

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

JOSEPH L. CASTLE, II, et al.,	:	
	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION
	:	
LINDA J. CROUSE, M.D.,	:	
	:	NO. 03-5252
Defendant.	:	
	:	

**ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, upon consideration of Defendant's Motion to Dismiss the Complaint, and any response thereto, it is hereby ORDERED that the motion is GRANTED. Plaintiffs' Complaint is hereby DISMISSED WITH PREJUDICE.

BY THE COURT:

\_\_\_\_\_  
The Honorable Harvey Bartle, III

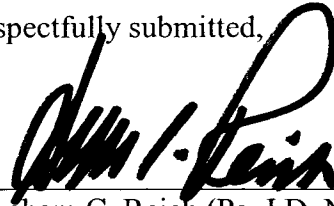
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**DEFENDANT’S MOTION TO DISMISS COMPLAINT**

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, defendant Linda J. Crouse, M.D., by her undersigned counsel, hereby moves to dismiss the complaint filed against her in this matter. In support of her motion, defendant relies on the attached memorandum of law.

Respectfully submitted,



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Dated: December 2, 2003

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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT’S MOTION TO DISMISS COMPLAINT**

Defendant Linda J. Crouse, M.D. (“Dr. Crouse”), by her undersigned counsel, hereby submits this memorandum of law in support of her motion to dismiss the complaint filed against her in this matter. For the reasons that follow, the complaint must be dismissed in its entirety.

**I. INTRODUCTION**

“Deplorable” is the only word that adequately captures the actions and motivations of the plaintiffs bringing this case against Dr. Crouse, a nationally-prominent cardiologist specializing in echocardiography, whose professional reputation has been indelibly stained by their insupportable accusations of racketeering, fraud and conspiracy. As part and parcel of their blatant scheme to delay and deny benefits to thousands of persons injured by the so-called Fen-Phen diet drugs, to shield the maker of those drugs from its miscalculation of the magnitude of harm caused by those drugs, and to mask their own incompetence in administering the settlement funds designed to compensate injured victims, plaintiffs here – the Trustees of the AHP Settlement Trust (the “Trust”) – have now embarked on a campaign to attack and discredit the

echocardiographers who have certified claimants as eligible for compensation. The Trust, in league with the maker of Fen-Phen, has made clear that it will stop at nothing to stem the tide of claims that threatens to exhaust its funds, regardless of who gets hurt in the process.

The actions of the Trust and its Trustees are even more egregious when their allegations are subjected to scrutiny. While the Trustees' claims of racketeering, fraud and conspiracy sound scandalous and have a sensationalistic appeal – indeed, the Trustees have made sure that their suit against Dr. Crouse has received widespread play in newspapers and other media throughout the country – the reality is utterly different. Viewed carefully, the Trustee's complaint is a paradigm of “shoot first, ask questions later” reasoning. Although the complaint is larded with salacious allegations of wrongdoing, the specifics are painfully thin, with many of the averments made “upon information and belief.” At bottom, however, the Trustees' allegations amount to nothing more than a disagreement with Dr. Crouse over the proper medical interpretation of the echocardiograms of 55 Fen-Phen claimants, hardly the stuff of a racketeering scheme.

Even if the Trustees are so callously indifferent that they would employ charges of racketeering, fraud and conspiracy – the legal equivalent of a nuclear strike – without a scintilla of evidence to support such serious charges, this Court cannot give them a free pass to blithely ruin the reputation of Dr. Crouse. The law commands, and Dr. Crouse trusts, that the Court will subject the complaint to exacting scrutiny. Dr. Crouse is confident that, in the end, the Court will agree that the Trustees' claims cannot stand and that the complaint must be dismissed.

## **II. FACTUAL BACKGROUND**

Dr. Crouse is a level III-trained cardiologist, who is board-certified in internal medicine and cardiovascular diseases. See complaint, ¶ 13. On September 28, 2003, the Trustees of the

Trust brought this action against Dr. Crouse, alleging that she engaged in fraudulent conduct in connection with Dr. Crouse's reading and interpretation of echocardiograms and certification that thousands of claimants had valvular heart disease ("VHD") entitling them to compensation from the Trust. Id. at ¶ 1.

Wyeth Corporation ("Wyeth"), formerly American Home Products ("AHP"), manufactured the diet drugs Pondimin and Redux (collectively, the "Diet Drugs"). Id. at ¶ 18. In the summer of 1997, the Mayo Clinic announced that the Diet Drugs caused VHD in the aortic and mitral valves located in the left side of the heart. Id. Wyeth withdrew the Diet Drugs from the market on September 15, 1997 because they cause VHD. Id. at ¶ 19. In reaction to the news that the Diet Drugs manufactured by Wyeth caused VHD, individuals who took the Diet Drugs filed thousands of individual lawsuits and hundreds of class action lawsuits across the United States against Wyeth. Id. On December 10, 1997, these actions were consolidated, and on November 17, 1999, Wyeth entered into the Nationwide Class Action Settlement Agreement (the "Settlement Agreement"). Id. at ¶¶ 20-21. The Settlement Agreement provides that claimants who are diagnosed as having VHD may elect to receive benefits from the Trust. Id. at ¶ 22. In order to receive benefits pursuant to the Settlement Agreement, claimants must have obtained an echocardiogram by January 3, 2003. Id. at ¶ 23.

An echocardiogram is the diagnostic tool used by cardiologists, such as Dr. Crouse, to diagnose regurgitation of the aortic and mitral valves, the type of VHD caused by the Diet Drugs. Id. at ¶ 24. The Settlement Agreement provides that persons with valvular regurgitation of a moderate level or higher qualify for benefits from the Trust. Id. at ¶¶ 27-28. The Settlement Agreement also provides that the claimant must retain a level II or level III-trained cardiologist or cardiothoracic surgeon to conduct or supervise the administration of the echocardiogram for

purposes of determining whether the claimant has valvular regurgitation. Id. at ¶ 31. The Trustees allege that the Settlement Agreement was based upon a presumption, not expressed in the Settlement Agreement, that the level II or level III-trained cardiologists, who had to conduct or supervise the echocardiogram and then interpret whether the echocardiogram showed the existence of valvular regurgitation, would function as “gatekeepers” to the Trust’s benefits. Id. at ¶ 32. Notably, the Trustees do not allege that cardiologists such as Dr. Crouse were ever informed that the Settlement Agreement “rested largely upon a presumption that the Trust could and would rely upon the integrity of cardiologists and cardiothoracic surgeons” as “gatekeepers to Trust payments.” Id.

