

**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: SHEILA BROWN, SHARON GADDIE, VIVIAN NAUGLE, QUINTIN LAYER, and JOBY JACKSON-REID, individually and all others similarly situated,	:	CIVIL ACTION NO. 99-20593
Plaintiffs,	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION, Defendant.	:	
	:	

**CLAIMANTS' REPLY MEMORANDUM ON THEIR MOTION  
TO COMPEL THE AHP SETTLEMENT TRUST AND  
CLASS COUNSEL TO DISCLOSE EVIDENCE RELATING  
TO THE ECHOCARDIOGRAPHIC REVIEWS ALLEGEDLY  
PERFORMED BY THEIR EXPERT DR. KARALIS**

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**PRELIMINARY STATEMENT**

Claimants, class members represented by the law firms Napoli Kaiser Bern & Associates, LLP and Hariton & D'Angelo, LLP, hereby offer their reply to Class Counsel's opposition of the claimants' motion to compel disclosure of evidence relating to the alleged echocardiographic reviews performed by their expert Dr. Karalis.<sup>1</sup>

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<sup>1</sup> In their Opposition papers, Class Counsel argues that the reviews of our clients' claims were done, not only by Dr. Karalis, but also by Dr. Catherine Otto, Dr. Alan Pearlman and Dr. Erin O'Malley Tysko. To the extent that those physicians also performed reviews of our clients' submissions for Class Counsel, we ask this Court to deem our motion amended to seek the reports, notes and other records produced in connection with those reviews by those physicians, as well as any records, notes or other documentation of Dr. Karalis' reviews.

Despite an attempt to resolve the issues raised by this motion via a stipulation agreement with Class Counsel, the issues remain unresolved and this Court should, upon a review of the primary motion papers and the within Memorandum, grant claimants' motion for discovery, compelling Class Counsel and/or the AHP Settlement Trust or Wyeth, to disclose the evidence sought by this motion without further delay.

Further, as Class Counsel argues in their Opposition Brief that the reviews of claimant's submissions conducted at Class Counsel's behest were completed – not only by Dr. Karalis – but indeed, by Dr. Karalis and at least three other physicians, Dr. Catherine Otto, Dr. Alan Pearlman and Dr. Erin O'Malley Tysko, claimants respectfully ask this Court to deem our motion amended to seek the reviews, notes, records and reports prepared by those physicians related to review of our clients' submissions, as well as any such information prepared by Dr. Karalis relating to reviews he conducted.

#### **UPDATED STATEMENT OF THE CASE**

As this Court will likely recall, claimants brought on the primary motion on this matter seeking the disclosure of reports and records and the physician's notes relating to the alleged expert echocardiographic reviews performed by a Dr. Karalis at the behest of Class Counsel.

Supporting our primary motion, we noted that Mr. Fishbein of Class Counsel's office had stated, in his affidavit in Opposition to Claimants' Motion to Discharge Class Counsel, that Dr. Dean Karalis, a Board-Certified cardiologist with Level 3 training in echocardiography, had reviewed the claimants' physician's attestations and the claimants' echocardiograms. Upon completing this alleged review, according to Mr. Fishbein, Dr. Karalis had stated his agreement with Dr. John Dent's opinion, *i.e.*, that the claims submitted were not medically reasonable.

Responding to our primary motion, served and filed on or about September 22, 2003, Class Counsel prepared a lengthy stipulation, stating that upon our execution of that stipulation, the evidence sought would be disclosed. A copy of that proposed stipulation is annexed here at Exhibit "A." Upon reviewing the proposed stipulation, we determined that it was overbroad, overreaching and -- in effect -- would moot the entire purpose of seeking the evidence, *i.e.*, to test the methods utilized in the physician's review of the evidence and to determine if, in fact, the expert's review and conclusions were medically reasonable and legally supportable.

In pertinent part, the proposed stipulation stated:

