. The claimants have no ability to force Dr. Miller to consent to an additional deposition.

C. George G. Miller, M.D.

Dr. George G. Miller recently has agreed to be deposed in lieu of MPQ responses.[34] In addition, many answers already were provided by Dr. Miller in his prior deposition testimony:

MPQ Question Number	**Citation to Deposition of George G. Miller, M.D., *In re Diet Drugs*, U.S.D.C., S.D.Tex. (7/11/03), Exhibit 5 hereto.**
1 (whether opinion was "to a reasonable degree of medical certainty")	(entirely redundant of Green Form, which states on page 7, "to a reasonable degree of medical certainty")
2 through 9 (the source of information reviewed)	Dep. at p. 20:5-9 (it was his practice to occasionally look at medical records), p. 20:14-19 (to his recollection, everyone had a medical questionnaire), 21:14-18 (occasionally but not frequently he reviewed germane medical records).
10 (identification of cardiac sonographer)	Dep. at p. 67:12-14 (as to EchoMotion, he does not know).
14 & 15 (who if anyone filled out forms other than you)	Dep. at p. 110:6-17 (he filled in substantive information; where he received partially completed Green Forms that was only where he had previously provided those answers and the form was sent back to him with the information he had already given).
16 through 17 (ambiguous questions regarding who/what he relied upon).	Dep. at p. 37:9-11 (he looked at every tape), p. 37:12-14 (he looked at every tape in its entirety), p. 37:15-21 (every tape was re-teched), p. 38:2-3 ("I was interpreting and giving my best opinion about the, about the data.").
18 (time of review)	Dep. at p. 46:17 (highly variable).
19 and 20 (whether and what portion of tape/disk he reviewed)	Dep. at p. 37:9-14 (he personally reviewed the echo tapes).
21 and 22 (regarding blood pressure)	Dep. at p. 70:23 (he did not know blood pressure at the time of the echo).

[34] Exhibit 14, Letter from Sims to Scheff of 3/18/04.

23 (regarding direct communication with claimants)	Dep. at p. 18:17-18 (only on those occasions when a claimant would have gone to him for treatment), p. 19:10-22 (not sure whether he met anyone previously).
24 (records)	Dep. at p. 22:14 - 23:11 (he gave back questionnaires and tapes).
25 through 28 (medical treatment and patient-physician relationship)	Dep. at p. 18:17-18 (on occasion claimants came to see him for treatment after he wrote echo report), p. 47:5-16 (explaining that in some cases he communicated with counsel that, "This patient needs to see a doctor in the immediate future ... They're in bad shape," and in some cases he received feedback thereafter), p. 23:11 (he did not consider claimants to be his patients).
31 through 33 (reaffirming)	(duplicative of Green Form)
34-35 (regarding fees)	Dep. at p. 60:23 ($150 for echo interpretation), p. 61:11 ($50 for completing gray form), p. 61:14 ($250 for completing green form, he believes, although not certain).
36 and 37 (about not being paid in full)	Dep. at p. 62:10 (Petroff bills have been paid).
38 and 39	(questions about who filled out MPQ)

D. Linda J. Crouse, M.D.

For each affected Movant, a Medical Practices Questionnaire signed by Dr. Crouse has been submitted to the Trust.[35] Because the Trust sued her for racketeering and fraud, Dr. Crouse has obtained independent counsel, and this lawyer apparently reviewed the MPQs and advised that she strike through a sentence of the certification and refer questions 2 through 39 to a separate attachment. This attachment provides information responsive to several questions,[36] and also lodges the following objections:

[35] Exhibit 15, Letter from Presby to Scheff of 3/12/04.

[36] Exhibit 7, sample MPQ signed by Dr. Crouse, at Attachment "A", Objections and Responses of Linda J. Crouse, M.D. to Medical Practices Questionnaire, pp. 2-3, ¶ 10 (information responsive to Questionnaire questions 34-37), p. 3, ¶¶ 12-13 (regarding questions 23 through 28), p.

1. "[T]he numerous Questionnaires sent to Dr. Crouse are an improper and premature attempt by the Trust to obtain discovery and/or responses to requests for admissions[.]"[37]

2. The Questionnaire places Dr. Crouse in an untenable position.[38]

3. The Questionnaire seeks to mischaracterize Dr. Crouse's engagement and duties.[39]

4. The Questionnaire exceeds the scope of the Green Form and Settlement Agreement.[40]

5. The Questionnaire "is part of a concerted improper attempt by the Trust and Wyeth to improperly deny or slow the payment of legitimate claims, and to change the 'rules of the game,' solely because Wyeth and the Trust significantly under-projected the number of potential claimants, incorrectly established the criteria to qualify for Matrix Benefits, incorrectly failed to establish a uniform protocol for the taking and reading of echocardiograms, and otherwise failed to properly fund and administer the Trust."[41]

6. The Questionnaire "is an obvious 'litigation trap' -- not designed to genuinely assess the medical reasonableness of a particular claim, but rather, a transparent attempt to seek improper discovery and/or admissions to be used by the Trust in lawsuits the Trust has filed or will file against cardiologists and/or attorneys, including the pending RICO Action."[42]

7. The questions are misleading and improperly imply facts regarding what is reasonably necessary or routinely used in the practice of echocardiogram administration.[43]

3, ¶¶ 13, 15 (regarding questions 2, 5-6). In addition, the Trust also has the transcript of Dr. Crouse's testimony before this Court in 2002 and, apparently, the ability to depose her in the RICO case it has filed against her.

[37] Exhibit 7, sample MPQ signed by Dr. Crouse, at Attachment "A", Objections and Responses of Linda J. Crouse, M.D. to Medical Practices Questionnaire, p. 1, ¶ 1.

[38] *Id.* at ¶ 2.

[39] *Id.* at ¶ 3.

[40] *Id.* at ¶ 4.

[41] *Id.* at p. 2, ¶ 5.

[42] *Id.* at ¶ 6.

[43] *Id.* at ¶ 7.

