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, JOSE GADDIE, VIVIAN NAUGLE, QUENTIN LAYER, JOAN S. LAYER, JOBY JACKSON-REID and HARVEY E. REID, Individually and all others similarly situated,	CIVIL ACTION NO. 99-20593
Plaintiffs,	CLASS ACTION
v.	
AMERICAN HOME PRODUCTS CORPORATION,	
Defendant.	

MEMORANDUM OF PLAINTIFFS JANE SCUTERI, ET AL., IN OPPOSITION TO JOINT MOTION FOR AN ORDER CONDITIONALLY CERTIFYING A CLASS ACTION TO EFFECTUATE A CLASS SETTLEMENT

PAUL J. NAPOLI
MARC JAY BERN
NAPOLI, KAISER & BERN, LLP
115 Broadway, 12th Floor
New York, NY 10006
(212) 267-3700
Attorneys for Plaintiffs Jane Scuteri, et al.

Of Counsel:

KENNETH J. CHESEBRO
1600 Massachusetts Avenue
Cambridge, MA 02138
(617) 661-4423

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MEMORANDUM OF PLAINTIFFS JANE SCUTERI, ET AL., IN OPPOSITION TO JOINT MOTION FOR AN ORDER CONDITIONALLY CERTIFYING A CLASS ACTION TO EFFECTUATE A CLASS SETTLEMENT

Jane Scuteri and twenty-two (22) other unnamed plaintiffs in this putative class action, who are identified in the margin and are represented by and appear through undersigned counsel,[1] hereby submit this memorandum in opposition to the Joint Motion for an Order Conditionally Certifying a Class Action to Effectuate a Class Settlement, Preliminarily Approving a Class Settlement, Directing Class Notice, and Scheduling a Final Fairness Hearing, filed on November 19, 1999.[2]

I. PRELIMINARY STATEMENT

In support of their joint motion to certify a class action to effectuate their proposed settlement, the counsel who seek to represent the putative class in Brown ("Brown class counsel" or "Brown counsel"), and the defendant, American Home Products Corporation ("AHP"), have filed papers that ignore two central points that this Court must address at the outset of this supposed "lawsuit."

The first point is whether any basis exists for the exercise of Article III jurisdiction over the "lawsuit" that these settlement proponents have brought before the Court. The attorneys who presently seek to serve as Brown class counsel entered into a contract with AHP on October 7, 1999, in which they agreed to work together to create a "global" alternative dispute resolution ("ADR") mechanism to resolve both personal injury claims that members of the putative Brown class currently have against AHP (and other entities), as well as personal injury claims that might accrue against AHP (and other entities) in the future. To implement this approach, these attorneys and AHP did not choose to proceed using ordinary contract law, creating a settlement program that plaintiffs could affirmatively elect to use as they wished, as has been done successfully by one major asbestos defendant.[3] Nor did these attorneys and AHP choose to lobby Congress to enact legislation establishing an ADR mechanism and forcing plaintiffs to use it, as another major asbestos defendant is currently doing.[4]

Instead, these attorneys and AHP agreed in the October 7 contract that, in exchange for a guaranteed $200 million payment by AHP to create a fund from which these attorneys could obtain fees, they would file the Brown "lawsuit" under which this Court would be asked to approve the creation of an ADR mechanism to resolve present and future personal injury claims, and under which all members of a class created pursuant to Fed. R. Civ. P. 23 would have their current and future tort claims against AHP (and other entities) released unless they both learned of the proposal and opted out by a given date. In this contract, the putative Brown class counsel specifically agreed that they would seek certification of the Brown class solely as a "settlement class," not for purposes of litigation. In other words, these attorneys and AHP have come to this Court, hand in hand, agreeing that they will not litigate anything in the class action complaint, and seeking only this Court's imposition of the ADR mechanism on the Brown class members.

How this enterprise could ever fit within the Article III jurisdiction of this Court, which is limited to the adjudication of actual "[c]ases" or "[c]ontroversies," is nowhere addressed by the settlement proponents in their papers. As we demonstrate in Part III-A of this brief, where, as here, proposed class counsel agree in advance with the defendant to bring a "lawsuit" in name only, in which they will not seek to litigate anything in the class action complaint, Article III bars the federal court from exercising jurisdiction over such a feigned proceeding. Further, as we demonstrate in Part III-B, even apart from the entirely feigned nature of this proceeding, there can be no Article III jurisdiction on the part of this Court to effect the sort of sweeping release of claims that will not even exist until the future that is contemplated by the proposed settlement, as these claims are not pleaded and cannot be pleaded in the Brown class action complaint.

The second point that the settlement proponents have totally ignored in their papers in support of their joint motion is the issue of whether certification is barred under Fed. R. Civ. P. 23(a)(4)'s adequacy-of-representation requirement, in light of Brown class counsel's multiple preexisting, disabling conflicts. Especially in the context of a "settlement class" effort such as this, Rule 23(a)(4) and due process require heightened attention toward possible sources of conflicts of interest. Here, Brown class counsel have preexisting duties to already certified classes — the Jeffers class pending in this Court, and state-wide class actions pending in seven states — that prevent them from adequately representing the putative Brown class. This attempted representation flies in the face of the rule, recently noted with approval by the Supreme Court, that "an attorney who represents another class against the same defendant may not serve as class counsel." Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2319 (1999) (citing 5 J. Moore, T. Chorvat, D. Feinberg, R. Marmer & J. Solovy, Moore's Federal Practice § 23.25[5][e], p. 23-149 (3d ed. 1998)).

Further, all of the proposed counsel have a preexisting interest in a given outcome in this Brown "lawsuit," preventing them from adequately representing the putative Brown class. Thus, no matter how personally honorable and competent proposed Brown class counsel may be in general, here the preexisting conflicts bar them from representing the Brown class. They must be replaced by other lawyers, ones untainted by these conflicts. No one disputes that plenty of fully competent, unconflicted lawyers are available who can be appointed in their stead.