In order to carry out the Settlement Agreement, the Trust created a form (the “Green Form”) upon which cardiologists attest to their findings that the claimant has valvular regurgitation. Id. at ¶ 34. The Green Form instructs cardiologists that they “may” take a claimant’s medical history in order to aid them in their determination of the claimant’s condition, but does not require it. Id. at ¶ 37 (emphasis added). In fact, a medical history is not necessary for a cardiologist to conclude that a patient suffers from valvular regurgitation, just as a medical history is not necessary for a radiologist to conclude that a patient suffers from a broken arm.

The Trustees allege that Dr. Crouse knowingly submitted thousands of false Green Forms to the Trust, including the spurious contention that Dr. Crouse read one echocardiogram in “a mere 16 seconds.” Id. at ¶¶ 47, 52. Exhibit “C” to the complaint, which was filed under seal and supposedly details the fraudulent acts of Dr. Crouse, lists only 55 Green Forms, not thousands. Complaint, Exhibit “C”. The Trustees posit that Dr. Crouse must have submitted false Green Forms because, on average, it took Dr. Crouse only seven minutes to read the echocardiograms

and determine whether the claimant had valvular regurgitation, which the Trustees allege is a departure from Dr. Crouse's normal practices. Id. at ¶ 53.

The Trustees' complaint alleges violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") as well as state law claims of fraud, conspiracy, gross negligence, negligence, and unjust enrichment. See complaint, Counts I, II, III, IV, V, VI and VII. In support of their allegations, the Trustees rely heavily on Exhibit "C" to the complaint. That exhibit, however, is nothing more than a list of 55 claimants, a date and an allegation that the valvular regurgitation is either backflow or overtraced. As Dr. Crouse argues below, Exhibit "C" does not provide an adequate basis for levying the serious misconduct charges in the complaint against one of the most respected cardiologists in the United States. The Trustees' complaint is profoundly flawed, and the Court should grant Dr. Crouse's motion to dismiss.

### **III. ARGUMENT**

#### **A. Standards For Motion To Dismiss**

Dr. Crouse submits this motion under Fed. R. Civ. P. 12(b)(6) for failure to state claims upon which relief can be granted.<sup>1</sup> It is well-settled that a motion to dismiss tests the legal sufficiency of a complaint. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal is appropriate where it appears beyond doubt that a plaintiff can prove no set of facts in support of its claim that would entitle it to relief. In re Rockefeller Center Properties, Inc. Sec. Litig., 311 F.3d 198, 215 (3d Cir. 2002). Although the Court must accept well-pleaded allegations in the Trustees' complaint as true, the Court need not accept as true their bald assertions or legal conclusions. Id. at 215-16. Even measured against this liberal standard, the Trustees' claims are fatally defective and the complaint should be dismissed.

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<sup>1</sup> Dr. Crouse also moves to dismiss the complaint for improper venue under Fed. R. Civ. P. 12(b)(3). See infra at 6.

**B. The Trustees' Complaint Should Be Dismissed For Improper Venue**

As an initial matter, the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue. The Trustees assert venue lies in the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(b)(2). See complaint, ¶ 16. The portion of the venue statute relied upon by the Trustees states:

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in ... (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated ...

28 U.S.C. § 1391(b)(2).<sup>2</sup>

The Trustees allege: “The Defendant, Linda J. Crouse, M.D., is a citizen and resident of Kansas City, Missouri.... Dr. Crouse operates a medical practice at 4320 Wornall Road, Suite 240, Kansas City, Missouri.” See complaint, ¶ 13. The Trustees further allege: “Dr. Crouse’s willingness to falsify a VHD certification resulted in Claimants’ lawyers traveling to Kansas City, Missouri, with Claimants from all over the country or, more often, merely with echocardiogram tapes from all over the country.” See complaint, ¶ 57 (emphasis added). Significantly, the Trustees do not and cannot allege that any of Dr. Crouse’s actions which are the subject of the complaint took place in the Eastern District of Pennsylvania. This failure to plead any factual basis to support the Trustee’s claim of venue here is not surprising, because:

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<sup>2</sup> Importantly, where, as here, a complaint asserts multiple claims against a defendant, venue must be proper for each claim asserted. See, e.g., Salpoglou v. Shlomo Widder, M.D., P.A., 899 F. Supp. 835, 839 (D. Mass. 1995); General Bedding Corp. v. Echevarria, 714 F. Supp. 1142, 1144 (D. Kan. 1989); Velcro Group Corp. v. Bielarant, 692 F. Supp. 1443, 1449 (D.N.H. 1988); Int’l Patent Dev. Corp. v. Wyomont Partners, 489 F. Supp. 226, 230 (D. Nev. 1980).

- None of the challenged echocardiograms were performed by Dr. Crouse or her sonographers in Pennsylvania;
- Dr. Crouse did not read or interpret any of the echocardiograms in Pennsylvania;
- Dr. Crouse did not complete or sign any of the Green Forms in Pennsylvania; and
- Dr. Crouse did not mail any completed Green Forms to the Trust in Pennsylvania.<sup>3</sup>

As a result, the Eastern District of Pennsylvania is not “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred” as required by 28 U.S.C. § 1391(b)(2). See, e.g., Streamlight, Inc. v. ADT Tools, Inc., Civ. A. No. 03-1481, 2003 WL 22594316, at \*5 (E.D. Pa. Oct. 9, 2003) (Hutton, J.); Wojtunik v. Kealy, Civ. A. No. 02-8410, 2003 WL 22006240, at \*4 (E.D. Pa. Aug. 26, 2003) (Kelly, Sr. J.). Indeed, the Trustees do not even allege in the complaint a factual basis to support venue in this district. Nor can they, in light of the complete absence of contacts between Dr. Crouse and the Eastern District of Pennsylvania relating to the Trustees’ claims against Dr. Crouse.<sup>4</sup> Accordingly, the Trustees’ complaint should be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue.

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<sup>3</sup> Dr. Crouse’s only contact with Pennsylvania relating to the Fen-Phen diet drugs litigation was when she testified as a witness before this Court on Thursday, September 5, 2002 and Monday, September 9, 2002 in the proceeding involving the Hariton and Napoli firms, which resulted in Memorandum and Pretrial Order No. 2640.

<sup>4</sup> The Trustees in their complaint refer to Pretrial Order No. 1415, pursuant to which they claim that the Court has continuing jurisdiction over the Diet Drugs Litigation and allege that “[t]his action falls within the scope of that order.” See complaint, ¶ 15. While Dr. Crouse disagrees that Pretrial Order No. 1415 provides the Court with an independent basis to exercise jurisdiction over this case, the Court need not address the issue because the Trustees do not and cannot suggest that the order can create venue where, as here, it is not proper pursuant to 28 U.S.C. § 1391(b)(2).