1. Napoli acknowledges that Class Counsel Expert Dean Karalis, M.D. did not perform an independent evaluation of any of the echocardiograms of any of the 12 specific Class Members who were the subject of the motion to compel;
2. Levin, Fishbein shall produce to Napoli the independent evaluations of the echocardiograms of the 12 specific Class Members at issue in the Motion to Compel that were performed by Class Counsel experts other than Dean Karalis, M.D.;
3. Napoli and Hariton agree that Class Counsel did not "audit" these 12 claims;
4. Napoli and Hariton agree that they shall keep the independent evaluation documents that Class Counsel produces hereby confidential and that same shall not be disclosed to anyone other than to the Trust or the Court;
5. Napoli and Hariton agree that they shall not make or attempt to make any contact in any manner whatsoever with any of the Class Counsel experts, whether directly or indirectly, and that any contact that they desire to make shall occur only and exclusively through Class Counsel. This agreement on the part of Napoli and Hariton to refrain from any contact with the Class Counsel experts other than exclusively through Class Counsel is to be broadly interpreted, and applies to all Class Counsel experts, and is not limited to the experts identified ... who performed the independent evaluations of the 12 specific Claims at issue in the Motion to Compel... Accordingly and without limitation, the agreement to refrain from contacts... applies to Class Counsel expert Harry Rakowski, M.D. ... as well as to Class Counsel experts Dean Karalis, M.D., Robyn Barst, M.D. and Stuart Rich, M.D.;

6. Napoli and Hariton agree that the documents to be produced by Class Counsel pursuant to this Stipulation shall not be submitted by Napoli or Hariton as part of any Claim for Matrix Benefits for any of the 12 Class Members at issue, and that such documents shall not constitute or be made part of any Audit File for any of the 12 Class Members at issue, as the term "Audit File" is defined by Rule 1(c) of the Rules for the Audit of Matrix Compensation Claims adopted by the Court pursuant to Pretrial order No. 2807;
7. Napoli and Hariton agree that the documents to be produced by Class Counsel pursuant to this Stipulation shall not form any basis or foundation whatsoever for Napoli and/or Hariton to seek any discovery with respect to the independent evaluations performed by Class Counsel and that Napoli and Hariton acknowledge that the agreement to produce the documents at issue does not represent any acknowledgement on the part of Class Counsel that any attempted use of such documents by Napoli and/or Hariton is proper or appropriate in any particular context;
8. Napoli and Hariton agree that the production of the documents at issue by Class Counsel is with a full reservation of all rights of Class Counsel to take and/or argue any position, objection or commentary regarding the substance of the documents an/or any use or attempted use of the same by Napoli and/or Hariton.

The tenor and purpose of the proposed stipulation, and of the opposition papers submitted in response to our motion, in our opinion, is patently clear – to the extent that their own expert physicians agreed that our clients have matrix-level injuries, the Trust nonetheless intends to deny those claims, and Class Counsel intends, as has been the case throughout this tortuous litigation, to stand with Wyeth and the Trust against the claimants.

## ARGUMENT

### POINT I.

#### **WHETHER THEIR EXPERTS SUPPORT THE CLAIMANTS' ATTESTING PHYSICIANS' OPINIONS OR DISAGREE, THERE IS NO REASONABLE ARGUMENT AGAINST DISCLOSURE OF THE RECORDS OF THOSE EVALUATIONS TO CLAIMANTS AND THEIR COUNSEL**

Opposing the instant motion, Class Counsel concedes that Mr. Levin, in explaining why Class Counsel joined the motion that resulted in this Court's Pretrial Order 2640, told the Court that Class Counsel's expert Dr. Karalis had reviewed the claims that were at issue in the September 2002 hearings. Allegedly, this review was performed in the interest of "due diligence," to demonstrate that Class Counsel was not "acting precipitously" in joining the motion. Dr. Karalis was not offered as a witness at the September hearings, he was not identified as a witness, and his reports or records of his alleged reviews have never been disclosed by Class Counsel or any other entity involved in the litigation.

Notably, Class Counsel is somewhat disingenuous in stating that the September 2002 hearings were precipitated by a Napoli/Hariton "scheme ... to earn enormous contingent fees by submitting thousands of false, unsupported Matrix Claims for payment by the AHP Settlement Trust... ." As Class Counsel is well aware, *there was not one iota of evidence adduced at those hearings* that supported the claim that either Napoli Kaiser Bern & Associates, LLP or Hariton & D'Angelo, LLP were involved in any wrongdoing. What was adduced was the fact that the Trust's "whistleblower" witness, Compton Shaw, R.N., was utterly incredible and his testimony was not supported by a single witness to the training sessions where Shaw claimed Hariton personnel were

training nurses to somehow falsify the echocardiogram results. Hence, the Trust withdrew Compton Shaw as a witness.

Going forward with the hearings notwithstanding the failure of their sole “witness” to the alleged wrongdoing, the Trust instead argued that the echocardiographic results for the 78 claimants at issue in those hearings had been improperly interpreted by the attesting physicians, namely Dr. Linda Crouse and Dr. Richard Mueller. The testimony from these physicians established conclusively that both complied wholly with the Settlement Agreement’s guidelines for performing the echocardiograms and interpreting the echocardiogram results, that both physicians<sup>2</sup> had carefully planimetered and noted the measurements of the regurgitant jets reported, and that both were among the most highly credentialed and experienced cardiologists interpreting echocardiogram results in the entire country.