8. The Questionnaire falsely implies that the Green Form required the taking of a medical history or physical examination "when the Green Form and the Settlement Agreement required neither[.]"[44]

9. The information is not medically necessary or routinely used in pertinent medical practice.[45]

10. "[I]t is over broad, unduly burdensome, vague and unreasonable and places an unfair burden on Dr. Crouse to respond."[46]

11. The Green Form states that medical records, et al. "may" be considered, yet "[t]he Questionnaire seeks to mischaracterize the word 'may' to 'must' or 'shall'[.]"[47]

In addition to appending this highly negative feedback to each and every Questionnaire sent to her, Dr. Crouse also has sued the Trustees, alleging that they are racketeers who defamed her and committed fraud, among other things.[48] Dr. Crouse's counterclaim demonstrates the extreme unlikelihood that claimants have any ability to compel her to further submit to the Trust's MPQs. In addition to complaining that "these boilerplate, openly hostile forms ... closely resemble litigation requests for admission," Dr. Crouse's counterclaim contends that, "many of the questions in the MPQ have nothing whatsoever to do with whether a particular claimant has valvular heart disease as set forth in the Settlement Agreement, but rather plainly appear to be aimed solely at building a litigation case against cardiologists."[49] Not mincing words, the counterclaim continues with the declaration that "the MPQs are a sham concocted by the Trustees and their co-conspirators to further their improper scheme to deny payments to tens of thousands

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[44] *Id.* at ¶ 8.

[45] *Id.* at ¶ 9.

[46] *Id.* at p. 3, ¶ 11.

[47] *Id.* at ¶ 15.

[48] *See* Exhibit 2, Crouse Counterclaim.

[49] *Id.* at p. 43, ¶ 125.

of claimants who qualify for benefits under the Settlement Agreement, while simultaneously falsely accusing Dr. Crouse and others of fraud."[50]

In sum, independent counsel hired by Drs. Bloom, Crouse and W. Miller have formed well-articulated conclusions that the MPQs are a pretext and a scam. If cardiologists are not cooperating with the Trust to the degree that it desires, that fact is neither the fault of the claimants nor a legitimate basis to deny the claims.

III. NEITHER THE SETTLEMENT AGREEMENT NOR THIS COURT'S ORDERS IMBUE THE TRUST WITH AUTHORITY TO DEMAND ANYTHING MORE OF THE CLAIMANTS.

A. The Trust Is Refusing to Accord Claimants the Benefits of the Bargain Promised Them in the Settlement Agreement.

In its most recent policy declaration, the Trust essentially admits that it has already unilaterally changed both claims processing and audit procedures, and professes its intent to continue to do so: "The Trust, in adopting this Policy, is not intending to alter or enhance the current opt-out rights, nor the Trust's right to institute such ***other and further changes*** **to the claims process and/or the audit or queuing procedures as it deems appropriate."**[51] Contrary to this grandiose view of its purported unilateral power, the dictates of claims processing are in fact outlined in Section VI of the Settlement Agreement that this Court approved, and only this Court has the authority to promulgate audit rules, as it did most recently in PTO 2807.

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[50] *Id.* at pp. 43-44, ¶ 126.

[51] *See* Exhibit 16, "POLICY: GREEN Form and Replacement Claim Package Substitutions When the Original Claim is Subject to an Outstanding Medical Practices Questionnaire ('MPQ')" dated 3/5/04 (hereinafter "POLICY as of 3/5/04"), at p. 3 (emph. supp.).

The Trust does not have the power it purports to be wielding here. It was represented at the Fairness Hearings that, "[t]he procedures provided for settlement administration are clear, they are nondiscretionary, they do not allow trustees or anyone else to mess around with the claims, they are basically mechanical, they are speedy[.]"[52] In certifying the settlement class and approving the settlement, this Court found that, "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."[53] And, per the Settlement Trust Agreement, the Trust must *follow* the Settlement Agreement, not re-write it.[54]

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[52] Exhibit 17, excerpt from 6/1/00 Hearing Transcript, at p. 56:4-9.

[53] *In re Diet Drugs,* Nos. MDL 1203 & Civ.A. 99-20593, PTO 1415, 2000 WL 1222042, at *63 (E.D. Pa. Aug. 28, 2000).

[54] The AHP Settlement Trust was established "to receive the funds to be paid by AHP and to administer the provision of benefits to the Settlement Class under the terms of the Settlement Agreement and the rights and benefits provided thereunder[.]" (AHP Settlement Trust Agreement, appended to PTO 1419 (hereinafter "Settlement Trust Agreement"), at p.1). The Declaration of Trust requires that the Trustees provide **"benefits to Class Members, all in accordance with the terms and conditions set forth in the Settlement Agreement**." Settlement Trust Agreement, p. 3, Article 2.02 (emph. supp.). The Trust Agreement later repeats that the Trustees may only disburse assets "under the terms of this Settlement Trust Agreement in accordance with the Settlement Agreement." *Id.* at p. 3, Article 2.03. All powers granted to the Trustees are fiduciary powers that the Trustees must exercise in their fiduciary capacities, and any expenditures not provided for in the Settlement Agreement or the Trust Agreement must be "reasonably necessary." *Id.* at p. 5, Article 3.02; p. 11, Article 4.03(c). The Trust only has the power to adopt and amend rules and procedures "**not inconsistent** with the Settlement Agreement, this Settlement Trust Agreement and By-laws[.]" *Id.* at p. 17, Article 6.02(i) (emph. supp.). In short, the Trustees have a fiduciary duty to follow the terms of the Settlement Agreement in paying claims to trust beneficiaries.

The Trust's MPQ policy embodies everything that this Settlement Agreement was designed to prevent. According to the Memorandum and Opinion that decreed the class injunction protecting Wyeth, these claims are *settled* and cannot be denied based on the Trust's "subjective judgment ... in making benefits determinations."[55] Yet the Trust is using the corpus settled to pay claims to instead attack cardiologists Wyeth seeks to discredit in opt-out litigation. The Trust's fiduciary duties to its beneficiaries, however, preclude the Trust from taking Wyeth's side in this fight.[56]

B. The Trust Admitted That It Has No Power to Deny Claims as an MPQ Penalty.

At the hearing on the issue of whether the Claims Integrity Program should be suspended, the Court expressed skepticism regarding both the Trust's threat to deny claims and the Trust's decision to force cardiologists to personally fill in answers on copious forms.[57] The Trust's Special Counsel agreed that the

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[55] Mem. & PTO 1415, 2000 WL 1222042, at * 63.