Because this Court lacks Article III jurisdiction over the instant feigned "lawsuit," and because Rule 23(a)(4) requires that proposed Brown class counsel must be replaced even if there is jurisdiction to hear the case, this Court cannot even conditionally certify the class.

II. FACTUAL BACKGROUND

The facts pertinent to the points raised in this brief do not appear to be in dispute. They are either plain on the face of the contract entered into between AHP and the attorneys who are now seeking to serve as Brown class counsel, or they were summarized in a letter to Brown class counsel in which undersigned counsel invited these attorneys to respond if anything set out in the letter was factually or legally incorrect. In the sole response to that letter, Brown class counsel disputed only the legal significance of the facts we laid out and did not dispute the accuracy of our factual summary, which we set out here and in the factual portions of Part IV, infra.[5]

1. The contract between Brown class counsel and AHP was executed on October 7, 1999. It is entitled "Memorandum of Understanding Concerning Settlement of Diet Drug Litigation" ("MOU"). The contract was signed for AHP by its General Counsel, Louis Hoynes. See MOU at 46. All members of the Plaintiffs' Management Committee ("PMC") were party to the contract.[6] Six other attorneys and law firms were party to the contract as well.[7]

2. In the contract, AHP and these attorneys explicitly "agree[d] to propose a nationwide class action settlement which would resolve, on the terms set forth in" the contract, various "'Settled Claims' against AHP and other 'Released Parties' arising from" the use of AHP's diet-drug products, Pondimin and Redux. MOU at 1. The signatories agreed that "this MOU is binding" and that they were required to "negotiate in good faith" to prepare the final text of a settlement agreement carrying out its terms "within 45 days from the date of this MOU." Id. at 2.

3. Under the MOU itself, these attorneys agreed that the class would be generally defined to include: (a) "[a]ll persons in the United States, its possessions and territories, who ingested Pondimin and/or Redux ('Diet Drug Recipients'), or their estates, administrators or other legal representatives, heirs or beneficiaries"); and (b) anyone else with a possible "right to sue AHP or any Released Party

independently or derivatively by reason of their personal relationship with a Diet Drug Recipient, including without limitation, spouses, parents, children, dependents, other relatives or 'significant others' ('Derivative Claimants')." MOU at 9.

4. These attorneys also agreed "that the Settled Claims against AHP and other Released Parties" would "be settled, compromised and released," MOU at 2, as follows. "Settled Claims" would be defined as including (with the sole exception of claims based on Primary Pulmonary Hypertension, or "PPH") any conceivable sort of legal claim factually connected to Pondimin and/or Redux, "whether known or unknown, asserted or unasserted, regardless of the legal theory, existing now or arising in the future by any or all members of the Settlement Class against AHP and/or any Released Parties," including "claims for damages or remedies . . . that may be created or recognized in the future by statute, regulation, judicial decision, or in any other manner." MOU, Exhibit C, at 1-2.

5. These attorneys also agreed that the "Released Parties" would be defined broadly, to include not just AHP but (with limited exceptions): (a) each of AHP's current and former officers, directors, employees, attorneys, agents and insurers, even if they were later discovered to have fault "based upon his, her or its own independent negligence or culpable conduct"; (b) each of AHP's subsidiaries, affiliates and divisions, along with each of their current and former officers, directors, employees, attorneys, agents and insurers, again, even if they were later discovered to have fault "based upon his, her or its own independent negligence or culpable conduct"; (c) "[a]ny and all suppliers of materials, components, and services used in the manufacturer of Redux and/or Pondimin"; (d) "[a]ll distributors of Pondimin and/or Redux; and (e) "[a]ll physicians who prescribed, and all pharmacists and pharmacies who dispensed, Pondimin and/or Redux." MOU, Exhibit D, at 1-2.

6. The attorneys also agreed that the class members whose present and future claims against these Released Parties would be released would potentially be eligible to receive various benefits from funds to be set aside by AHP for that purpose, to function in a manner akin to a workers' compensation or other ADR mechanism, as outlined in the MOU. See MOU at 11-35.

7. In exchange for their agreement to seek the approval of this proposed ADR mechanism through the device of a "settlement class" action, in the October 7 contract AHP promised these

attorneys that, upon final approval of the settlement, it would pay $200 million into an escrow account out of which these attorneys could seek a fee award from the Court and further that, although AHP would receive back the entire amount not actually awarded in fees, it would not oppose the Court awarding the entire $200 million in fees. MOU at 12, 43-44. However, payment of this sum was guaranteed only if these attorneys performed their contract to the letter, exactly as set out in the MOU; if they failed to do so "in any respect," AHP was free to "terminate this MOU." MOU at 41. (The MOU also provided for the creation of another, separate fund, containing up to $229 million, from which these and other attorneys could seek to obtain additional fees. See MOU at 43-44.)

8. Finally, with respect to the filings and proceedings that would be involved in the "lawsuit" that these attorneys had agreed to bring to implement this ADR mechanism, these attorneys agreed with AHP that they would "cooperate in all of these filings and proceedings and in any related appeals." MOU at 40. In particular, these attorneys agreed in advance not to attempt actually to litigate the class action complaint that they had agreed to file. See MOU at 9 ("The Parties shall seek certification of a nationwide class solely for settlement purposes (the 'Settlement Class')").

9. Five days after executing their contract with AHP these attorneys, on October 12, 1999, filed the Brown class action complaint in this Court. Although they had already contracted with AHP not to litigate this "lawsuit," in a nod to the convention that plaintiffs in a complaint must actually set out facts and at least formally ask the Court to grant judgment on the claims, the complaint pleaded a negligence claim and sought personal injury damages and medical monitoring relief for all members of the Brown class. On October 12, 1999, the complaint was amended to add more parties. After that, nothing else occurred with respect to the claims set out in the complaint. Instead, on November 19, 1999, these attorneys filed the finalized settlement with the Court and jointly moved for conditional certification of the Brown "settlement class," and for preliminary approval of the settlement and the issuance of notice.