Notwithstanding the utter dearth of any hard evidence to support these attacks against the claimants’ attorneys, the claimants’ attesting physicians and the claimants themselves, it is clear by now that Class Counsel, the AHP Trust and Wyeth, with this Court’s apparent imprimatur, have determined that they simply will not pay any claim submitted by these law firms – even in those cases where their own experts have determined that the claimant is suffering a matrix level injury.<sup>3</sup> That this Court is

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<sup>2</sup> Or, in Dr. Crouse’s case, her long-experienced and highly credentialed sonographer, Audrey Loeb, had planimetered and measured the jets.

<sup>3</sup> *See, e.g.*, Linda Morales, Ruth Enloe (Enloe’s claim was settled by stipulation only after a motion was brought before this Court), John Rodriguez and Barbara Meszaros. In each case, the Trust’s expert or Dr. Dent (with this Court’s subsequent agreement) found that the claimants were, indeed, suffering Matrix level injuries. Nonetheless the claims of Morales, Rodriguez and Meszaros remain unpaid, in what is perhaps the ultimate embodiment of “form over function,” on the contention that Rodriguez and Meszaros did not proceed through the proper channels to audit, and that Morales’ attesting physician, Dr. Crouse, is being sued by the Trust.

enabling such nonsense is extremely troubling to the claimants (including claimants not represented by these law firms) and to their attorneys.

Both Class Counsel and the Trust seem to believe that there is no impropriety in submitting these claims to repeated levels of serial review by multiple physicians. Neither Class Counsel nor the Trust has an ethical or moral problem with the fact that their actions have wholly emasculated the letter and the spirit of the Settlement Agreement these claimants negotiated with this Court's approval.

While it might be understandable for Wyeth, a defendant in these matters, to take the positions espoused by Class Counsel and the Trustees, this Court need not be reminded that it is Class Counsel's entire purpose to protect the rights of the claimants – not just the claimants represented by attorneys who don't ask the hard questions. Similarly, the Trustees have a fiduciary duty to protect their beneficiaries – not just the beneficiaries whose echocardiograms were not performed by doctors known to this Court and the Trust as having done large numbers of echocardiograms for claimants (as opposed to the Trust or Wyeth).

Opposing this motion that was initially seeking only the records for Dr. Karalis' alleged reviews and opinions, Class Counsel argues that this office had no basis to believe that the group of twelve claims reviewed were reviewed by Dr. Karalis, and that, the claims were actually reviewed by three other cardiologists, Dr. Catherine Otto, Dr. Alan Pearlman and Dr. Erin O'Malley Tysko. Assuming that to be the case, the principle is the same. Just as we are entitled to review any records, notes or reports produced by Dr. Karalis in conjunction with any review he performed, ***we are similarly entitled to the records and reports created by the other three physicians*** in reviewing the

twelve claims at issue in this motion. Disclosure of expert witness identities, opinions and data is unquestionably required under the Federal Rules of Civil Procedure:

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, ***this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.***

(C) These disclosures ***shall*** be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial ***or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party.*** The parties shall supplement these disclosures when required under subdivision (e)(1).

See, Fed. R. Civ. P. 26 (emphasis added).

As we have argued repeatedly, a Settlement Agreement presumes that all of the parties involved are dealing with each other and with the Court in good faith. That being

the case, and given the fact that there is no question now that Class Counsel has engaged various experts, including Dr. Karalis, Dr. Otto, Dr. Pearlman and Dr. Tysko to review claimants' medical records and submissions on the Green Forms, as well as to review their echocardiograms, there is no good faith basis for withholding the outcomes of those reviews, including the physician's notes and records, from the claimants and their counsel. This is particularly true where Class Counsel has stood before this Court and said that they have engaged an expert who has performed reviews of the claimants' submissions and that, upon completion of that review, the expert agreed with the Trust's expert, finding the claims medically unreasonable.

Thus, there is no question that where the reviews support non-payment of our clients' claims, the Trust and Class Counsel will be more than happy to disclose the evidence at issue here. Clearly, they are willing to stand in open court and, without disclosure of the actual evidence, nonetheless rely on the alleged conclusions to our clients' detriment. They withhold the evidence and attempt to ransom it to claimants' counsel by requiring counsel to stipulate that the information may not be used to support a matrix claim and may not be disclosed to anyone but Class Counsel and the Trust, and that counsel agree not to engage in any direct communication with those expert physicians. There is no basis in law for such requirements, and we can not, and should not, be required to bargain away the right to make use of the evidence, to the extent that it may support our clients' claims in this litigation, to obtain the right to view the evidence.