[56] *See, e.g., In re Trust Under Agreement of David H. Keiser, Dated December 23, 1925,* 392 Pa. Super. 146, 150 n.2, 572 A.2d 734, 736 n.2 (1990) ("'The Trustees should occupy a neutral and indifferent attitude in any controversy between the real parties in interest, and clearly they ought not be allowed to litigate the claims of one such interested party as against another[.]'" (quoting *Annot.*, 6 A.L.R.2d 147, 149 (1948))); *In re Main, Inc.*, No. 98-158, 1999 WL 330239, at *6 (E.D. Pa. May 24, 1999) ("It appears syllogistic that using constructive trust funds to pay counsel for litigating against the trust beneficiary is not in the trust beneficiary's interest, but obviously it must be said here."). In *Main,* the Eastern District of Pennsylvania remanded to the bankruptcy court for factual findings on whether the expenditure of trust corpus on litigation fees was a breach of fiduciary duty. In *In re Main, Inc.*, 239 B.R. 59, 71 (Bankr. E.D. Pa. 1999), the bankruptcy court ordered the return of sums paid in legal bills.

[57]Exhibit 1, Excerpts from 9/23/03 Hearing Transcript, at pp. 68:20 - 69:9 ("I can certainly permit this questionnaire to go forward without necessarily endorsing all the language in the cover letter that if you don't return it, you are out-of-Court, so-to-speak.... [E]ven if I let it go forward, it would not be total endorsement that, all right, you are out, if you don't submit it by the 15th, regardless of what the circumstances are[.]"), p. 70:16-19 ("Certainly by letting it go forward does not mean that I'm endorsing anything that the Trust wants to do with it down the road, because I don't know what they are going to do in specifics."), p. 94:23 - 95:4 ("But to print in 1,000 times, the job titles, first names and last names of people. That is, I mean, I just think you, as a lawyer, had to personally fill out a form, you could not have a legal assistant do it or paralegal or your secretary do it. You had -- you were

Medical Practices Questionnaires' cover letter needed to be modified.[58] Specifically, the Trust's counsel agreed to change the letter's blanket statement that the claims would not be processed without a returned Questionnaire.[59] "[T]he Trust is not assuming that it has the authority to deny a claim," the Trust then said.[60] Special Counsel also stated that, "if somebody simply refused to, you know, they were not going to do it, we tried and tried and tried, and it ended up in a brick wall, then that would be treated as an incomplete claim, and we would come to Your Honor for relief at a certain time."[61] According to the statements of Trust's counsel in open court, the Trust has neither the authority to deny claims on MPQ grounds nor the intent to act unilaterally if the cardiologist refused to complete the MPQ. This, however, is not the MPQ policy the Trust now attempts to enforce, as the next section explains.

C. The Trust's Present MPQ Policy Is Inconsistent with the Settlement Agreement.

Notwithstanding its disclaimers in open court, the Trust has since announced two MPQ "substitution" policies, both of which are premised on the Trust's presumed authority to change the

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ordered to do it yourself, that would be pretty onerous, wouldn't it?), pp. 104:21 - 105:7 ("I certainly wouldn't be prepared to rule in any event in that regard to say that even if I let it go forward, that I'm saying that that is going to have a binding effect. Clearly, that would not be the case for the reasons we have stated. We would have to look at the equities of some of these situations, plus the time factor involved, so there are a lot of – I see some problems down the road, but I also think that the Trust does have a right to get information if it is not inconsistent with the Settlement Agreement to determine if there is fraud so long as what they are doing is reasonable.").

[58] Exhibit 1, excerpts from 9/23/03 Hearing Transcript, at p. 50:5-10 (COURT: "So your blanket statement that this is not going to be processed if it is not returned may have to be modified. MR. SCHEFF: I think it does and in all honesty, that one phrase in the cover letter does have to be modified.").

[59] *Id.*

[60] *Id.* at p. 50:14-15.

[61] *Id.* at pp. 50:22 - 51:1.

Settlement Agreement's claims requirements.[62] Pursuant to the Trust's new edicts, the penalty for failing to submit a "completed" MPQ or conform to one of the Trust's unilaterally devised "substitutions" is that, "the claim will be *denied* in accordance with the provisions of Section VI.E.3 of the Settlement Agreement."[63] Neither this nor any other provision of the Settlement Agreement grants the Trust authority to deny claims as a penalty for noncompliance with its protean MPQ policy.

That the Trust is making up claims criteria as it goes along is evident from the fact that the demands change with the seasons. The original policy, confected in the late Summer of 2003, required the cardiologists to personally complete the Medical Practices Questionnaires – presumably to scrawl in their own hands, hundreds of times over, redundant answers to the same questions, an admittedly onerous process that the Trust imposed to encourage the doctors to "focus."[64] In the Autumn, the Trust decided that depositions would be acceptable, but under draconian conditions, such as advance stipulations that the answers would apply to "each and every pending claim," that "all questions relating to the validity of all pending claims" would be answered regardless of whether those questions were set forth in the MPQ, and that unspecified documents "requested by the Trust" had to be produced.[65] Now as the Winter of

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[62] *See* Exhibit 16, POLICY as of 3/5/04, at p. 2; Exhibit 18, excerpt from "MPQ POLICY - APPROVED NOVEMBER 6, 2006," downloaded from the AHP Diet Drug Settlement web page, http://www.settlementdietdrugs.com/index.cfm/fuseaction/sdd.news/index.cfm (dated 11/20/03) (hereinafter POLICY as of 11/06/03), at ¶ 5.

[63] Exhibit 16, POLICY as of 3/5/04 at p. 2 (emph. in original); *see also* Exhibit 18, POLICY as of 11/06/03, at ¶ 5.

[64] Exhibit 1, excerpts from 9/23/03 Hearing Transcript, p. 95:5, p. 95:11.