III. CONDITIONAL CLASS CERTIFICATION MUST BE DENIED BECAUSE THE INSTANT CLASS ACTION "LAWSUIT" IS NOT A "CASE" OR "CONTROVERSY" WITHIN THIS COURT'S ARTICLE III JURISDICTION

Absent from the motion papers filed jointly by AHP and by proposed Brown class counsel in

support of implementing the proposed ADR mechanism is any discussion of the basis for this Court to exercise Article III jurisdiction over this "lawsuit." This Court's jurisdiction is limited to the actual adjudication of "cases" or "controversies." This joint effort by AHP and proposed Brown counsel, with whom it has contracted to establish an ADR mechanism to handle claims arising out of AHP's diet-drug products, might be worth directing toward Congress, see, e.g., note 4, supra, but it falls outside the power of an Article III federal court. There are two separate reasons why. First, this is a transparently feigned proceeding, in which AHP guaranteed to make a $200 million payment for the benefit of the Brown class counsel if they filed a "lawsuit" against it, and both these attorneys and AHP agreed in advance that they would not litigate any of the claims in the class action complaint. Second, even if this were not a feigned proceeding, there can be no Article III jurisdiction on the part of this Court to effect the sort of sweeping release of claims that will not even exist until the future that is contemplated by the proposed settlement, as these claims are not pleaded and cannot be pleaded in the Brown class action complaint.

A. This is a Feigned Proceeding Designed to Impose an Alternative Dispute Resolution Mechanism on All Users of AHP's Diet-Drug Products and Their Families Who Fail to Opt Out, Not an Article III "Case" or "Controversy"

"The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." In re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (Higginbotham, J.). Here, the Brown class action complaint was filed on October 12, 1999, solely as part of a joint venture between proposed Brown class counsel and AHP, formed five days earlier, to foist their negotiated ADR mechanism to govern claims brought against AHP (and other entities) upon a class of persons that these attorneys would soon seek to represent. These attorneys explicitly promised AHP that they would cooperate with it on all filings, and specifically that they would not seek to litigate anything in the class action complaint. Article III jurisdiction may not rest upon such "a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." City of Dawson v. Columbia Avenue Saving Fund, 197 U.S. 178, 181 (1905) (Holmes, J.).

Article III, § 2, provides that the jurisdiction of the federal courts extends only to "[c]ases" or "[c]

ontroversies." The Supreme Court thus "has found unfit for adjudication any cause that 'is not in any real sense adversary,' that 'does not assume the honest and actual antagonistic assertion of rights,'" and which thereby violates "a safeguard essential to the integrity of the judicial process." Poe v. Ullman, 367 U.S. 497, 505 (1961) (opinion of Frankfurter, J.) (quoting United States v. Johnson, 319 U.S. 302, 305 (1943)). See generally Laurence H. Tribe, American Constitutional Law § 3-7, at 311-13, 319-20, § 3-12, at 361-64 (3d ed. 2000).

The burden of proving justiciability rests on those who invoke federal jurisdiction (here, the settling parties). Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). If "challenged by his adversary," the party asserting jurisdiction cannot rest on his allegations and must prove jurisdiction "by a preponderance of evidence." McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). See also Lujan, 504 U.S. at 561, 567 n.3.[8] Article III compels a court to look beyond the pleadings to the actual state of affairs when the complaint was filed, in light of all that has been learned. A court is not bound by what plaintiffs and defendants have alleged as to adversity, as "[f]ormal agreement between the parties that collides with plausibility is too fragile a foundation for indulging in . . . adjudication." Poe v Ullman, 367 U.S. at 501. See also City of Dawson, 197 U.S. at 180 ("Court will look beyond the pleadings and arrange the parties according to their sides in a dispute").

For example, in United States v. Johnson, 319 U.S. 302 (1943), the Supreme Court analyzed the existence of Article III jurisdiction over a lawsuit that a tenant brought against a landlord, at the request and the expense of the landlord, as a means of furthering the landlord's interests. The Court dismissed lawsuit for want of a Article III "case" or controversy" on the basis that the lawsuit "was instituted as a 'friendly suit' at [the defendant's] request;" that the plaintiff was represented by "counsel who was selected by [defendant's] counsel" in advance of the lawsuit; and that the defendant agreed in advance to pay the plaintiffs' counsel for bringing the suit. Id. at 304-05. See also id. at 304 ("Even in a litigation where only private rights are involved, the judgment will not be allowed to stand where one of the parties has dominated the conduct of the suit by payment of the fees of both.").

The same sort of feigned "lawsuit" exists here. Before this "lawsuit" was brought the defendant, AHP, contracted in writing with the attorneys who filed the "lawsuit" and scripted its precise outcome. For

this work, but only in the event that the prescribed outcome was actually achieved, AHP agreed to pay $200 million toward their attorneys' fees, and not to oppose a fee award of this entire amount. That is, in advance of filing the class action complaint, which created the putative class, and thus before these attorneys could obtain any input from the class members, these attorneys made contractual commitments to the defendant, AHP, dictating precisely how they would carry out the representation once it began.