## POINT II.

**NEITHER SEMANTIC GAMESMANSHIP NOR BASELESS ATTEMPTS TO TREAT THIS OFFICE, THE HARITON AND FLEMING OFFICES AS A SINGLE ENTITY, CHANGE THE FACT THAT CLASS COUNSEL IS WITHHOLDING EVIDENCE THAT THEY SHOULD, IN THE INTEREST OF THEIR FIDUCIARY DUTIES AND GOOD FAITH, HAVE LONG AGO DISCLOSED TO CLAIMANTS' COUNSEL**

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Throughout their opposition papers, Class Counsel repeatedly inserts commentary on the alleged concerted actions of this office, the Hariton law firm and the Fleming Law firm. For example, responding to initial requests by correspondence for the disclosure of their experts' reviews, Class Counsel asked that the claimants' counsel stipulate that they would not engage in *ex parte* communications with the individual expert physicians. See Exhibit "G" to Class Counsel's Opposition Papers.

Responding to that request, Paul J. Napoli wrote back stating that, while he would stipulate to that request, he was not empowered to enter any agreement on behalf of the Fleming office. See Correspondence from Paul Napoli to Class Counsel, annexed to Class Counsel's Opposition papers at Exhibit "H." Describing this exchange, Class Counsel writes:

Noteworthy, however, is that the unsigned, undated letter also contained a reservation that "as to Fleming & Associates, LLP our office can not speak on their behalf please feel free to contact them directly." Further, the letter did not address the need for a Hariton stipulation at all. The letter also again wrongly characterizes what Class Counsel did as an "audit", which is a mis-characterization of the review that Class Counsel performed, and it also wrongly implies that Class Counsel have been uncooperative in providing information to Napoli in response to requests.

See, Class Counsel's Opposition Brief at p. 7.

After the exchange of the letters at issue, Class Counsel responded that the letter was insufficient to constitute a stipulation, and that "because of the joint involvement and enterprising activity of the Hariton and Fleming law firms with Napoli, that there could be no disclosure of any additional material unless all three law firms executed an appropriate stipulation not to engage in any *ex parte* contacts with Class Counsel experts. Responsive correspondence from Paul Napoli indicated his interest in reaching a stipulation agreement, but reiterated that the three entities (Napoli Kaiser, et al., Hariton & D'Angelo, and Fleming & Associates) are separate law firms, and that he could not bind the other two firms by his agreement to stipulate. There is no indication as to whether Class Counsel ever approached Fleming & Associates or Hariton & D'Angelo seeking their agreement not to communicate with the expert physicians.

It is clear by now, after all that has gone before in this litigation, that, to the extent that the three law firms may be said to be acting in concert in seeking evidence or in moving for various items of relief, the same could be said of Class Counsel, the AHP Settlement Trust and defendant Wyeth. As we have repeatedly noted in motion papers and appellate briefs, Class Counsel has taken positions jointly with the Trust and Wyeth and against the class members on numerous occasions. While we do not concede that it is appropriate to group the three plaintiffs' firms as a single entity for contractual or stipulation purposes, if anything, should not class counsel be standing up for the rights of the claimants we represent, rather than repeatedly and uniformly taking positions that undermine the claimants' rights under the Settlement Agreement and that hamstring claimants' counsel's ability to seek and obtain relief on their behalf?

Further, Class Counsel's problem with the term "audit" is more than a little confusing. We have not argued that the reviews conducted by Class Counsel's experts should take the place of the audit procedure enacted by this Court with PTO 2640 and PTO 2662 and related procedural implementation orders. Nonetheless, is there any reasonable basis that Class Counsel would not want to submit their experts' opinions and reports in those instances where the expert's opinion supports the claimant? Whether that use of the expert's opinion is for support of a post-audit contest or the claimant's position in a "show cause" proceeding, there is simply no reasonable basis for Class Counsel to refuse class members the use of that evidence to support their submissions in the audit and post-audit process, whether those class members are represented by Napoli, Kaiser, et al., Fleming & Associates, or any other law firm in this country.