[65] Exhibit 18, POLICY as of 11/06/03, at ¶ 4. Fox Rothschild objected to these conditions and noted that, "The Trust's offer that a certifying cardiologist may submit to a deposition, under the foregoing conditions, in lieu of responding to the Questionnaire, makes clear that the Questionnaire is really intended as litigation discovery, rather than to assess the medical reasonableness of a particular claim." Exhibit 7, sample MPQ of Dr. Crouse, at Attachment A, p. 2 ¶ 6. Further, the stipulation as

2004 ebbs into Spring, the Trust announces another version of the MPQ policy, a compulsory $1,250.00 "deposit" and the submission of an entirely new GREEN Form or new replacement package as a substitute for a completed MPQ.[66] Contrary to the Trust's *ipse dixit* policy proclamations, the Settlement Agreement does not grant it authority to deny claims as a penalty for non-compliance with any of these criteria. What the Trust euphemistically dubs as its MPQ "policy" is in truth a string of *ultra vires* acts. The Trust continues to draft new claims criteria notwithstanding that the Trust only has the power to abide by the Agreement – not to rewrite the Agreement.[67]

To camouflage its MPQ policy as something the Agreement purportedly condones, the Trust invokes Agreement Section VI.E.3, which provides in pertinent part that:

> With respect to Claims which are selected for audit, the Trustees ... may require that the Class Member(s) provide them with the following information as a condition to consideration of the Claim:
>
> a. Identification of general practitioners....
>
> b. Fully completed and executed authorizations....
>
> c. Such other relevant documents or information within the Class Members' custody, possession, or control as may reasonably be requested by the Trustees and/or Claims Administrator(s).

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written is potentially impossible. A cardiologist could not stipulate in advance that his deposition answers would apply to "each and every claim" unless he remembers the answers as to each and every claim. The stipulation appears to demand that any exception to general practices must be recalled and recounted in the deposition, which might be impossible.

[66] Exhibit 16, POLICY as of 3/5/04, at p. 1. The replacement package criteria include features that have no apparent purpose other than to inconvenience claimants. For example, the Green Form replacement package must include a new Part I and a new Part III, notwithstanding that the only substantive change is a new signature on Part II. *See id.*

[67] *See supra* note 54.

> If the Class Member unreasonably fails or refuses to provide any material documents or information after being afforded an adequate opportunity to do so, the Class Member's Claim shall be denied.[68]

This section of the Settlement Agreement does not vest the Trust with authority to deny claims as punishment for not returning a completed MPQ or not "substituting" for the MPQ. The Trust is using the MPQs as a ruse to force claimants to comply with commands that the Trust has no colorable authority to make.

The substitutions invented by the Trust are obviously beyond the pale of anything the Trust has the authority to demand of Claimants. As to the Autumn "substitution," a person other than the class member submitting to a deposition under the Trust's obnoxious (and potentially impossible) terms is not a "relevant document[] or information within the Class Member's custody, possession, or control," which is the only thing the Trust may request pursuant to Section VI.E.3. And the Trust cannot seriously contend that the payment *of money* to the Trust as required in the March 2004 substitution is a "document" or "information," or that the Agreement empowers the Trust to demand new and different signatures on Agreement-compliant submissions. Claimants also object that this purported option is entirely illusory in that the Trust portends in its Policy statement that it can simply issue another MPQ.[69]

What the Trust has done is to confect improper, extra-Settlement conditions under the guise of "substitutes" for the MPQs. If the MPQs are not a basis for denying the claims in the first instance, then the availability of substitutions *that the Trust is unauthorized to demand* does not help matters. As

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[68] Settlement Agreement § VI.E.3, p. 118.

[69] Exhibit 16, POLICY as of 3/5/04, at p. 2. In an effort to obtain information regarding this warning that the entire effort may be for naught at the apparent whim of the Trust, undersigned wrote to the Trust's counsel seeking information. Exhibit 19, Letter from Presby to Scheff of 3/8/04. A substantive response has not been forthcoming at this time.

cardiologists' counsel have observed, the fact that the Trust is using the MPQs as a ruse to achieve other ends casts doubt on the legitimacy of the MPQs.[70]

Because the Trust has no authority to demand the "substitutions," the issue remains whether non-submission of an MPQ would allow the Trust to deny the claim in the first instance. That answers to extra-Settlement questions were not submitted in a particular form is no basis for denial of claims that qualify for payment under the Agreement's stated terms. This is true for at least two primary reasons described below. As described *infra* at Subsection III.D, whether the cardiologists answer the MPQs (or submit to a deposition) is not "within the Class Members' custody, possession, or control." Second, as Subsection III.E explains, the MPQs are not relevant, material, or reasonable.

D. Whether the Cardiologists Submit to the MPQs Is Not a "Document[] or Information within the Class Member's Custody, Possession, or Control."

Settlement Agreement Section VI.E.3.c and CAP No. 4 ¶ 7 only allow the Trust to require *Class Members* to submit additional medical records or information "within the Class Member's custody, possession, or control."[71] Neither allows the Trust to direct *physicians* to answer new, extra-Settlement questions about the physicians' state of mind and present memories. Further, the Trust has no power to deny claims as a penalty for noncompliance with a Trust request unless the claimants' noncompliance was

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[70] Exhibit 8, Letter from Eisenbrandt to Bates of 3/8/04, at attachment, Stephen A. Bloom, M.D.'s Responses and Objections To Medical Practices Questionnaires and Proposed Deposition, p.3, ¶ 9 ("The Trust's option that cardiologists submit to a deposition further illustrates that the MPQ is a discovery devise rather than a legitimate inquiry into the medical reasonableness of the work performed by cardiologists on behalf of a claimants' counsel.").

[71] Settlement Agreement § VI.E.3.c, p. 118; CAP No. 4, p. 3, ¶ 7.

"unreasonabl[e]."[72] Because the movants' failure to puppet the cardiologists is not unreasonable, the Trust cannot deny their claims.