We emphasize that no showing of "fraud or trickery" on the court is required to render a friendly lawsuit nonjusticiable. Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 344 (1892). Thus, a finding that this "lawsuit" falls outside the scope of the adjudicatory power of an Article III court is required regardless of how personally honorable proposed counsel for the Brown class may be in general, and even if they acted with the best of intentions in entering into the October 7 contract with AHP. A case need not be "'collusive' in the derogatory sense" to fail the Article III test; it need only reveal "a want of a truly adversary contest, of a collision of actively asserted and differing claims." Poe v. Ullman, 367 U.S. at 505. Here, it is clear from the October 7 contract and the joint filings made by proposed Brown class counsel and AHP that this "lawsuit" is what Justice Holmes once called a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." City of Dawson, 197 U.S. at 181. In short, this is a joint venture, not an adversarial lawsuit. A federal court's only constitutionally permissible option when such circumstances appear is to dismiss the action for lack of subject-matter jurisdiction.[9]

Of course, the proposed Brown class counsel and AHP have referred, in urging support of the settlement, to the extended, adversarial, even heated negotiations between them on the terms of a "global" settlement to replace tort claims against AHP with claims that would henceforth be handled through an ADR mechanism. But tough negotiations are commonplace both in private contractual dealings and in the legislative process, so they can hardly distinguish those processes from federal litigation. How much struggle took place before the pleadings were submitted to this Court, before any sort of "lawsuit" existed even in name, proves nothing about whether what is now before the Court is a justiciable "case" or "controversy" within its Article III jurisdiction.[10]

In sum, the settlement proponents here are attempting to use the federal courts not as a forum in which to litigate their differences (for there are none, reflected in the class action complaint, that anyone

actually intends to litigate), but as an ad hoc legislative body, "a sort of junior-varsity Congress." Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). The settlement proponents here ask the federal judiciary to convert their privately negotiated ADR damages schedule into a nationwide rule of law binding on all absent class members. But the very purpose of the case-or-controversy requirement is to restrict the judicial branch to the adjudication of distinct, ripe disputes between bona fide adversaries. Our Constitution does not grant federal courts the power to legislate solutions, even in response to pressing problems: "It is not for [the federal judiciary] to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case." Whitmore v. Arkansas, 495 U.S. 149, 161 (1990).

B. Independently, There is No Conceivable Article III Jurisdiction to Effect, as Required by the Proposed Settlement, the Sweeping Release of Claims That Will Not Even Exist Until the Future and Thus That Are Not Pleaded, and Cannot be Pleaded, in the Class Action Complaint

Independently, the principles of Article III require that conditional certification be denied because this Court lacks the power to effect the sort of sweeping release of claims that will not even exist until the future that is contemplated by the proposed settlement, as these claims are not pleaded and cannot be pleaded in the Brown class action complaint.

There is a vast temporal disconnect between the legal claims pleaded in the Brown class action complaint and the legal claims that would be released through the proposed Brown settlement — a disconnect of constitutional dimensions. The complaint pleads that various named plaintiffs ingested AHP's diet drugs for a period of time and are currently injured; it pleads a negligence claim against AHP; and based on this claim of negligence on the part of AHP, it seeks personal injury damages and medical monitoring relief for the named plaintiffs and similarly situated members of the Brown class. On the face of the complaint, some or all of these claims may support a finding of Article III standing, in that they suggest that the named plaintiffs may be able to demonstrate that they and similarly situated class members have suffered an "injury in fact": "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" Lujan, 504 U.S. at 560 (citation omitted).

But as already noted, see pp. 6-8, supra, the scope of the release effectuated by the Settlement Agreement is vastly broader. The release is designed to give AHP, with respect to the members of the Brown class, "global" peace with respect to any future claims being brought against it, so that all such claims must be processed through the ADR mechanism set up by the Settlement Agreement (subject to the ability of some class members to exit the ADR mechanism on some claims in some circumstances). Thus, the release operates to wipe out claims against AHP and a vast array of other entities that will only accrue on behalf of class members in the future.

Because the class is defined "without limitation" to include all family members of Diet Drug Recipients, it apparently even operates to wipe out claims of people who are not yet even class members because they do not yet have a "personal relationship with a Diet Drug Recipient" (for example, who have not yet become a spouse of a Diet Drug Recipient) or, even more dramatically, because these people are not yet even alive (for example, children who will be born to Diet Drug Recipients in the future, and who will then accrue claims when their parents fall ill or die due to past diet-drug use).[11] Apparently, under the Settlement Agreement none of these people who are not yet class members will receive anything from the ADR mechanism in exchange for their future claims being released now, before they have any possibility of knowing of the settlement's impact on them.

This sweeping release of all future claims, hard enough to square with basic principles of contract law,[12] is impossible to square with the dictates of Article III. The authority of class plaintiffs to represent and bind absent class members under Rule 23, and thus to release the claims of class members, is limited by the scope of the class action complaint, which describes the typical "claims" held in common by the class. Class representatives can release only those claims pleaded in the complaint or arising from the very same factual predicate as those pleaded. National Super Spuds v. New York Mercantile Exchange, 660 F.2d 9, 18-19 & n.7 (2d Cir. 1981) (Friendly, J.).[13] Because the named plaintiffs on the Brown class action complaint do not, by definition, currently possess unaccrued claims for injuries that they will experience only in the future and because, by definition, they have already been born and are already inside the Brown class, they fail to plead a wide range of claims that fall within the settlement's definition of released claims, and thus cannot release or settle such claims on behalf of either current or future class

members.

Of course, if a named plaintiff were to attempt to plead such claims and seek money damages for them in an effort to gain authority to release them — for example, by alleging that he or she might marry, after which the new spouse might become injured derivatively, or that he or she may have a child, which might become injured derivatively — the plaintiff would be laughed out of court. To establish standing under Article III, a plaintiff must demonstrate "that he has suffered an 'injury in fact" that is "concrete both in a qualitative and temporal sense." Whitmore, 495 U.S. at 155. Article III's requirement of actual or imminent injury is "stretched beyond the breaking point when . . . the plaintiff alleges only an injury at some indefinite future time." Lujan, 504 U.S. at 565 n.2. The absurdity of any such effort is obvious. Cf. Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) ("Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad.").