**C. The Trustees' RICO Claims Should Be Dismissed**

The complaint alleges two related violations of the RICO statute by Dr. Crouse. Count I alleges that Dr. Crouse violated Section 1962(c), 18 U.S.C. § 1962(c), by operating an alleged enterprise affecting interstate commerce – her medical practice, Kramer & Crouse Cardiology, P.C. (“Kramer & Crouse”) – through a pattern of racketeering activity. In Count II, the Trustees allege that Dr. Crouse conspired with (1) other employees of Kramer & Crouse, whom the Trustees label as “co-conspirators,”<sup>5</sup> and (2) Kramer & Crouse itself in violation of Section 1962(d), 18 U.S.C. § 1962(d), to generate “false” Green Forms and to prevent the Trust from uncovering their falsity. Each RICO count, however, suffers from multiple defects. Any one of them would support dismissal of the Trustees’ RICO claims; taken together, they compel it.

**1. The Section 1962(c) Claim Fails as a Matter of Law**

Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs, through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Accordingly, to state a claim under Section 1962(c), a plaintiff must allege:

(1) the existence of an enterprise that affects interstate commerce and is separate and distinct from the defendant; (2) the defendant is employed by or associated with the enterprise; (3) the defendant conducted or participated in the affairs of the enterprise; (4) the defendant engaged in a pattern of racketeering activity; and (5) the pattern of racketeering activity was the proximate cause of injury to the plaintiff’s business or property. See, e.g., Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989); Polymer Dynamics, Inc. v. Bayer Corp., Civ. A. No.

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<sup>5</sup> The Trustees have not named the alleged “co-conspirators” as defendants.

99-4040, 2000 WL 1146622, at \*3 (E.D. Pa. Aug. 14, 2000) (Waldman, J.). Even if Dr. Crouse concedes for purposes of this motion that the Trustees have adequately pleaded that Kramer & Crouse is an enterprise affecting interstate commerce, that she is employed by or associated with the enterprise and that she conducted or participated in its affairs, this count must fail because the Trustees neither adequately plead that Dr. Crouse engaged in a pattern of racketeering activity nor that her actions were the proximate cause of harm to the Trust's business or property.

**a. The Trustees have failed to plead a “pattern of racketeering activity.”**

To state a claim under Section 1962(c), a plaintiff must allege that a defendant operated or participated in the operation of an enterprise through a “pattern of racketeering activity.” 18 U.S.C. § 1962(c); *see, e.g., Tabas v. Tabas*, 47 F. 3d 1280, 1289 (3d Cir. 1995), *cert. denied*, 515 U.S. 1118 (1995); *Banks v. Wolk*, 918 F.2d 418, 421 (3d Cir. 1990); *Breslin v. Brainard*, Civ. A. No. 01-7269, 2003 WL 22351297, at \*7 (E.D. Pa. Oct. 14, 2003) (Yohn, J.). Here, the Trustees allege that Dr. Crouse engaged in multiple acts of mail and wire fraud as part of a scheme to defraud the Trust through submission of allegedly false and fraudulent Green Forms on behalf of Fen-Phen claimants. *See* complaint, ¶¶ 73, 75-76, 80-93. Their allegations, however, fail to establish a “pattern of racketeering activity” sufficient to sustain a RICO claim.

First, the Trustees fail to identify even a single mailing or use of the wires with the necessary specificity. When the underlying predicate acts sound in fraud, a RICO plaintiff must comply with Fed. R. Civ. P. 9(b), which mandates that “[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity.” *See Warden v. McLelland*, 288 F.3d 105, 114 (3d Cir. 2002) (“Where acts of mail and wire fraud constitute the alleged predicate racketeering acts, those acts are subject to the heightened pleading requirement of Rule 9(b).”); *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d

Cir. 1984) (“Rule 9(b) requires plaintiffs to plead with particularity the circumstances of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.”); Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network, Civ. A. No. 99-4653, 2001 WL 41143, at \*3 (E.D. Pa. Jan. 18, 2001) (O’Neill, J.) (“When the predicate acts in a RICO complaint sound in fraud, Rule 9(b) applies.”). Compliance with Rule 9(b) is especially critical in a civil RICO case, since the simple act of filing a RICO claim can stigmatize the defendant. See, e.g., In re Sumitomo Copper Litig., 995 F. Supp. 451, 455 (S.D.N.Y. 1998) (recognizing powerful stigma resulting from claim of racketeering requires strict adherence to Rule 9(b) specificity requirements).

Amazingly, the Trustees in their complaint do not identify any particular use of the mails or wires by either Dr. Crouse or the alleged co-conspirators purportedly operating in league with her. Despite the Trustees’ repeated incantations that Dr. Crouse and her confederates used the mails, commercial interstate carriers, telephone and telefax to carry out their alleged scheme, see complaint, ¶¶ 73, 75, 76, 83, 86, 87, 88, they fail to identify a single specific instance where the mail or wires were used – not one! Moreover, reference to Exhibit “C” to the complaint, which the Trustees filed under seal, is of no help. While the complaint implies that Dr. Crouse signed more than 2,500 false Green Forms, see complaint, ¶¶ 46-47, Exhibit “C” actually lists only 55 Green Forms that the Trustees contend are fraudulent.<sup>6</sup> See complaint, ¶ 70 (alleging dates on Exhibit “C” are dates Dr. Crouse signed the Green Forms). It does not, however, identify when each Green Form was transmitted, how it was transmitted, who transmitted it or who received it.

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<sup>6</sup> Notably, 50 of the 55 Green Forms on Exhibit “C” were challenged during the hearing held before this Court, including a challenge brought by the Trust to 88 claims submitted by the New York law firms of Hariton & D’Angelo, LLP and Napoli, Kaiser, Bern & Associates, LLP that resulted in Memorandum and Pretrial Order No. 2640.

In short, the Trustees provide none of the specifics mandated by Rule 9(b). With no particulars to support their allegations, the Trustees' claim cannot stand. See, e.g., Tierney and Partners, Inc. v. Rockman, 274 F. Supp.2d 693, 698 (E.D. Pa. 2003) (Baylson, J.) (dismissing RICO complaint because “[a]lthough Plaintiff’s Complaint contains several lists of invoices, alleged to be fraudulent, these bare lists fail to provide details regarding the transmission of the invoices, via mail or wire. Such details are necessary to properly allege predicate acts under RICO.”)

Second, apart from lacking specificity, the predicate acts pleaded by the Trustees do not form a pattern of racketeering activity under the RICO statute. As the Supreme Court has explained, a pattern of racketeering requires both relatedness and continuity of predicate acts. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989); see also Tabas, 47 F.3d at 1292; Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 609 (3d Cir. 1991); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1412 (3d Cir. 1991). Relatedness focuses on whether the predicate acts “have the same or similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events.” H.J., Inc., 492 U.S. at 240. Continuity is “both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.” Id. at 241; see also Tabas, 47 F.3d at 1292.