The premise of the MPQ demand has been the Trust's insistence that claimants have control over their "experts." That the certifying physician is akin to an expert is insufficient to establish "control," as the Trust has assumed. For example, in *Clark v. Vega Wholesale, Inc.*,[73] the defendants filed a motion to compel the signing of a release form to obtain the plaintiff's medical records. The defendants argued that the plaintiff had control over her medical records, which were in her doctor's control. The court disagreed. Specifically, the court considered the "relationship between the party and the person or entity having actual possession of the document."[74] Within this relationship, the party must have "exclusive" control of the documents before production is required.[75] The court concluded that the relationship between the doctor and the plaintiff was insufficient to establish control.[76]

Even if the certifying physicians are under class members' control, which is denied, neither CAP 4 nor the Settlement Agreement calls for class members to "create" documents. As the care and custody language has been interpreted in the context of Federal Rule of Civil Procedure 34, it does not require a

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[72] Settlement Agreement Section VI.E.3, p. 118.

[73] 181 F.R.D. 470, 472 (D. Nev. 1998).

[74] *Id.*

[75] *Id.*

[76] *Id.*; *see also Greene v. Sears, Roebuck & Co.*, 40 F.R.D. 14, 16 (N.D. Ohio 1966) (office records not under plaintiff's control); *First State Bank of Junction City, Kan. v. Deere and Co.*, No. 86-2308-S, 1991 WL 46375, at * 1 (D. Kan. Mar. 15, 1991) (documents in possession of a non-party expert witness were not under the plaintiff's control, even though he was the plaintiff's expert witness); *see generally Magee v. The Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 633 (E.D. N.Y. 1997) (the defendant had to serve subpoenas on the plaintiff's doctors to produce documents at their depositions).

party to "prepare, or cause to be prepared" new documents merely to respond to requests for production.[77] Thus, where there are no documents in existence, a party may not be compelled to "create" documentary evidence.

Moreover, the Questionnaires not only request "information," but also demand additional acts. Question 31 asks the physician to "re-affirm" the Green Form Part II.[78] This unabashedly antagonistic demand is neither a request for medical records nor a request for information.

As a result of the Trust's undertaking to intimidate and penalize medical professionals who assisted fen-phen victims, many doctors are hiring their own lawyers, and those lawyers very quickly realize that succumbing to the Trust's investigation is about as smart as the teenage girl in a grade B horror movie sauntering into a haunted house. It is one thing to request information, but another thing to do it in an openly threatening manner. By crafting an undeniably onerous form,[79] by demanding that physicians "**PERSONALLY**" answer the same redundant questions hundreds of times over notwithstanding that the Trust already has this very information,[80] by placing the words "***under penalty of perjury***" in both bold and italics hundreds of times over in papers addressed to these doctors,[81] the Trust has itself engineered the class's loss of "control." Now, the Trust wishes to use the situation it created as a basis for denying the claims.

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[77] *See Alexander v. F.B.I.*, 194 F.R.D. 305, 310 (D. D.C. 2000) (cit. om.).

[78] *See* Exhibit 7, sample MPQ, at p. 14.

[79] *See* Exhibit 1, excerpts from Hearing Transcript of 9/23/03, at p. 95:5.

[80] *See id.* at p. 95 (discussing why Trust wants physicians to personally fill in each form); *see also* Section II, *supra.*

[81] *See* Exhibit 7, sample MPQ, at p. 18 (emph. in original).

As to the four doctors at issue here, three have hired independent counsel who have penned detailed objections which remove any doubt that these cardiologists are not going to surrender to the Trust's MPQ "scam" merely because the claimants ask them to.

In short, the Settlement Agreement language cannot be contorted to fit the Trust's MPQ policy. To the limited extent there was responsive information that the Trust did not already have, that information has been provided to the extent it reasonably could be. The Trust has no power to penalize the claimants for the cardiologists' failure to personally create and re-affirm hundreds of documents in the onerous format demanded by the Trust.

E. The Questionnaires Are Not a Basis for Denial Because They Are Not "Relevant," "Material," and "Reasonable."

Neither authority that the Trust has advanced in the course of its shifting MPQ policy condones the interrogation of physicians on extra-Settlement grounds. The Settlement Agreement provision invoked by the Trust only extends to "**relevant** documents or information ... **reasonably** ... requested" and only authorizes the Trust to deny claims in the face of unreasonable failure or refusal to provide "**material** documents or information."[82] CAP No. 4 ¶ 7 requires that "the Trust has **reasonable grounds** that a claim or group of claims for Matrix Compensation Benefits has not been submitted in accordance with the Settlement Agreement, reflects any of the practices determined inappropriate by the Court..., contains misrepresentations of material fact, or suffers any other circumstance questioning the legitimacy of the claim(s)."[83] Thus, to exercise its authority under the Agreement and this Court's order: 1) the information must be relevant; 2) material information must have been unreasonably withheld by the claimant; and, 3)

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[82] Settlement Agreement § VI.E.3, p. 118 (emph. supp.).

[83] CAP No. 4 ¶ 7 (emph. supp.).

the Trust must have reasonable grounds to contend that there has been a breach of the Agreement or court order, material misrepresentation, or claim illegitimacy to request the information in the first place. The Trust does not have authority to deny or further delay the claims under the guise of its MPQ policy because the Trust cannot satisfy these requirements.

1. The Difference Between the Form in Which the Information Has Been Provided and the MPQ Form Is Not "Material," as Required in Settlement Agreement § VI.E.3.

As detailed *supra* at Section II, the Trust has received information responsive to the MPQs in one form or another. The issue under the Settlement Agreement, then, is whether the Class Members' failure to submit the information in the identical form demanded by the Trust is "material." From the perspective of collecting information, which is the only proper purpose under Section VI.E.3, answers in sworn deposition testimony or in a sworn affidavit are not *materially* different from answers on an MPQ form. The difference the Trust has described between its MPQ form and an affidavit is the Trust's belief that the cardiologists will "focus" more if the MPQ is more onerous.[84] But where the questions are substantially the same, as for example in the Waenard Miller, M.D. affidavit and the Drs. Miller and Bloom depositions recited above, the Trust's desire to see the cardiologists endure greater inconvenience does not establish a material difference in the information itself. Therefore, Section VI.E.3 does not authorize claim denial.