* * *

In its decision affirming the Third Circuit's refusal to allow certification of the "settlement class" involved in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), the Supreme Court took note of the objection that had been made that the efforts of the settlement proponents in that case involved "not a justiciable case or controversy" falling within the scope of Article III, but instead "a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries." Id. at 612. But the Court was able to avoid a decision on this Article III issue, as had the Third Circuit below, by first addressing the class certification issue, see id. at 612-13, which it found easily dispositive of the case, ruling for the objectors. See also Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2307 (1999) (adopting similar approach). Emphasizing the seriousness of the jurisdictional objections in Amchem, the Court stated that "[i]f certification issues were genuinely in doubt . . . the jurisdictional issues would loom larger." 521 U.S. at 613 n.15.

It follows that, if this Court agrees with our argument in Part IV of this brief that conditional certification must be denied under Fed. R. Civ. P. 23(a)(4) given the conflict-of-interest problems affecting

proposed Brown class counsel, it may avoid the Article III arguments just presented. Otherwise, it must rule on these arguments.

IV. CONDITIONAL CERTIFICATION MUST BE DENIED UNDER FED. R. CIV. P. 23(a)(4) GIVEN THAT PROPOSED CLASS COUNSEL HAVE MULTIPLE PREEXISTING, DISABLING CONFLICTS

The settlement proponents have not even come close to meeting their burden, in seeking conditional certification, to demonstrate compliance with Fed. R. Civ. P. 23(a)(4)'s requirement that proposed Brown class counsel be in a position to "adequately protect the interests of the class." See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 792 (3d Cir.), cert. denied, 516 U.S. 624 (1995) ("the party advocating certification bears the burden of proving appropriateness of class treatment") (citing Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974)). In the context of a proposed "settlement class" such as this one, the Rule 23(a)(4) requirement carries special force. Yet here proposed class counsel barely address Rule 23(a)(4), and they do not even address the key issue under it: whether their current status as counsel on other certified class actions against the same defendant, and/or the contract they entered into with AHP scripting in advance their representation of the instant Brown class, render them ineligible to serve here as class counsel.[14]

A. Rule 23(a)(4) Requires Heightened Attention in the "Settlement Class" Context to Ensure That Proposed Class Counsel Are Free of Any Conflict of Interest, or Even an Appearance of a Conflict of Interest

As the Supreme Court held in Amchem, where, as here, a "settlement class" is proposed, in which the claims in the complaint will never be tried, although the court "need not inquire whether the case, if tried, would present intractable management problems" — a matter addressed by Fed. R. Civ. P. 23(b)(3)(D) — the "other specifications of the Rule . . . demand undiluted, even heightened, attention." Amchem, 521 U.S. at 620. See also Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2316 (1999) ("When a district court . . . certifies for class action settlement only, the moment of certification requires "heightene[d] attention.") (quoting Amchem, 521 U.S. at 620).

The Supreme Court has emphasized that whether the threshold requirements of Rule 23(a) and (b) have been met is an inquiry separate from whether the settlement seems fair (an inquiry that is to be addressed separately, under Rule 23(e) in conjunction with the fairness hearing). As the Court explained in Amchem, the Rule 23(a) and (b) standards

> serve to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.
>
> * * *
>
> Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted — that if a settlement is "fair," then certification is proper.

521 U.S. at 621-22. The Court strongly reiterated this theme a few months ago in its decision in Ortiz. See 119 S. Ct. at 2316 ("a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees'") (quoting Amchem, 521 U.S. at 620); id. at 2323 ("the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b).").[15]

Rule 23(a)(4), of course, demands "adequacy of representation," id. at 613, both by the named plaintiffs and by proposed class counsel. See Amchem, 521 U.S. at 625-26 & n.20 (the analysis of adequacy "also factors in competency and conflicts of class counsel.") (emphasis added).[16] The Court's emphasis on examining both "the competency of class counsel and conflicts of interest" was set out much earlier in General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-58 n.13 (1982)

(cited in Amchem) (emphasis added). The principle was recently emphasized again by the Court in Ortiz. See 119 S. Ct. at 2319 n.31 ("In Amchem we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the 'competency and conflicts of class counsel.'") (quoting Amchem, 521 U.S. at 626 n.20) (emphasis added).

Of particular interest here, in Ortiz, in emphasizing the requirement that federal courts structure the representation of class actions so as "to eliminate conflicting interests of counsel," the Court illustrated the point by citing with approval the rule, as analyzed in a leading treatise, that "an attorney who represents another class against the same defendant may not serve as class counsel." 119 S. Ct. at 2319 (citing 5 J. Moore, T. Chorvat, D. Feinberg, R. Marmer & J. Solovy, Moore's Federal Practice § 23.25[5][e], p. 23-149 (3d ed. 1998)) (emphasis added). Further, in Ortiz, the Court emphasized the need for closer analysis of possible conflicts of interest with respect to a "class action settlement with the potential for gigantic fees," given the understandable risk that "with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant." Id. at 2317 & n.30. See also GM Truck, 55 F.3d at 801 ("even honorable counsel . . . may be compromised by the possibility of a large fee.").

Applying the "heightened attention" toward the risk of the conflicts of interests affecting proposed Brown class counsel, it is clear that conditional certification must be denied.[17]

B. Nearly All of the Proposed Class Counsel Have Preexisting Duties to the Already Certified Jeffers Class That Prevent Them From Adequately Representing the Putative Brown Class

This litigation is governed by the Pennsylvania Rules of Professional Conduct ("Pa. R. Prof. Con.").[18] Under Third Circuit precedent, if Brown class counsel have a conflict of interest as defined by the rules, "then certainly they are not 'generally able to conduct the litigation' and there is inadequate representation of the class's interests" within the meaning of Rule 23(a)(4), especially where the conflict "would create divided loyalties." In re Fine Paper Antitrust Litig., 617 F.2d 22, 27 (3d Cir. 1980) (citation omitted). Indeed, one court has held that Rule 23(a)(4)'s "adequacy of representation"

requirement is not met where there is even "[t]he 'appearance' of divided loyalties." Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir.), cert. denied, 516 U.S. 914 (1995).