### **POINT III.**

#### **CLAIMANTS' APPEAL OF THIS COURT'S PRETRIAL ORDERS 2640 AND 2958 HAS NO BEARING ON CLAIMANTS' RIGHT TO KNOW THE SUBSTANCE AND BASIS OF THE EXPERT REVIEWS CONDUCTED AT CLASS COUNSEL'S BEHEST.**

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The information sought on this motion, *i.e.*, the discovery of the expert reviews conducted at Class Counsel's behest, is neither waived nor precluded by the claimants' appeal of this Court's pretrial orders 2640 and 2658. The issue on this motion is not the propriety of those pretrial orders, or of the evidence adduced during the September 2002 hearings. That Class Counsel's disclosure of the fact that reviews of the claims were conducted by Dr. Karalis happened to take place during the September 2002 hearings is so attenuated to the issues before the Court on this motion as to be of no moment. Hence, to the extent that the case law cited in the Opposition papers holds

that this Court cannot decide issues related to the matters on Appeal until there is an order reversing or remanding the matter back to this Court, such case law is inapposite to the motion before the Court. The expert information is not sought to amend our Appellate record on 2640 or 2658; it is sought to support our clients in the Audit procedure and the post-audit proceedings.

The issue on this motion, stated *ad nauseum*, is that the claimants and their counsel are entitled to review and make reasonable use of the reports and evaluations prepared by physician experts reviewing those claimants' submissions to the Trust at Class Counsel's behest.

The fact that the Pretrial Orders are on appeal has not divested this Court of its jurisdiction over basic discovery matters in MDL 1203. Nor, moreover, has the Trust stopped its ongoing audits and reviews of the claimants' submissions, or stopped preparing its post-audit determinations that must be contested by the claimants. The information sought, we believe, is vital to our ability to demonstrate to the Trust, and to this Court, that our clients have properly been diagnosed by their attesting physicians. Notwithstanding this Court's obviously jaundiced view of the law firm, there is no basis for denying the class members the ability to support their claims and seek compensation that is due them under the Settlement Agreement.

#### POINT IV.

### **CLASS COUNSEL HAD AN AFFIRMATIVE DUTY TO DISCLOSE THE DISCOVERY SOUGHT PURSUANT TO FED. R. CIV. P. 26 (A); THE ARGUMENT THAT NO DISCOVERY NEED BE SERVED IN THE ABSENCE OF A “FORMAL” DEMAND IS INSUPPORTABLE.**

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Relying on citation to the local rules of this Court, Class Counsel argues that they were under no obligation to provide the medical evidence sought by this motion because no formal demand had been forthcoming from class members' counsel. This argument is utterly meritless. Fed. R. Civ. P. 26(a) clearly states, in pertinent part, that

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, ***a party must, without awaiting a discovery request, provide to other parties:***

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information; ...

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), ***a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.***

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support

for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26 (a)(1) and (2) (emphasis added).

Even to the extent – however minimal -- that Class Counsel could reasonably argue it was unaware of the fact that the discovery sought by this motion was required to have been served pursuant to Fed. R. Civ. P. 26(a)(2), the series of communications between Paul Napoli and Mr. Fishbein's office certainly apprised Class Counsel that the information was being sought. Class Counsel argues, in their footnote 4, that "since Dr. Karalis was not a testifying expert at the Hariton/Napoli hearing, Class Counsel were not obligated to produce a written report pursuant to Fed. R. Civ. Pr. 26 (a)(2)(B)."

Class Counsel argues that the alleged requirement of a formal discovery demand is important because serving a formal discovery demand will insure that the Court, in a dispute, will be presented with a focused dispute, rather than one that is amorphous. Certainly Class Counsel cannot, in all good faith, be arguing that they, or this Court, do not understand what is being sought, or why that discovery is being sought on this motion? Class counsel also argues that "the scope of permissible discovery is governed by Fed. R. Civ. P. 26(b), requiring that discovery sought should be relevant to the claim or defense or subject matter at issue. The findings of the medical experts Class Counsel retained to review our claimants' submissions are unquestionably relevant to the class members' claims and the subject matter, both of the class action litigation, as well as to the subject matter of this motion.

**POINT V.**

**HAD CLASS COUNSEL COMPLIED WITH ITS  
OBLIGATIONS TO DISCLOSE UNDER THE FEDERAL  
RULES, THIS MOTION WOULD HAVE BEEN MOOTED  
AND THERE WOULD BE NO NEED FOR FURTHER  
BASELESS ATTACKS ON CLAIMANTS' COUNSEL'S  
ETHICS, INTEGRITY OR MOTIVES.**

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An old jewel of legal wisdom speaks of different modes of attack, given the particulars of the merits in law or fact of a case: "if the law is against you, argue the facts, if the facts are against you, argue the law; if the law and the facts are both against you, pound on the table." When all is said and done, Class Counsel feels it necessary, once again, to engage in the sort of factually unsupported *ad hominem* attacks that have been the melody line of this ongoing litigation: "the present dispute is much to do about nothing other than Napoli's persistent effort to flout court rules and harass Class Counsel." Nothing could be further from the truth.