2. The Questions Are Neither Relevant Nor Reasonable.

Even were there a material difference arising from the form in which the information appears, which is denied, the claims cannot be denied for the second, independent reason that the Trust cannot establish either the relevance of the information nor the reasonableness of the demand for it.

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[84] *See* Exhibit 1, excerpts from Hearing Transcript of 9/23/03, at p. 95.

a. Medical History Questions.

Two of the cardiologists' counsel specifically have objected to the MPQ questions that interrogate doctors on their sources of information.[85] Specifically, the Green Form Part II tells cardiologists that they "may" consider and use medical records, not that they must,[86] and the cardiologists' counsel object to the manner in which the Trust seeks to distort the Green Form requirements.

The medical history issue was resolved by this Court when it approved the Physician Verification and DDR Acknowledgment form in PTO 2805, which calls for review of medical records or a patient interview. The four doctors who have received the MPQs have not signed that form on behalf of the movants. The medical history and examination requirement of the Physician Verification form was not spelled out in the Settlement Agreement or in the Green Forms Part II that the four doctors did sign.[87]

Nor did the Trust otherwise communicate this alleged requirement in any timely fashion. The Trust did not require its cardiologists in the Screening Program to take medical histories from class members.[88]

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[85] *See* Exhibit 7, sample MPQ, at pp. 4-9, Questions 2 through 9; *Id.* at Attachment A, p. 3, ¶ 15; Exhibit 8, Letter from Eisenbrandt to Bates of 3/8/04, at attachment, Stephen A. Bloom, M.D.'s Responses and Objections To Medical Practices Questionnaires and Proposed Deposition, p. 3, ¶ 10.

[86] Green Form, p. 7.

[87] *See also* Docket Nos. 205089 & 205103, Certain Class Members' Response in Opposition to Wyeth's Motions for a Court-approved Procedure and for a Stay of Processing and Payment of Matrix Claims (3/1/04), at § VI., pp. 23-26. This brief and the associated exhibits are incorporated herewith by reference.

[88] *See* Exhibit 20, Affidavit of Anita C. Pridemore; Exhibit 21, Affidavit of David Schrier; Exhibit 22, Affidavit of Michelle Hibbard; Exhibit 23, Affidavit of Mary Hoffman Dorgan; Exhibit 24, Affidavit of Annie Castle. Moreover, the Trust's form letters, including those instructing "exactly" what is required, omit any instruction to take medical histories. *E.g.*, Exhibit 25, Deposition of Robert A. Mitchell, Jr., *In re Diet Drugs,* U.S.D.C., E.D. Pa. (11/14/02), (hereinafter "Mitchell Dep.") at deposition exhibit 4. *See also generally* Docket Nos. 204599 & 204616, Certain Class Members' Response in Opposition to AHP Settlement Trust's Motions to Disqualify EchoMotion Echocardiograms and to Stay Payment of Claims Supported by EchoMotion Echocardiograms

Moreover, when the Trust's executive director was asked in his 2002 deposition what the requirement was, he testified that, "I think it would be up to the physician to decide what was appropriate in order to be able to fill out those – to respond to those questions."[89] That the Trust changed its mind is no reasonable grounds to badger doctors about examinations that the Settlement Agreement did not require.

b. Names, addresses, make and model.

Questions 10-13 demand disclosure of what the cardiologist knew and can now recall about the sonographer, the location of the echocardiogram, the echocardiogram machine, and the cardiologists' past history with that sonographer.[90]

The irrelevance of these questions is apparent from the Trust's own Screening Program, in which these doctors participated. The Trust did not require its Screening Program physicians to use echocardiographic equipment in the physicians' own offices, or that the physicians have any particular knowledge or association with the sonographers, the echocardiogram facilities, or the echocardiographic equipment. Instead, Screening Program physicians were specifically advised that if they did not possess echocardiographic equipment in their office, then they should "call CCN at 800/226-5116 to identify the nearest network provider who may have this equipment."[91] Thus, Trust executive director Mitchell admitted, as he had to, that Screening Program physicians were not required to have echocardiograms in their offices and were told to call the Trust's contractor for a facility to send a patient to.[92]

(12/19/2003). Section II.B and the exhibits cited therein describe the Trust's Screening Program.

[89] Exhibit 25, Mitchell Dep., p. 74:16-19.

[90] *See* Exhibit 7, sample MPQ, pp. 9-10.

[91] Exhibit 25, Mitchell Dep., at deposition exhibit 2, p. 2.

[92] Exhibit 25, Mitchell Dep., p. 24:24 - 25:1.

That the MPQ questions unreasonably beleaguer claimants' doctors is further demonstrated by the fact that the Trust's consultant Dr. Dent could not identify the precise make and model of the echocardiogram machine used in a case in which he testified.[93] And Wyeth's retained expert Dr. David Elizardi also testified that when he reads echocardiograms in a clinical setting, he feels no need to know either the model of the machine or its manufacturer.[94] These questions serve no reasonable purpose.

c. Post hoc requests for details are unreasonable.

It is unjust to allow the Trust to demand information extraneous to the Green Form Part II for the additional reason that the physicians are not likely to remember many of the irrelevancies asked of them. For example, Question 18 queries how long it took "to form your opinion."[95] Physicians cannot reasonably be expected to recall such information long after the fact as to each named claimant. Were there a

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[93] Exhibit 26, excerpts of Deposition of John Dent, M.D., *Rives v. Wyeth,* No. 001503, Court of Common Pleas, County of Philadelphia, Pennsylvania (8/20/03), at pp. 38:17 - 39:11 (discussing different possibilities but unable to name with definite precision). When asked, the most Dr. Dent could do was identify the machines that would have been available, not what was actually used.

[94] Dr. Elizardi testified:

Q. And in that situation [when a tape is sent to a cardiologist to be read in a clinical setting], do you need to know what type of machine was used?
A. No.
Q. Do you need to know the model of the machine?
A. No.
Q. Manufacturer?
A. No.
Q. Just doesn't matter, does it?
A. As long as it's a good quality study, it doesn't matter.