Two separate provisions of Rule 1.7 govern the circumstances in which the Brown counsel must withdraw on the basis that representation of the Brown class would conflict with their responsibilities to existing clients. Rule 1.7(a) states as follows (emphasis added):

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

Further, Rule 1.7(b) states in relevant part (emphasis added):

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after full disclosure and consultation.

Thus, Rule 1.7(a) focuses on whether the interests of the first client represented by the lawyer will be hurt if the lawyer takes on the second client. Rule 1.7(b) focuses on whether the interests of the second client that the lawyer now seeks to represent may be hurt by the lawyer's responsibilities to the first client.

Both provisions are violated with respect to the Brown class counsel who, prior to the filing of the instant Brown complaint, were counsel to the currently certified Jeffers class, also brought against AHP as the defendant. The Jeffers counsel, of course, are the entire Plaintiffs' Management Committee and their law firms. The putative Brown class is also represented by the entire PMC — that is, all the attorneys and law firms who are currently representing the Jeffers class, see note 6, supra — as well as other attorneys and law firms that are apparently not counsel in Jeffers. See note 7, supra. With respect to these Brown class counsel, the Jeffers class and its members constitute "another client" within the meaning of Rule 1.7(a) & (b). Under Rule 1.7(a), the Jeffers counsel cannot represent the Brown class if that representation would in any way adversely impact on **the interests of the Jeffers class**. Under Rule 1.7(b), the Jeffers counsel cannot represent the Brown class if their responsibilities to the Jeffers class might materially limit their ability to represent **the interests of the Brown class**. We address each rule in turn.

1. Adverse Impact on the Interests of the Jeffers class.

With respect to Rule 1.7(a), any effort by the PMC attorneys and law firms to represent the Brown class of necessity "will be directly adverse" to the interests of the Jeffers class, thus barring them from taking on the Brown representation. A brief summary of recent developments in the Jeffers class action makes clear why this is so.

In successfully obtaining certification of the Jeffers class, counsel for Jeffers emphasized that everyone who took diet drugs for 30 days or more suffers from an increased risk of heart damage; that medical monitoring in the form of echocardiograms for all such individuals is essential to permit affected individuals to take steps to protect their health; that Jeffers only sought targeted equitable relief under Rule 23(b)(2) to establish a trust to dispense medical monitoring benefits (avoiding all of difficulties of certifying a class seeking recovery for personal injuries); and that without class certification, no such relief could be obtained because the stakes involved for any one individual were too small to support the costs of litigation.[19] Especially with respect to uninsured diet-drug users, the PMC urged that "there is a serious risk" posed by the fact that such people know nothing about underlying heart conditions and "are walking around with an impending risk of death just from going to the dentist and having their teeth cleaned," because "they don't have insurance to pay for echocardiograms." 3/17/99 Tr. at 35. "It is with respect to these people," the PMC represented, "that we seek certification of a nationwide medical monitoring class so that we can litigate to obtain relief on their behalf and obtain that relief after a trial on the merits." Id.

In Pretrial Order No. 865, filed Aug. 26, 1999, the Court ultimately certified a class of all people (whether or not insured) who took diet drugs for 30 days or more, a class nationwide in scope but excluding: (1) persons in states that have certified state-wide class actions seeking medical monitoring relief; and (2) persons who have already filed a lawsuit in connection with their diet-drug use. Id. at 34-37. Further, the Court ruled that plaintiffs who are asymptomatic and whose claims arise under the law of a state which does not recognize medical monitoring claims for such plaintiffs would be excluded from the class as well. See id. at 28-33.[20] Wholly excluded from the Jeffers class action complaint

was any request to obtain damages for personal injuries, or any suggestion that the outcome of the lawsuit (whether by adjudication or settlement) would release any personal injury claims, including any claims for punitive damages.

Thus, the PMC attorneys and law firms have a duty to the Jeffers class, composed of people who took diet drugs for 30 days or more and are not currently a party to the state-wide class actions or individual actions, to continue with their focus on obtaining medical monitoring relief for this class, without any release of personal injury claims. That duty is a continuing one, as the PMC has made no effort to withdraw from Jeffers or to seek dismissal of the Jeffers class action complaint. (Not that any such effort would be permissible; in any event, any such effort would not solve the conflicts problems. See, e.g., Pa. R. Prof. Con. 1.9(a)). Thus, the PMC currently has, and had at the time of the filing of the Brown complaint, a duty competently, diligently, and promptly to carry out the interests of the Jeffers class, as articulated in the Jeffers complaint, the PMC's arguments in support of certification of the Jeffers class certification, and the Court's order approving the Jeffers class. See, e.g., Pa. R. Prof. Con. 1.1, 1.3, 1.4, 2.1.

Given this background on Jeffers, it is obvious that any effort by the PMC attorneys and law firms to represent the new Brown class will, within the meaning of Rule 1.7(a), "be directly adverse to another client" of these same PMC attorneys and law firms — namely, the Jeffers class and its members. The Brown class settlement that has been proposed by Brown class counsel would, if adopted, release the defendant in Jeffers, AHP, from liability on all the claims that have been asserted in Jeffers, thereby entirely supplanting the Jeffers class action. See Nationwide Class Action Settlement Agreement With American Home Products Corp., filed Nov. 19, 1999 (hereinafter "Brown Settlement Agreement"), Part VI-B, at 114-15. See also id., Part VIII-C(5), at 127; Part VIII-D(1)(a)(4), at 128. Indeed, the brief filed by Brown class counsel in support of the settlement specifically observes that the proposed settlement is designed to supplant Jeffers, as well as the seven currently certified state-wide class actions seeking medical monitoring relief. See Plaintiff's Memorandum of Law dated Nov. 19, 1999, at 2 ("This proposed nationwide class action settlement is intended, among other things, to resolve the claims of members of other diet drug class action lawsuits that have been brought against AHP and

have been certified or conditionally certified."); see also id. at 20-21 (describing type of claims to be released).