The fact is that we have complied, time and again, with the Federal Rules of Civil Procedure and with the rules and directives of this Court in the Settlement Agreement and its pretrial orders and amendments to the Settlement Agreement. It has been the AHP Trust, with the support of Class Counsel, that has, throughout, submitted our clients' claims to repeated levels of scrutiny; ignored the opinions of their own experts in support of our clients' submissions to the Trust; and repeatedly taken steps that were either lacking this Court's permission or, in several cases, that directly went afoul of this Court's orders not to perform reviews and audits of the cases.

There is nothing unreasonable, unfair or unjust about this office attempting to have the Trust act appropriately in processing our clients' claims when the Trust's own expert physicians have supported the determination that the class member has a

matrix-level injury. The massive and ongoing elevation of form over function, throughout this process, has wasted this Court's resources of time and effort, not to mention the Trust's funds that should be conserved for the benefit of the class members.

If, as Class Counsel argues, the documents and evidence sought by this motion simply do not exist, as they argue we would have learned in the face of serving a so-called "formal" demand for the discovery, the obvious question becomes, what was Class Counsel attempting to protect when drafting the draconian stipulation it demanded before the discovery would be released?

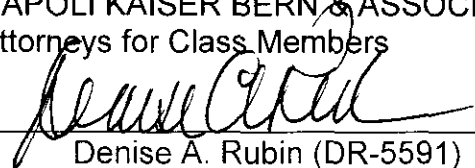
## CONCLUSION

Class Counsel has told this Court that their expert Dr. Karalis reviewed claimants' submissions filed by Napoli Kaiser Bern & Associates, LLP; and by Hariton & D'Angelo, LLP. The actual review notes, reports and documents that constituted the materials reviewed have never been served on claimants' Counsel and whether those reviews were completed by Dr. Karalis, Dr. Otto, Dr. Pearlman or Dr. Tysko, there is no basis for withholding these physicians' reports, notes, or other file materials from discovery by the claimants' counsel.

Dated :       New York, New York  
              October 28, 2003

NAPOLI KAISER BERN & ASSOCIATES, LLP  
Attorneys for Class Members

By:

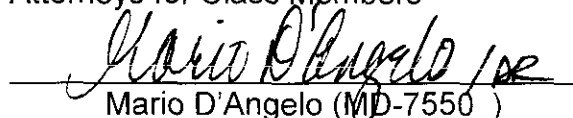
  
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Exhibit A

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October 17, 2003

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**RE: Diet Drugs, MDL 1203  
Motion to Compel RE: Dr. Karalis**

Dear Messrs. Napoli and D'Angelo:

Pursuant to my exchange of correspondence with Mr. Napoli, in which he has also represented that Mr. D'Angelo is agreeable on behalf of his law firm, please find enclosed a draft Stipulation for the resolution of the Motion to Compel regarding Dr. Karalis and independent echocardiogram reviews. Please advise any comments regarding same. Once the Stipulation is fully executed and approved by the Court as an enforceable So Ordered Court Order, and the Motion to Compel is withdrawn with prejudice, we will provide the echocardiogram review information concerning the 12 class members at issue.

Very truly yours,

  
LAURENCE S. BERMAN

LSB/jtc

Enc.

cc: Mario D'Angelo, Esquire

DRAFT-10/17/2003

**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:  
SHEILA BROWN, et al., v. AMERICAN HOME  
PRODUCTS CORPORATION**

**Civil Action No. 99-20593**

**PRETRIAL ORDER NO. \_\_\_\_\_**

**STIPULATION FOR WITHDRAWAL WITH PREJUDICE OF NAPOLI KAISER BERN  
& ASSOCIATES, LLP'S MOTION TO COMPEL REGARDING INDEPENDENT  
EVALUATION OF ECHOCARDIOGRAMS BY DEAN KARALIS, M.D.**

**WHEREAS**, the law firm of Napoli Kaiser Bern & Associates, LLP (hereinafter, "Napoli") has filed a Motion to Compel that seeks the production from Class Counsel, Levin, Fishbein, Sedran & Berman, (hereinafter, "Levin, Fishbein") of certain materials, documents and/or reports of Class Counsel's expert, Dean Karalis, M.D., regarding his alleged independent evaluation of echocardiograms concerning 12 specific clients of Napoli who have submitted a Claim for Matrix Compensation Benefits with the AHP Settlement Trust (hereinafter, the "Trust");