Even assuming arguendo that the predicate acts alleged by the Trustees satisfy the relatedness test, they fail the continuity one. There is no allegation in the complaint that the wrongdoing allegedly committed by Dr. Crouse is ongoing or projects to continue into the future. Moreover, as a closed period of conduct, virtually all of the racketeering acts alleged by the

Trustees in Exhibit “C” cover only a three-month period from January to March 2002. See complaint, Exhibit “C.”<sup>7</sup> A period of conduct lasting less than 12 months, however, is insufficient as a matter of law to establish a pattern for RICO purposes. See, e.g., Tabas, 47 F.3d at 1293 (“[T]his court has faced the question of continued racketeering activity in several cases, each time finding that conduct lasting no more than twelve months did not meet the standard for closed-ended continuity.”); see also Hughes, 945 F.2d at 610 (predicate acts over a twelve-month period do not establish closed-ended continuity); Hindes v. Castle, 937 F.2d 868, 875 (3d Cir. 1991) (predicate acts over an eight-month period do not establish closed-ended continuity); Breslin, 2003 WL 22351297, at \*9 (predicate acts over a six-month period do not establish closed-ended continuity).

Third, the fact that the complaint at best alleges a single scheme to defraud by a single actor aimed at a single “victim” - the Trust - militates against a finding of a continuity. In Barticheck v. Fidelity Union Bank/First Nat’l Bank, 832 F.2d 36 (3d Cir. 1987), the Third Circuit adopted a multi-factor approach to determining continuity.

[T]he existence of a RICO pattern does not turn on the abstract characterization of racketeering acts as “continuous” and “related” but rather on a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.

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<sup>7</sup> Curiously, the Green Form for only one of the claimants listed on Exhibit “C” – no. 54, a clinical patient of Dr. Crouse since 1998 – falls outside of this three-month range. To the extent that this is the Trustees’ effort to rectify the glaring defect in their pleading of a closed-ended pattern of racketeering activity, it must fail. The purported defect in this patient’s Green Form is not willful misidentification or over-measuring of regurgitation, as the Trustees allege for every other claimant listed on Exhibit “C,” but “fail[ure] to identify reduction factors.” There is simply no relationship between the alleged defect in the Green Form for claimant no. 54 and those for every other claimant in Exhibit “C” and, therefore, the Green Form for claimant no. 54 cannot be used to establish a pattern of racketeering activity.

Id. at 38-39; see also Hinds, 937 F.2d at 875 (“[T]he Barticheck decision remains relevant to the pattern inquiry.”); Banks, 918 F.2d at 423 (“H.J., Inc. has not rendered obsolete our prior multi-factor pattern inquiry.”).

Obviously recognizing the weakness of their position, the Trustees feebly claim that the victims of Dr. Crouse’s alleged wrongdoing “include not only the Trustees and the Trust but all Claimants who have been forced to await the completion of the investigation, audits, and litigation required to detect and counter the Enterprise’s fraudulent scheme.” Complaint, ¶ 92. Setting aside that the Trust itself is the one that has “forced” the delay in payments to Fen-Phen claimants, it is completely specious for the Trustees to contend that persons who are not targets of an alleged fraudulent scheme nevertheless are to be counted as “victims” for determining whether a pattern of racketeering exists. See Fiorentino v. Converse, 705 F. Supp. 253, 257 n.6 (E.D. Pa. 1989) (Reed, J.) (“Barticheck surely does not direct courts to consider such indirect victims. If it did, any fraudulent scheme would produce millions of victims, since all members of society are victims of crime.”). By the Trustees’ own complaint, it is clear that the only “victim” of Dr. Crouse’s alleged racketeering is the Trust, not tens of thousands of Fen-Phen claimants. Accordingly, the Trustees have failed to allege a pattern of racketeering activity to support their Section 1962(c) claim against Dr. Crouse.

**a. The Trustees lack standing to assert a Section 1962(c) claim.**

In Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992), the Supreme Court addressed the standing required to bring a civil RICO claim. In particular, the Court was called upon to construe the meaning of the language of Section 1964(c) of RICO, 18 U.S.C. § 1964(c), which provides that only persons injured “by reason of” a racketeering violation can sue for damages. In Holmes, the Court rejected an expansive view of RICO standing, and held that only

those whose injuries are proximately caused by the racketeering activity – i.e., those who are directly harmed by the injurious conduct – have standing to sue. Id. at 266.

Here, the Trustees claim that the Trust was injured as a result of the allegedly false Green Forms prepared by Dr. Crouse and others working with her. See complaint, ¶¶ 77-78, 91-93. The complaint does not allege, however, that Dr. Crouse ever utilized the mail or wires to submit the Green Forms to the Trust. Indeed, the complaint alleges only that Dr. Crouse submitted the forms through the mail to the lawyers and law firms that retained her to read their clients' echocardiograms. Id., ¶ 73. Whether the Green Forms were or were not to be submitted to the Trust was not Dr. Crouse's decision, but solely within the discretion of the lawyers and law firms. Dr. Crouse had no direct contact with the Trust at all. Consequently, any injury that the Trust may have suffered was at most only indirectly caused by Dr. Crouse's alleged pattern of racketeering activity, not directly caused within the meaning of the Supreme Court's holding in Holmes. 503 U.S. at 266. The Trustees, therefore, lack standing to bring a Section 1962(c) claim against Dr. Crouse.

Furthermore, the Trustees have failed to plead an actual injury resulting from the 55 allegedly fraudulent Green Forms listed on Exhibit "C." There is no allegation in the complaint that the Trust has paid any of the claims listed therein.<sup>8</sup> Nor do the Trustees allege that Dr. Crouse's fees for reading any of the 55 echocardiograms listed on Exhibit "C" were reimbursed by the Trust. Sweeping allegations that the Trust has paid some unspecified claims or that Dr. Crouse somehow "intended" the Trust to pay "billions" of dollars based on fraudulent claims, see complaint, ¶¶ 77-78, are no substitute for specific allegations of actual pecuniary harm

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<sup>8</sup> Indeed, the Court can take judicial notice of the fact that it ruled that at least 50 of the claims should not be paid. See Memorandum and Pretrial Order No. 2640.

suffered as a proximate result of Dr. Crouse's racketeering. Without actual pecuniary loss, the Trustees have no RICO claim. See Maio v. Aetna, Inc., 221 F.3d 472, 483 (3d Cir. 2000); see also Oscar v. Univ. Students Co-op. Ass'n, 965 F.2d 783, 785 (9<sup>th</sup> Cir.) (holding injuries not actionable under RICO unless they result in tangible financial loss), cert. denied, 506 U.S. 1020 (1992).

## 2. The Section 1962(d) Claim Fails as a Matter of Law<sup>9</sup>

Section 1962(d) of RICO, 18 U.S.C. § 1962(d), makes it unlawful for any person to conspire to violate Sections 1962(a), (b) or (c).<sup>10</sup>

To plead conspiracy adequately, a plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose. Additional elements include agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity.