Thus, under the settlement that Brown class counsel have proposed, all of the claims now pending in the already certified Jeffers class action would be forever released. Such a result is, by definition, "directly adverse" to the interests of the Jeffers class, as the Jeffers action will be eviscerated by operation of the Brown settlement, without any adjudication of the claims in Jeffers, and without AHP paying anything to the Jeffers class to settle that lawsuit. The Brown settlement requires that the outcome in Jeffers be the equivalent of the lawsuit being dismissed on a motion for summary judgment. In other words, with full knowledge of what the Brown settlement entails, the PMC attorneys and law firms who currently represent the Jeffers class have chosen to take on a second client (the Brown class) whose interests require that they abandon the lawsuit brought by the first client (the Jeffers class).

Of course, some in the Jeffers class may be the beneficiaries of money paid by AHP to achieve a "global" resolution of litigation against it, through the Brown settlement. But this is immaterial to whether or not Jeffers counsel are barred from seeking to represent a new, different, larger pool of clients (the Brown class) whose representation requires the dismissal of the Jeffers class action. Further, it bears emphasis that the members of the Jeffers class, which constitutes a subset of the Brown class, receive no advantage under the Brown settlement terms corresponding to the fact that the Jeffers class members were, just prior to the Brown settlement, in an advantaged position compared with other diet-drug users, as they were members of a currently certified class action who reside in a state that has not rejected medical monitoring claims for asymptomatic plaintiffs. In its decision approving the Jeffers class certification, the Court emphasized the need, as a means of avoiding disabling intraclass conflicts, for the creation of subclasses grouped based on the content of state substantive law, to reflect the varying value of the legal claims of class members in different states. See Pretrial Order No. 865 at 27-33. Contrary to this principle, no Brown subclass has been created for the Jeffers class, or for any other members of the Brown class based on the content of controlling state law. Further, contrary to the relief sought in the currently certified Jeffers class action litigation, the medical monitoring relief provided in the Brown settlement would come with "strings attached." Even the portion of the Jeffers

class eligible for medical monitoring benefits under the Brown settlement (those who used diet drugs for more than 60 days; those who used it between 30 and 60 days will not be eligible) would, as a quid pro quo of receiving prompt medical monitoring relief, be forced to waive their rights to punitive damages and restrict their future litigation options as to certain forms of heart-valve damage.

Thus, viewing Jeffers and Brown as a whole, it is clear that in the current Brown settlement, the PMC attorneys and law firms propose simply to abandon the Jeffers class, take on the Brown class as a new client, and promote a global settlement plan that is structured as if Jeffers had never existed, with their Jeffers clients getting only what everyone else in the class gets. This is a plain violation of Rule 1.7(a).

Even at the beginning stages of the Brown litigation, well before the settlement can actually go into effect and release the claims in the Jeffers complaint, the adverse effect of this new representation on the Jeffers class is apparent. Work by the PMC attorneys and law firms on Jeffers appears to have stopped in its tracks: following a motion filed by the PMC on Sept. 7, 1999, for an order approving a form of notice to the Jeffers class, from the docket sheet it appears that Jeffers class counsel have been idle on the case. Jeffers class counsel have not even filed a motion seeking a stay of Jeffers, and attempting to justify such a stay on the basis of the desire of these attorneys to file a lawsuit and pursue a settlement on behalf of a different set of clients (not that the abandonment of one client for another could be permitted on these facts).

Further, the very same PMC attorneys and law firms who are counsel in Jeffers have, in the process of finalizing the Brown settlement, entered into factual understandings with AHP that are directly contrary to positions that they took in winning certification in Jeffers, and that appear essential to maintaining certification in Jeffers. In winning certification of Jeffers, the PMC attacked as baseless AHP's contention that there is no sound evidence that those who used diet drugs for 90 days or less have an increased risk of heart damage. In so doing, the PMC emphasized the persuasive medical evidence that the risk exists after 30 days of use.[21] Accepting this argument, the Court defined the Jeffers class to include those who used diet drugs for 30 days or more, without further subclassing based on the time of use. Obviously, the PMC's duties to the Jeffers class, both to maintain the existence of

the class certification, and to win substantive relief for all members (regardless of their level of usage) depend on a continued reiteration and defense of this argument on the 30-day risk level.

But such a position is incompatible with the duties of counsel to the Brown class action, at least with respect to the proposed settlement. As has recently come to light, and has received substantial attention in the press,[22] in the process of finalizing the negotiation of the Memorandum of Understanding ("MOU") announced on October 7, 1999, the Brown counsel's negotiating team wrote AHP a letter on October 6, 1999.[23] This letter confirmed the mutual agreement of Brown class counsel and AHP that the global settlement was predicated on certain understandings about the health risks of diet-drug usage. In the letter, Brown class counsel capitulated to AHP's previously expressed opinion that "currently no reliable epidemiological evidence" exists that diet-drug users will develop significant heart-valve problems if they took diet drugs for 90 days or less. This statement is contrary to the arguments that the same PMC lawyers made to the Court in obtaining certification of the Jeffers class, see note 21, supra, a certification that issued about a month before the October 6 letter. This statement is also contrary to the views of one of the PMC's lead attorneys in charge of analyzing the scientific evidence, Michael Williams, with whom Brown class counsel evidently did not check before entering into their understanding with AHP and sending the October 6 letter.[24]

Quite apart from the fact that the understanding reflected in the October 6 letter was apparently extracted from Brown class counsel by AHP as part of the agreement on a global settlement, it would appear that in order to gain approval of the Brown class settlement, some position such as that outlined in the letter would need to be taken by Brown class counsel. After all, the Brown class settlement provides medical monitoring benefits only for those who used diet drugs for more than 60 days, contrary to the explicit position taken in Jeffers that all those who used diet drugs for 30 days or more are at risk and need medical monitoring, and that there was no scientific basis for differentiating between members of the Jeffers class based on how much longer than 30 days they took diet drugs. Some explanation for providing medical monitoring only for more than 60 days of use would be needed to justify the Brown settlement. But any such effort to justify the Brown settlement would, of course, be directly contrary to the position that was taken to obtain certification in Jeffers and would need to be taken to maintain class

certification in Jeffers (for example, if the Brown settlement were invalidated, so that Jeffers ultimately did go forward). Clearly, whoever is counsel in Brown and must defend the 60-day threshold reflected in the Brown settlement cannot be the same counsel who are responsible for defending the 30-day threshold in the Jeffers class action.