Exhibit 27, excerpts of Deposition of Dr. David Elizardi, *In re Diet Drugs,* MDL No. 1203 (8/28/03) (hereinafter "Elizardi Dep."), at p. 47:12-22.

[95] Exhibit 7, sample MPQ, p. 12.

requirement that such information be provided to the Trust, then the only realistic way for any claimant to do so with specificity would be if the Green Form requested it or at least gave notice that such data must be preserved. In stark contrast, the class was told that benefits were based on "appropriate information in the claim form"[96] – not on information capriciously demanded long after the fact. When the Trust hired these doctors as part of the Trust's Screening Program, the doctors likewise were told that the Trust did *not* require retention of claimants' echocardiogram tapes,[97] revealing the Trust's disinterest in record retention.

Once the MPQ questions were omitted from the Green Form, it is too late in the day to ask them now. The Questionnaires' post hoc requests deviate from any remote concept of fairness and telegraph the irrational lengths to which the Trust is going to fabricate reasons not to pay claims.

d. Blood pressure is a red herring.

The MPQs interrogate the cardiologists regarding whether they directed that blood pressures be taken prior to the echocardiograms.[98] The Trust has no grounds, reasonable or otherwise, to ask these questions.

Neither the Settlement Agreement nor the Green Form Part II articulates any requirement regarding blood pressure, and the Trust did not require that its Screening Program cardiologists or echocardiographers take blood pressures.[99] Nor are blood pressures a necessary part of the clinical

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[96] 2000 WL 1222042, at * 63.

[97] *See* Exhibit 28, form correspondence, at Bates Nos. AHP-SCR 0008 ("You can discard the original tape once you have received payment for that claimant."); AHP-SCR 0010 (same).

[98] Exhibit 7, sample MPQ, at pp. 12-13, Questions 21 and 22.

[99] *See, e.g.,* Exhibit 24, Affidavit of Annie Castle ("no blood pressure readings were taken"); Exhibit 23, Affidavit of Mary Hoffman Dorgan (same); Exhibit 22, Affidavit of Michelle Hibbard

practice relating to echocardiography. Wyeth's own expert cardiologist, Dr. David Elizardi, has testified that when an internist sends a patient for an echocardiogram, the standard practice in the United States is that the patient's vital signs, including blood pressure, are not taken.[100] A cardiologist does not need to know "anything whatsoever" about blood pressure in order to determine whether a patient has left-sided valvular heart disease and complicating factors such as enlarged left atrium or reduced ejection fraction.[101] Dr. Elizardi had never in his twenty years of medical practice *heard of* any echocardiography criteria that required blood pressures:

> Q Have you ever[] heard it said that to provide an echocardiogram and to render an echocardiographic diagnosis, you need to have blood pressure on the patient?
>
> A My familiarity with echocardiographic grading criteria does not include a blood pressure.
>
> * * *
>
> Q And you think you're practicing good medicine when you preform an echo without having any idea what a person's blood pressure is. Right?
>
> A I think if they come for an echo, and they get an echo that's interpretable, I think I'm performing a good service.
>
> * * *

(same); Exhibit 21, Affidavit of David Schrier (same); Exhibit 20, Affidavit of Anita Pridemore (same); Exhibit 29, Affidavit of Carolyn Jester (same); Exhibit 30, Affidavit of Patricia Sweet (same).

[100] Exhibit 27, Elizardi Dep., pp. 57:16, 58:11-13.

[101] Wyeth's retained expert testified:

> Q If I say, Doctor, what I want to know on this patient is: Does she have left-sided valvular heart disease; and if so, does she have any complicating factors associated with it; such as, an enlarged left atrium or reduced ejection fraction? Do you feel you need to know anything whatsoever about their blood pressure status in order to give me your opinion?
>
> A No.

Exhibit 27, Elizardi Dep., p. 58:14-23.

Q And you've never heard of anybody who's said otherwise, have you, in your 20-plus years in clinical medicine?

A I'm not aware of any echocardiographic criteria for grading echocardiograms that include blood pressure as part of the formula.[102]

Another Wyeth expert, Dr. Peter Stack, stated that he did not believe that blood pressure had been taken in connection with the echocardiograms that he had observed.[103] Wyeth's expert Dr. Stoddard testified that in the vast majority of patients blood pressure has no effect on the level of regurgitation.[104]

The blood pressure red herring illustrates how the Trust has allowed itself to become a tool of Wyeth's litigation goals. Wyeth apparently is fomenting a theory in its opt-out cases that uses blood pressure as a means of challenging *causation.* Yet class members were promised in PTO 1415 that if they agreed to submit matrix claims, then causation defenses were waived.[105] Class members' counsel were certainly not on notice that doctors needed to run tests that are relevant, if at all, to issues that Wyeth had waived in the Settlement Agreement.

In short, blood pressures are nowhere required in the Settlement Agreement, were not required to be taken in the Trust's Screening Program, and certain of Wyeth's own seasoned experts could articulate no cogent reason why cardiologists would require blood pressures to be taken in association with echocardiograms. It is simply perverse, then, for a Court-supervised Trust to force Board Certified

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[102] *Id.* at p. 57:17 - 59:5.

[103] Exhibit 31, excerpts from Deposition of Peter S. Stack, M.D., *In re Diet Drugs,* MDL 1203 (9/25/03), at p. 54:20.

[104] Exhibit 32, excerpts from Deposition of Marcus Stoddard, *In re Diet Drugs,* MDL 1203 (7/10/03), at p. 91:8-11.

[105] *In re Diet Drugs,* MDL 1203, 2000 WL 1222042, at * 22 (E.D. Pa. August 28, 2000) ("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.").

cardiologists across the country to write in their own hand, hundreds of times over, that they did not do something that they had no reason to do. That it pleases Special Counsel to "focus" the cardiologists on something irrelevant to both clinical practice and the Settlement Agreement is insufficient reason for harassing licensed professionals in this manner.

e. The MPQs are based in part on Wyeth's rejected "diagnosis" theory.