Glessner v. Kenney, 952 F.2d 702, 714 (3d Cir. 1991) (quoting Shearin, 885 F.2d at 1166); see also Grider v. Keystone Health Plan, Civ. A. No. 01-05641, 2003 WL 22182905, at \*26 (E.D. Pa. Sept. 18, 2003) (Gardner, J.) (same). Here, the Trustees seem to allege two different conspiracies in which Dr. Crouse participated. The first is a conspiracy between Dr. Crouse and Kramer & Crouse, the professional corporation in which she is a shareholder and employee (the "Vertical Conspiracy"). See complaint, ¶ 103. The second is between Dr. Crouse and two current or former sonographers employed by Kramer & Crouse, Audrey Loeb and Leslie Falke

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<sup>9</sup> If this Court concludes that the Trustees fail to state a claim against Dr. Crouse for violating Section 1962(c), then it need not even consider their RICO conspiracy claim. It is axiomatic that a conspiracy claim under Section 1962(d) fails if a plaintiff fails to adequately plead a claim under Section 1962(a), (b) or (c). Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1993) ("Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient.").

<sup>10</sup> "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section." 18 U.S.C. § 1962(d).

(the “Horizontal Conspiracy”). See complaint, ¶¶ 98-102. Irrespective of the theory, however, the Trustees’ complaint fails to state a cause of action for violation of Section 1962(d).

a. **The Vertical Conspiracy**

The Vertical Conspiracy the Trustees allege existed between Dr. Crouse and Kramer & Crouse is not actionable under Section 1962(d). It is well-established under the intracorporate conspiracy doctrine that an employee acting in her authorized capacity on behalf of her employer cannot conspire with that employer for purposes of Section 1962(d) liability. See, e.g., Glessner, 952 F.2d at 714 (affirming district court holding in RICO case that “there can be no conspiracy between a corporate entity and its employees”), rev’d on other grounds, Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc., 46 F.3d 258 (3d Cir. 1995). Numerous other judges in this district have agreed. See, e.g., Greenberg v. Tomlin, 816 F. Supp. 1039, 1050 (E.D. Pa. 1993) (Joyner, J.) (rejecting Section 1962(d) claim on basis that “it is obvious that under the law of this circuit, a corporation cannot conspire with one or more of its employees when those employees are acting in their authorized capacities on behalf of the corporation.”); Franks v. O’Connor Corp., Civ. A. No. 92-0947, 1992 WL 301266, at \*10 (E.D. Pa. Oct. 16, 1992) (O’Neill, J.) (dismissing Section 1962(d) claim against corporation and present or former employees since “the corporation cannot conspire with its officers or employees”); T.I. Constr. Co., Inc. v. Kiewit Eastern Co., Civ. A. No. 91-2638, 1992 WL 195425, at \*10 (E.D. Pa. Aug. 5, 1992) (DuBois, J.) (dismissing RICO conspiracy claim since “a corporate entity cannot conspire with its employees and agents”); Plemmons v. Pa. Mfrs. Ass’n Ins. Co., Civ. A. No. 90-2495, 1991 WL 125982, at \*6 (E.D. Pa. July 3, 1991) (Gawthrop, J.) (for Section 1962(d), “the plaintiff must (1) name coconspirators who are not employees or officers of the corporation, or (2) allege that the employees or officers who are named acted outside the scope of the employment in the pursuit of

their own benefits”); Northeast Jet Center, Ltd. v. Lehigh-Northampton Airport Auth., 767 F. Supp. 672, 684-85 (E.D. Pa. 1991) (Van Antwerpen, J.).

Furthermore, the complaint contains no allegation that the plaintiffs were injured in their business or property by the alleged Vertical Conspiracy between Dr. Crouse and Kramer & Crouse. Injury to one’s business or property by reason of a Section 1962 violation is a threshold standing requirement for anyone seeking to bring a civil RICO claim. 18 U.S.C. § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . .”); see also Holmes, 503 U.S. at 265; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985); Rehkop v. Berwick Healthcare Corp., 95 F.3d 285, 288 (3d Cir. 1996); Tabas, 47 F.3d at 1289. Because they plead no injury from the alleged Vertical Conspiracy, the Trustees have no standing under RICO to bring a claim against Dr. Crouse.

**b. The Horizontal Conspiracy**

The Trustees’ Section 1962(d) claim predicated on the alleged Horizontal Conspiracy between Dr. Crouse and sonographers employed by Kramer & Crouse likewise must be dismissed.<sup>11</sup> As with the alleged Vertical Conspiracy, the combination of Dr. Crouse and other employees or agents of Kramer & Crouse, even if true, is not actionable under the intracorporate conspiracy doctrine. United Nat’l Ins. Co. v. Equip. Ins. Managers, Civ. A. Nos. 95-0116 & 95-2892, 1995 WL 631709, at \*5-6 (E.D. Pa. Oct. 27, 1995).

In United Nat’l, plaintiffs alleged that defendants engaged in a scheme to collect audit premiums from insureds, for which they failed to account or remit to plaintiffs. Inter alia,

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<sup>11</sup> The complaint makes repeated reference to actions taken by Dr. Crouse, the sonographers Audrey Loeb and Leslie Falke, and “upon information and belief, other sonographers” or “upon information and belief, other conspirators.” See complaint, ¶¶ 51, 54, 62-63, 69, 73, 75, 84, 87, 98-99, 101-102. Given the particularity requirements of Rule 9(b) when pleading fraud, see Fed. R. Civ. P. 9(b), the Trustees’ mere surmise that others were involved in the alleged conspiracy is not only grossly insufficient, but raises a substantial question as to the scope and adequacy of their pre-suit investigation under Fed. R. Civ. P. 11. The allegation that unnamed and unknown others might have been involved in the alleged conspiracy should simply be disregarded.

plaintiffs alleged that the two individual defendants, who were managing agents of the corporate defendant, conspired under Section 1962(d) to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity in violation of Section 1962(c). Id. at \*6. Judge Rendell, then a district judge and now a member of the Third Circuit, granted defendants' motion to dismiss the RICO conspiracy claim, finding that employees of a corporation cannot conspire with one another while acting on behalf of the corporation.

Under both RICO and Pennsylvania civil conspiracy law, employees of a corporation, while acting in the course and scope of their employment, cannot conspire with each other. See Hughes v. Technology Licensing Consultants, Inc., 815 F.Supp. 847, 851 (W.D.Pa. 1992); Fabrico Manufacturing Corporation v. Wilson Sporting Goods Co., 1985 WL 1474 (N.D.Ill. May 22, 1985); Jagielski v. Package Machine Company, 489 F.Supp. 232, 233 (E.D.Pa. 1980); see Rutherford v. Presbyterian-University Hospital, 612 A.2d 500, 508 (1992) (Pennsylvania law); see also Johnston v. Baker, 445 F.2d 424, 426-27 (3d Cir. 1971). The exception to this rule exists when employees act in the pursuit of their own ends and not for the benefit of the corporation. See Johnston, 445 F.2d at 426-27; Hughes, 815 F.Supp. 847; Fabrico, 1985 WL at \*2.