**WHEREAS**, Levin, Fishbein has filed an Answer and Opposition of Class Counsel to said Motion to Compel, wherein Levin, Fishbein has argued that there is no merit to said Motion to Compel;

**WHEREAS**, based upon record information in this case, the law firm of Hariton & D'Angelo (hereinafter, "Hariton") has jointly represented with Napoli, Class Members making Claims for benefits with the Trust pursuant to the terms of the Nationwide Class Action Settlement Agreement with American Home Products Corporation (hereinafter, the "Settlement Agreement");

**WHEREAS**, the law firms of Napoli, Hariton and Levin, Fishbein desire to amicably resolve the Motion to Compel on certain terms and conditions that are mutually agreeable to each other;

**WHEREAS**, in connection with the amicable resolution of the Motion to Compel, the parties are desirous that the Court approve this Stipulation to accomplish same and enter a Court Order to memorialize and render enforceable against one another the agreed upon terms and conditions recited herein;

**NOW THEREFORE**, with the foregoing incorporated herein, and the parties hereto intending to be legally bound hereby, the parties agree as follows:

1. The Motion to Compel filed by Napoli is hereby withdrawn with prejudice.
2. Napoli acknowledges that Class Counsel Expert Dean Karalis, M.D. did not perform an independent evaluation of any of the echocardiograms of any of the 12 specific Class Members who were the subject of the Motion to Compel.
3. Levin, Fishbein shall produce to Napoli the independent evaluations of the echocardiograms of the 12 specific Class Members at issue in the Motion to Compel that were performed by Class Counsel experts other than Dean Karalis, M.D.

4. Class Counsel represent that the independent evaluations of the echocardiograms of the 12 specific Class Members at issue in the Motion to Compel were performed by Catherine Otto, M.D., who evaluated 9 of the 12 claims, by Alan Pearlman, M.D. who evaluated 1 of the 12 claims and by Erin O'Malley Tysko, M.D. who evaluated 2 of the 12 claims.
5. Napoli and Hariton agree that Class Counsel did not "audit" these 12 claims.
6. The 12 Claims that are at issue are identified by their Trust DDR # as follows:  
  
1728039  
2422442  
3587482  
8015123  
8019401  
8019804  
8020154  
8021940  
8022163  
8022263  
8022664  
8023213
7. Napoli and Hariton agree that they shall keep the independent evaluation documents that Class Counsel produces hereby confidential, and that same shall not be disclosed to anyone other than to the Trust or the Court.
8. Napoli and Hariton agree that they shall not make or attempt to make any contact in any manner whatsoever with any of the Class Counsel experts, whether directly or indirectly, and that any contact that they desire to make shall occur only and

exclusively through Class Counsel. This agreement on the part of Napoli and Hariton to refrain from any contact with the Class Counsel experts other than exclusively through Class Counsel is to be broadly interpreted, and applies to all Class Counsel experts, and is not limited to the experts identified above in paragraph 4 hereof, who performed the independent evaluations of the 12 specific Claims at issue in the Motion to Compel. Accordingly, and without limitation, the agreement to refrain from contacts as described herein applies to Class Counsel expert Harry Rakowski, M.D., who was identified in the Answer and Opposition of Class Counsel to the Motion to Compel as having performed independent evaluations of Class Member Claims for Matrix Benefits submitted by Fleming & Associates (hereinafter, "Fleming"), as well as to Class Counsel experts, Dean Karalis, M.D., Robyn Barst, M.D. and Stuart Rich, M.D.

9. Napoli and Hariton agree that the documents to be produced by Class Counsel pursuant to this Stipulation shall not be submitted by Napoli or Hariton as part of any Claim for Matrix Benefits for any of the 12 Class Members at issue, and that such documents shall not constitute or be made part of any Audit File for any of the 12 Class Members at issue, as the term "Audit File" is defined by Rule 1 (c) of the Rules For The Audit of Matrix Compensation Claims adopted by the Court pursuant to Pretrial order No. 2807.
10. Napoli and Hariton agree that the documents to be produced by Class Counsel pursuant to this Stipulation shall not form any basis or foundation whatsoever for Napoli and/or Hariton to seek any discovery whatsoever with respect to the

independent evaluations performed by Class Counsel, and that Napoli and Hariton acknowledge that the agreement to produce the documents at issue does not represent any acknowledgment on the part of Class Counsel that any attempted use of such documents by Napoli and/or Hariton is proper or appropriate in any particular context.