Questions 26-28 of the MPQs ask whether the cardiologists are treating claimants, whether they provided referrals, and whether they sought to limit a physician-patient relationship.[106] These questions are not relevant – according to the Trust's own correspondence and statements to cardiologists in the course of the Screening Program. Attached is a Trust form letter to one of the cardiologists at issue, Dr. George Miller, in which he was told that, "This screening is for diagnostic purposes only and will not cover the treatment of any medical problems diagnosed during the echocardiogram."[107] Thus Dr. Miller and the other screening cardiologists were told *by the Trust itself* that they could diagnose regurgitation based on echocardiogram interpretation without providing "treatment of any medical problems."

The Trust was speaking consistently with the Agreement *then*, and is ignoring the Agreement now. This Court recently rejected Wyeth's argument that the Settlement Agreement will not allow a "diagnosis" unless it is made by a treating physician.[108] Wyeth's incorrect, revisionist history of what the Agreement

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[106] Exhibit 7, sample MPQ, at pp. 13-14.

[107] Exhibit 33, AHP Settlement Trust Facsimile Transmission to George Miller of 6/7/02, at page 4/11.

[108] *See* Mem. & PTO 3376, p. 3 (discussing Settlement Agreement § I.22.a).

allegedly requires was the unfounded basis for these MPQ questions.[109] Wyeth's inaccurate, post hoc "requirements" are not a reasonable basis for interrogating physicians.[110]

f. The fee questions are irrelevant and unreasonable.

In addition to being told that they need not provide medical treatment, Screening Program doctors such as those at issue here were instructed by the Trust that they were "free to charge Class Members fees associated with the time it takes to complete these GREEN Forms."[111] When Trust director Robert Mitchell was asked by a plaintiffs' lawyer whether Mitchell had an opinion regarding what an appropriate

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[109] *Compare* Exhibit 1, excerpts from 9/23/03 Hearing Transcript, at p. 58:4 (the Trust's reasons for going forward were outlined in Wyeth's brief filed 9/19/03). Wyeth's 9/19/03 Brief in part relies on a reading of the Settlement Agreement that this Court rejected in Memorandum and PTO 3376.

[110] Take for example Question 25, which asks whether "the Claimant ha[s] a cardiac condition that warrants or requires treatment." Exhibit 7, sample MPQ, at p. 13. The Green Form effectively instructs cardiologists that he or she is not responsible for such fact:

> A claimant who qualifies for a particular Matrix payment, by virtue of a properly interpreted Echocardiogram showing the required levels of regurgitation and/or complicating factors, after exposure to Pondimin and/or Redux, **shall not be disqualified** from receiving that Matrix payment if a subsequent Echocardiogram shows that the required levels of regurgitation and/or complicating factors **are no longer present**.

Green Form Part II, at p. 7 (emphasis supplied). Thus the Green Form essentially instructs that the Trust has no interest in the claimant's condition at the time a claim is submitted. That being the case, the Trust has no grounds for inquiring about the claimant's condition long after the fact, whenever the Trust deigns to ask the question.

See also Docket No. 204753, Certain Class Members' Amicus Brief in Support of Annette Kerr and Roberta Rains' Opp. to Wyeth's Eligibility Challenge (1/21/04), which is incorporated by reference.

[111]Exhibit 25, Mitchell Deposition, at deposition exhibit 8, p. 2. In addition, Mitchell testified that the cardiologists hired by the Trust in the Screening Program could charge an additional fee to claimants who wished to have Green Forms completed. Exhibit 25, Mitchell Deposition, at p. 63:14-16.

charge might be, he had no opinion.[112] Forcing these doctors to answer these questions in their own hand hundreds of times over is not reasonable and is unnecessary to any determination of an Agreement violation, misrepresentation, proscribed practices, or claim illegitimacy.

IV. CONCLUSION

This Court is the protectorate of absent class members,[113] and we ask the Court in that role to protect the claimants from the Trust's open hostility toward them. The Trust refuses to accept information in the form reasonably provided and continues to threaten claims denial for reasons that are beyond the claimants' control. The past six months of the ill-fated MPQ policy have demonstrated that the Trust does not intend to process and pay these claims as required by the Settlement Agreement. The Trust should be prohibited from denying claims, further delaying claims, and persisting with its MPQ policies.

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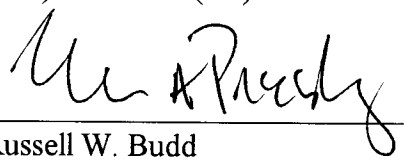
BY: 

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[112] *Id.* at p. 63:25.

[113] *In re Cendant Corp. Prides Litigation*, 233 F.3d 188, 194-95 (3d Cir. 2000).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum has been electronically filed with the Court and forwarded via facsimile and/or electronic transmission to the attached service list on this the 31st day of March, 2004.

Ellen A. Presby

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

IN RE DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	§ § § § §	MDL Docket No. 1203
THIS DOCUMENT RELATES TO ALL ACTIONS	§ § §	
SHEILA BROWN, et al v. Wyeth	§	CIVIL ACTION NO.99-20593

Pretrial Order No. ____
Granting Class Members' Protective Order and Compelling Audits

AND NOW, this ____ day of _____, 2004, after consideration of Certain Class Members' Motion for Protective Order and to Compel Claims Processing, and Objections to Medical Practices Questionnaires, the Memorandum supporting this motion, and the responses thereto, the Court considers the Motion meritorious and GRANTS the relief requested. Therefore,

The Court FINDS that the AHP Settlement Trust has no authority to deny matrix benefit claims as a penalty for noncompliance with the Trust's Medical Practices Questionnaire ("MPQ") policy and has wrongfully threatened denial and wrongfully delayed payment of claims to the irreparable injury of claimants.

IT IS ORDERED THAT the AHP Settlement Trust be enjoined and restrained from denying claims as a penalty for non-compliance with the Trust's MPQ policy. IT IS FURTHER ORDERED that the class members' objections are sustained, that the policy be discontinued, and that the Trust place claimants subjected to the Trust's MPQ policy into their original and rightful place in the processing queue.

BY THE COURT:

_____