Id. The United Nat'l court dismissed the RICO conspiracy claim because the complaint was devoid of any allegations that the individual defendants were acting solely for their own personal interests and not for the benefit of the corporate defendant. Id.

As in the United Nat'l case, the complaint here contains no allegation that Dr. Crouse and her alleged co-conspirators – all employees or agents of Kramer & Crouse – were acting other than for the benefit of their employer. Accordingly, the Trustees' claim for violation of Section 1962(d) cannot stand, and Count II of the complaint should be dismissed.

**D. The Trustees' Common Law-Claims Should Be Dismissed**

Apart from their claims under RICO, the Trustees also attempt to assert a number of common-law claims against Dr. Crouse for fraud, conspiracy, gross and ordinary negligence and

unjust enrichment. As with their RICO claims, the Trustees fail to properly plead any of these common-law claims in the complaint, and they also must be dismissed.

**1. The Trustees' Common-Law Fraud Claim Should Be Dismissed**

Count III of the complaint purports to state a claim against Dr. Crouse for intentional misrepresentation and fraud. The Trustees, however, fail both to plead the necessary elements for a common-law fraud claim and to plead them with the specificity required by Rule 9(b). Therefore, Count III should be dismissed.

A claim for common-law fraud requires a plaintiff to plead and prove the following elements:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately cause by the reliance.

Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); see also Presbyterian Med. Center v. Budd, 832 A.2d 1066, 1072 (Pa. Super. Ct. 2003) (“The essence of fraud is a misrepresentation fraudulently uttered with the intent to induce the action undertaken in reliance upon it, to the damage of its victim.”).

Here, the Trustees fail to state a claim for two reasons. First, by their own admission, Dr. Crouse never made any representations to the Trust, whether false or not. See complaint, ¶¶ 71, 73, 86-88, 101-102, 123, 131. The Green Forms were never submitted by Dr. Crouse to the Trust, but were given to the lawyers or law firms for the Fen-Phen claimants whose echocardiograms she read. Id. at ¶ 73. Dr. Crouse had no authority or control over what Green Forms, if any, ultimately were submitted to the Trust. Under Pennsylvania law, there can be no

liability for intentional misrepresentation or fraud to one to whom the alleged misrepresentation was not directed. See, e.g., Bell v. George, No. 3225 April Term 2003, 2003 WL 22250350, at \*2 (C.C.P. Philadelphia County Sept. 24, 2003) (dismissing fraud claim for failure to plead facts to support plaintiff's contention that defendants acted to defraud him or that any misstatements of fact were made to plaintiff directly.)

Second, under Fed. R. Civ. P. 9(b), common-law fraud must be pleaded with particularity. See Prusky v. Phoenix Life Ins. Co., Civ. A. No. 02-6010, 2003 WL 1256225, at \*8 n.10 (E.D. Pa. Mar. 4, 2003) (Kelly, J.) (“Rule 9(b) applies to fraud claims based on state law.”). As with their RICO claims, the Trustees fail to identify with specificity what statements were made, how they were false and misleading, who made them, when they were made, how they were conveyed to the Trust and how the Trust was injured in reliance on them. For instance, the Trustees plead that Dr. Crouse made false representations “in Green Forms on the dates set forth in Exhibit C and at other times.” Complaint, ¶ 108 (emphasis added). This is a nebulous allegation that does not permit Dr. Crouse to even know what she is alleged to have done wrong. Is it limited to the 55 Green Forms in Exhibit “C”? If not, what are the other alleged false representations? Who made them? When were they made? How were they false? The Trustees’ failure to comply with Rule 9(b) makes it impossible to tell.

Likewise, it is impossible to determine whether and how the Trust suffered harm as a proximate result of the alleged false representations. Neither the complaint nor Exhibit “C” thereto provides any information as to what false representations caused specific harm to the Trust. Which, if any, of the 55 claims listed on Exhibit “C” were paid by the Trust as a result of its reliance on Dr. Crouse’s representations? The Trustees do not say.<sup>12</sup> If the Trustees contend

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<sup>12</sup> Dr. Crouse believes that few, if any, of the claims listed on Exhibit “C” have been paid by the Trust.

that the Trust paid claims not listed on Exhibit “C” as a result of reliance on false representations, then they failed to plead them. Either way, the Trustees have not pleaded the required harm element for purposes of establishing a claim for intentional misrepresentation or fraud, and they certainly have not satisfied the requirements of Rule 9(b).

If the Trustees are going to state a claim for common-law fraud against Dr. Crouse, a kaleidoscope of unconnected allegations will not suffice. A complaint alleging fraud must specifically and completely identify each representation, how it is false, who made it, when it was made, who received it, who relied upon it, and the harm it proximately caused. It must be a clear picture, not a Jackson Pollock painting. Count III of the complaint utterly fails to adequately plead the required elements for intentional misrepresentation or fraud, and thus must be dismissed.

**2. The Trustees’ Common-Law Conspiracy Claim Should Be Dismissed**

Count IV of the complaint purports to state a claim against Dr. Crouse for conspiracy to commit common-law fraud against the Trust by submitting Green Forms containing false representations and preventing the Trust from uncovering the misrepresentations. See complaint, ¶ 116. As with the conspiracy claim under Section 1962(d) of RICO, the intracorporate conspiracy doctrine bars the Trustees’ common-law claim, whether the alleged conspiracy is between Dr. Crouse and Kramer & Crouse or between Dr. Crouse and sonographers employed by Kramer & Crouse.

Under Pennsylvania law, unless employees or agents are acting outside the scope of their employment and solely for their own benefit, not the benefit of their employer, they cannot conspire with each other. See, e.g., United Nat’l, 1995 WL 631709, at \*6 (applying Pennsylvania law); Fox v. Keystone Turf Club, Inc., No. Civ. A. 97-1424, 1997 WL 793590, at

\*2 (E.D. Pa. Dec. 4, 1997) (Reed, J.) (“Under Pennsylvania law, a corporation cannot conspire with itself or with its agents when they are acting on behalf of the corporation.”); Rutherford v. Presbyterian-Univ. Hosp., 612 A.2d 500, 508 (Pa. Super. Ct. 1992) (holding that “agents of a single entity cannot conspire among themselves”). Indeed, this Court recently recognized this principle in Reeser v. NKG Metals Corp., 247 F. Supp.2d 626 (E.D. Pa. 2003) (Bartle, J.) when it rejected a civil conspiracy claim against employees of the corporate defendant. “[W]ith respect to civil conspiracy claims, a corporation cannot conspire with its employees unless the latter are acting for personal reasons.” Id. at 630-31.