11. Napoli and Hariton agree that the production of the documents at issue by Class Counsel is with a full reservation of all rights of Class Counsel to take and/or argue any position, objection or commentary regarding the substance of the documents and/or any use or attempted use of same by Napoli and/or Hariton.
12. Napoli and Hariton agree that the production of the documents at issue by Class Counsel is for the amicable resolution of a dispute, without any acknowledgment on the part of Class Counsel that there is any merit whatsoever to the dispute, and that the provision of the documents does not afford Napoli and/or Hariton any rights to any discovery regarding such documents and/or the independent evaluations performed by Class Counsel and their experts.
13. Napoli and Hariton agree that they shall not produce to Fleming any of the documents produced by Class Counsel as a result of this Stipulation, nor to any other person, law firm, or entity, excepting the right to produce the documents to the Court

under seal or to the Trust in confidence.

**AGREED TO:**

\_\_\_\_\_  
Arnold Levin  
Michael D. Fishbein  
Laurence S. Berman  
**LEVIN, FISHBEIN, SEDRAN & BERMAN**  
510 Walnut Street, Suite 500  
Philadelphia, Pa. 19106  
(215) 592-1500

\_\_\_\_\_  
Paul D. Napoli  
**NAPOLI KAISER BERN &  
ASSOCIATES**  
3500 Sunrise Hwy., Suite T207  
Great River, N.Y. 11739  
(212) 267-3700

And

\_\_\_\_\_  
Mario D'Angelo  
**HARITON & D'ANGELO, LLP**  
3500 Sunrise Hwy., Suite T207  
Great River, N.Y. 11739  
(800) 683-0852

DATED: \_\_\_\_\_

**APPROVED AND IT IS SO ORDERED  
BY THE COURT:**

\_\_\_\_\_  
Harvey Bartle, III, J.

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

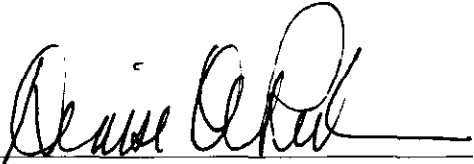
-----X  
IN RE: DIET DRUGS (Phentermine/  
Fenfluramine/ Dexfenfluramine) :  
PRODUCTS LIABILITY LITIGATION : CIVIL ACTION 99-20593  
-----X  
THIS DOCUMENT RELATES TO: : **Hon. Harvey Bartle**  
SHEILA BROWN, SHARON GADDIE, :  
VIVIAN NAUGLE, QUINTIN LAYER, and :  
JOBY JACKSON-REID, : **DECLARATION OF SERVICE**  
Individually and all others similarly situated, :  
Plaintiffs, :  
-against- :  
AMERICAN HOME PRODUCTS :  
CORPORATION, :  
Defendants. :  
-----X

DENISE A. RUBIN, an attorney duly admitted to practice in the State of New York and before the United States Court of Appeals for the Third Circuit, hereby declares that on October 29, 2003, I caused a true copy of the **CLAIMANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO REMOVE THE AHP SETTLEMENT TRUST BOARD OF TRUSTEES** to be served on the following person(s) by e-mail and electronically filed with the Court.

Michael D. Schissel, Esq.  
Arnold & Porter, LLP  
399 Park Avenue  
New York, New York 10022  
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Denise A. Rubin (DR-5591)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA  
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IN RE: DIET DRUGS  
(Phentermine/Fenfluramine/Dexfenfluramine)  
PRODUCTS LIABILITY LITIGATION  
-----  
SHEILA BROWN, et al.

MDL 1203

Plaintiffs,  
-against-

Docket No.: 99 CV 20593

AMERICAN HOME PRODUCTS  
CORPORATION, *et al*,  
  
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Defendants.

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

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**NAPOLI KAISER BERN & ASSOCIATES, LLP**

*Attorneys for : Claimants  
Office and Post Office Address, Telephone  
3500 Sunrise Hwy., Suite T-207  
Great River, New York 11739  
(212) 267-3700*

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To  
Attorney(s) for

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Service of a copy of the within  
is hereby admitted.

Dated,

Attorney(s) for \_\_\_\_\_

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PLEASE TAKE NOTICE:

NOTICE OF ENTRY

that the within is a (certified) true copy of a  
duly entered in the office of the clerk of the within name court on 20

NOTICE OF SETTLEMENT

that an order of which the within is a true copy  
will be presented for settlement to the HON. one of the judges of the  
within named Court, at  
on 20 at M.

Dated,

Yours, etc.

NAPOLI KAISER BERN & ASSOCIATES, LLP