In this case, there is no allegation that Dr. Crouse and her alleged co-conspirators were acting for their own interests or outside the scope of their employment by Kramer & Crouse. Accordingly, the Trustees have failed to state a valid claim for conspiracy, and Count IV of the complaint should be dismissed.

**3. The Trustees’ Common-Law Claim For Gross Negligence, Willful Misconduct, And Wanton And Outrageous Conduct Should Be Dismissed**

Count V of the complaint purports to assert a claim against Dr. Crouse for “gross negligence, willful misconduct, wanton and outrageous conduct.” These claims are not independent causes of action, however, and therefore Count V should be dismissed for failing to state a claim upon which relief can be granted.

Under Pennsylvania law, gross negligence is not recognized as an independent cause of action. In Ferrick Excavating and Grading Co. v. Senger Trucking Co., 484 A.2d 744, 749 (Pa. 1984), the Pennsylvania Supreme Court held that “there are no degrees of negligence in Pennsylvania.” Ferrick has been cited numerous times by the Third Circuit, this Court and other Pennsylvania courts for the proposition that gross negligence is not an independent cause of

action under Pennsylvania law. See, e.g., Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 462 (3d Cir. 1990) (stating that degrees of negligence are not generally recognized under Pennsylvania common law); Floyd v. Brown & Williamson Tobacco Corp., 159 F. Supp.2d 823, 828 (E.D. Pa. 2001) (DuBois, J.) (dismissing gross negligence claim because, under Pennsylvania law, degrees of negligence are not generally recognized); Jordan v. City of Philadelphia, 66 F. Supp.2d 638, 645 (E.D. Pa. 1999) (Joyner, J.) (dismissing gross negligence claim because gross negligence cannot be maintained as separate cause of action under Pennsylvania common law); Shouey v. Duck Head Apparel Co., 49 F. Supp.2d 413, 417 (M.D. Pa. 1999) (holding that gross negligence cannot be maintained as separate claim because there are no degrees of negligence under Pennsylvania law); Matthews v. Shoemaker, Civ. A. No. 88-0705, 1988 WL 167262, at \*3 (M.D. Pa. Dec. 23, 1988) (granting defendant's motion for summary judgment and holding that plaintiff's attempted distinction between gross negligence and negligence is questionable based upon Pennsylvania common law).<sup>13</sup> Willful, wanton, outrageous and/or reckless conduct are also degrees of negligence under Pennsylvania law. See Saaybe v. Penn Central Transp. Co., 438 F. Supp. 65, 69 (E.D. Pa. 1977) (Bechtle, J.).

Accordingly, they also are not separate causes of action.

Count V should be dismissed for failure to state a claim upon which relief can be granted. Gross negligence, willful misconduct and wanton and outrageous conduct are simply not recognized independent causes of action.

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<sup>13</sup> Further, it is axiomatic that a claim of gross negligence must fail if the plaintiff cannot establish the elements of ordinary negligence. See Neuchatel Ins. v. ADT Sec. Sys., Inc., No. Civ. A. 96-5396, 1998 WL 966080, at \*7 (E.D. Pa. Nov. 5, 1998) (Pollak, J.) (holding that whether gross negligence claim is viable requires court to consider whether plaintiff established essential elements of ordinary negligence); Dorsey v. Bioteque Am., Inc., No. Civ. A. 95-6085, 1996 WL 469255, at \*2 (E.D. Pa. Aug. 14, 1996) (Huyett, J.) (dismissing gross negligence count for failure to plead basic elements of negligence). As set forth below, the Trustees also fail to state a claim against Dr. Crouse for ordinary negligence.

#### 4. The Trustees' Common-Law Negligence Claim Should Be Dismissed

Count VI of the complaint purports to assert a claim for negligence against Dr. Crouse. While styled as a claim for negligence, it appears that the Trustees are actually attempting to assert a claim for negligent misrepresentation in Count VI.

Under Pennsylvania law, “negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.” Bortz v. Noon, 729 A.2d 555, 562 (Pa. 1999) (citing Gibbs v. Ernst, 647 A.2d 882, 890 (1994) and Restatement (Second) of Torts § 552 (1976)); see also Kramer v. Dunn, 749 A.2d 984, 991 (Pa. Super. Ct. 2000) (same). “The elements of negligent misrepresentation differ from intentional misrepresentation in that the misrepresentation must concern a material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of those words.” Bortz, 729 A.2d at 561; Kramer, 749 A.2d at 991. Moreover, “like any action in negligence, there must be an existence of a duty owed by one party to another.”

Id.<sup>14</sup>

The Trustees do not sufficiently allege that Dr. Crouse made misrepresentations of material fact, that she made such misrepresentations with the intent that the Trustees act on them, or injury to the Trust as a result of the Trustees' justifiable reliance on such alleged misrepresentations. See complaint, ¶¶ 130-36. With regard to the fourth element required for a

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<sup>14</sup> Under Pennsylvania law, to state a cause of action for negligence, a plaintiff must sufficiently plead that the defendant owed a duty to the plaintiff, the defendant breached that duty, the defendant's breach proximately caused an injury to the plaintiff and the plaintiff suffered damages as a result. See, e.g., Toogood v. Rogal, 824 A.2d 1140, 1145 (Pa. 2003); Sharpe v. St. Luke's Hosp., 821 A.2d 1215, 1218 (Pa. 2003); Althaus v. Cohen, 756 A.2d 1166, 1168 (Pa. 2000); Hicks v. Arthur, 843 F. Supp. 949, 958 (E.D. Pa. 1994) (Joyner, J.).

negligent misrepresentation claim set forth by the Pennsylvania Supreme Court in Bortz (injury resulting from justifiable reliance), the Trustees do not allege that the Trust paid any of the claimants identified in Exhibit “C” to their complaint. In fact, of the 55 claimants listed in Exhibit “C,” at least 50 are among those whose claims the Court already permitted the Trust not to pay. See Pretrial Order No. 2640.

More importantly, the Trustees do not and cannot allege that Dr. Crouse owed a duty of care to the Trust.<sup>15</sup> See complaint, ¶¶ 130-36. As the Trustees acknowledge, Dr. Crouse was retained by attorneys and/or law firms representing claimants. See id., ¶¶ 57-58. Any duty that she owed was to the attorneys and/or law firms who retained and paid her. She had no relationship with the Trustees or the Trust whatsoever. Accordingly, the Trustees do not have standing to bring a negligent misrepresentation cause of action – or any negligence cause of action – against Dr. Crouse, and Count VI of their complaint should be dismissed.

**5. The Trustees’ Common-Law Claim For Unjust Enrichment Should Be Dismissed**

Count VII of the complaint purports to assert a claim for unjust enrichment against Dr. Crouse. The Trustees cannot state such a claim against Dr. Crouse and, accordingly, Count VII should be dismissed.

Under Pennsylvania law, the Trustees do not have standing to allege an unjust enrichment cause of action against Dr. Crouse. Unjust enrichment is traditionally asserted in cases where a plaintiff seeks to recover a benefit conferred upon a defendant by the plaintiff under a quasi-contract theory. Temple Univ. Hosp., Inc. v. Healthcare Mgt. Alternatives, Inc., 832 A.2d 501, 507 (Pa. Super. Ct. 2003). The Pennsylvania courts have consistently held that in order to state a

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<sup>15</sup> The question of whether a duty exists is a question of law for the Court to decide. See Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1044 (Pa. 1998).

claim for unjust enrichment: (1) the plaintiff must have conferred a benefit upon the defendant; (2) the defendant must have appreciated the benefit; and (3) the defendant must have accepted and retained the benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without payment of value. Id.; see also Still v. Regulus Group LLC, No. Civ. A. 00-6053, 2003 WL 22249198, at \*6 (E.D. Pa. Oct. 1, 2003) (Kelly, J.) (stating elements of unjust enrichment); Styer v. Hugo, 619 A.2d 347, 350 (Pa. Super. Ct. 1993) (same); Zvonik v. Zvonik, 435 A.2d 1236, 1239 (Pa. Super. Ct. 1981) (holding that focus is not on intentions of parties, but rather result of unjust enrichment); Romy v. Burke, No. 1236 May Term 2003, 2003 WL 21205975, at \*5 (C.C.P. Philadelphia County May 2, 2003) (holding that unjust enrichment not proper claim to assert when plaintiff seeks damages for torts committed by defendant). The most significant element of unjust enrichment is whether the enrichment of the defendant is unjust. Temple Univ. Hosp., 832 A.2d at 507.

Here, the Trustees do not have standing to make an unjust enrichment claim against Dr. Crouse because the Trust did not confer any benefit upon Dr. Crouse. Rather, as the Trustees admit, Dr. Crouse was retained and paid for her professional services by a number of attorneys and/or law firms representing Fen-Phen claimants. See complaint, ¶¶ 57-58. Any monetary benefit that she received was conferred by the attorneys and/or law firms; the Trust does not and cannot allege that Dr. Crouse received any money (or other benefits) directly from the Trust. Accordingly, the Trustees' unjust enrichment claim must fail because the benefits paid to Dr. Crouse were not conferred upon her by the Trust.

In addition, the Trustees do not and cannot allege that Dr. Crouse failed to review the echocardiograms and provide the other professional services that she agreed to provide to the attorneys and/or law firms. As a result, Dr. Crouse performed the services that she agreed to

perform, and thus, any payments that she received were earned and she was not unjustly enriched by anyone.

**6. The Trustees' Tort Claims Are Barred by the Statute of Limitations**

As set forth above, the Trustees' complaint purports to assert a number of common-law tort claims against Dr. Crouse. See complaint, Counts III (intentional misrepresentation and fraud), IV (conspiracy to commit fraud); V (gross negligence, willful misconduct, wanton and outrageous conduct); and VI (negligence). The Trustees allege that conduct of Dr. Crouse dating back to March 22, 2000 is improper and unlawful, see, e.g., complaint, ¶¶ 57, 70, allegations which the Trustees incorporate by reference in each of their tort claims. Id. at ¶¶ 107, 115, 121, 129. Thus, the Trustees are attempting to assert tort claims that date back to March 22, 2000. Apart from their lack of substantive merit, these claims are untimely on their face, and thus they should be dismissed. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 n.1 (3d Cir. 1994) ("While the language of Fed. R. Civ. P. 8(c) indicates that a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion to dismiss, an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading.").

Under Pennsylvania law, all of the Trustees' purported tort claims are governed by a two-year statute of limitations. See 42 Pa. C.S. § 5524; see also Gurfein v. Sovereign Group, 826 F. Supp. 890, 917 (E.D. Pa. 1993) (fraud and negligence claims governed by Pennsylvania's two-year statute of limitations); AAMCO Transmissions, Inc. v. Harris, 759 F. Supp. 1141, 1144 (E.D. Pa. 1991) (same); Today's Exp., Inc. v. Barkan, 626 A.2d 187, 192 (Pa. Super. Ct. 1993) (same), appeal denied, 636 A.2d 635 (Pa. 1993); Smith v. Wambaugh, 887 F. Supp. 752, 757 (M.D. Pa. 1995) (conspiracy claim governed by Pennsylvania's two-year statute of limitations),

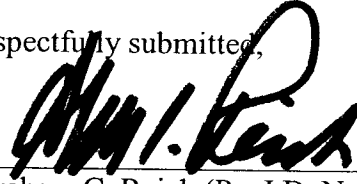
aff'd, 87 F.3d 108 (3d Cir.), cert. denied, 519 U.S. 1041 (1996); Teamsters, Chauffeurs, Warehousemen and Helpers Local 764 v. Greenawalt, 919 F. Supp. 774, 783 (M.D. Pa. 1996) (fraudulent misrepresentation claim governed by Pennsylvania's two-year statute of limitations), aff'd in part, vacated in part, 116 F.3d 470 (3d Cir. 1997). The Trustees filed the complaint in this matter on September 28, 2003. Under the governing statute of limitations, however, all claims based on conduct occurring before September 28, 2001 are time-barred. As a result, the Court should dismiss all of the Trustees' tort claims arising out of alleged conduct that occurred before September 28, 2001.

#### IV. CONCLUSION

This is a case that never should have been filed. The Trustees of the Trust, based on nothing more than a disagreement with Dr. Crouse's good-faith exercise of her medical judgment in interpreting 55 echocardiograms of unfortunate recipients of the Fen-Phen diet drugs, have attempted to brand Dr. Crouse as a racketeer, a con artist and a conspirator. Not only are these allegations unequivocally false, the Trustees cannot even plead them sufficiently to allow their case to progress. Beyond the Trustees' incendiary rhetoric, orchestrated publicity campaign and obvious desire to achieve an in terrorem effect, their claims are hollow. Dr. Crouse is a dedicated physician and one of this country's leading echocardiographers; that her reputation has been smeared by the Trustees' unfounded accusations is outrageous, but it would be more outrageous to allow this meritless suit to continue.

Accordingly, and for all of the foregoing reasons, Dr. Crouse respectfully requests that her motion be granted and the Trustees' complaint be dismissed with prejudice.

Respectfully submitted,



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Dated: December 2, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Defendant's Motion to Dismiss Complaint was served this day via hand-delivery on the following:

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