In sum, under Rule 1.7(a)'s bar on an attorney taking on a second client when doing so will adversely affect the claims of the first client, none of the PMC attorneys or law firms that are representing the Jeffers class can have any role in the Brown class action litigation, as representation of the proposed Brown class requires actions that are inconsistent with the existing interests of the Jeffers class. The Jeffers class includes only those who used diet drugs for 30 days or more and do not have another available vehicle for obtaining medical monitoring relief (through a state-wide class action or an individual action), and it does not seek any personal injury damages. Because the Jeffers class is already certified for all purposes (i.e., it is not a so-called "settlement class," good only to the extent that the defendant agrees with certain settlement terms), the Jeffers class is in a position to win classwide relief on the merits, thus conferring on it substantial settlement leverage to obtain medical monitoring relief, with no strings attached (i.e., without the members of the Jeffers class being forced to waive their rights to bring suit over certain heart valve conditions, or to seek punitive damages, as would be required under the Brown settlement as a condition to receiving medical monitoring benefits). The members of the Jeffers class are in a substantially better position than other users of diet drugs to win valuable medical monitoring relief, either through the Jeffers class action litigation or conceivably as a subclass in the Brown class action litigation. The PMC attorneys and law firms are required zealously to advance the interests of Jeffers class, and to use the leverage created based on the existing certification of that class for that class's benefit. Any effort by them to shift to representing the interest of the Brown class, involving a broader class of persons and a broader scope of relief, would injure the ability of the Jeffers class to pursue their targeted interest in medical monitoring relief and to retain the fruits of their advantaged position compared with other persons.

2. Adverse Impact on the Interests of the Brown Class.

Even if the decision of the current Jeffers counsel to take on the Brown class as a new client had

no adverse impact on the Jeffers class, it would still be barred by an entirely separate conflicts provision: Rule 1.7(b). Rule 1.7(b) mandates that these attorneys may not take on a new client — here, the Brown class — if doing so "may . . . materially limit[]" their ability to represent the new client. There are obviously at least several respects in which the past positions taken by Jeffers class counsel, and their continuing duties to the Jeffers class members, "may" limit their ability to zealously and effectively advocate the interests of the Brown class:

Most basically, the PMC attorneys and law firms who propose to take up the challenge of the Brown class action litigation owe a continuing duty of loyalty to their first class action client, the Jeffers class. This duty of loyalty bars these attorneys from going forward with the Brown class action settlement. As already noted, the Jeffers class members enjoy a position superior to that of many other members of the Brown class by virtue of the currently certified Jeffers class action, which is carefully targeted on the medical monitoring relief that can be won by litigation under the law of the states that have favorable law on this subject. The duty of loyalty owed toward the Jeffers class bars the PMC attorneys and law firms from agreeing to any settlement that would release the claims in the Jeffers class action for nothing, leaving the Jeffers class members with the same relief won by others whose claims are less strong. This duty of loyalty owed to the Jeffers class members, whom the PMC attorneys and law firms already represent, prevents them from advocating the Brown settlement, which regards as irrelevant whether the Brown class member is a party to Jeffers or another currently certified medical monitoring class action. Only attorneys without a duty of loyalty to the Jeffers class can serve as attorneys for the Brown class to advocate the currently proposed standardized settlement.

In obtaining certification of the Jeffers class, the Jeffers class counsel took legal positions that would be cited against them if they represent the Brown class and hence must defend certification of the Brown class. For example, in arguing for certification in Jeffers on the theory that Pennsylvania law should govern the eligibility of all class members for medical monitoring, the Jeffers class counsel conceded AHP's argument about the existence of significant differences among the states over the law of medical monitoring. See note 20, supra. This concession will obviously be quoted back at these same counsel with considerable force if they represent the Brown class, as the Brown class definition

does not include any subclasses based either on the content of state law or on whether a given state had a currently certified state-wide class action seeking medical monitoring relief. For the same counsel who made this concession in a related case to take on a new client — the Brown class — knowing that they will be confronted with this concession, and knowing that the interests of the Brown class may require arguing that the concession was incorrect, is a clear violation of Rule 1.7(b).

Another example of a legal concession made by the Jeffers counsel that they will be forced to confront if they seek to represent the Brown class is that in summarizing the impact of the current Third Circuit case law on class certification, particularly after Amchem, the Jeffers class counsel emphasized "the very sharp distinction between non-certification or presumptive non-certification of claims for personal injury, which we see in the Amchem and the Georgine cases, and presumptive certification for medical monitoring." 3/17/99 Tr. at 51.[25] Obviously, to the extent that a class such as Brown could ever be certified, the putative Brown class deserves to be represented by attorneys who have not already taken a position in a related case that a "settlement class action" such as Amchem or Brown, seeking to resolve personal injury damages, is presumptively non-certifiable. Allowing the Jeffers class counsel to represent the Brown class, in light of this critical position taken by them on behalf of another current client, certainly "may" adversely affect the Brown class, barring the representation under Rule 1.7(b).

Likewise, in representing the Jeffers class, the Jeffers class counsel took factual positions that would be cited against them in any attempt to win approval of the Brown class settlement. For example, one of the key features of the Brown settlement is the idea that there is a principled basis on which to attach significant consequences to whether or not a diet-drug user is now, or will in the future be, "FDA positive" in terms of the nature of heart-valve damage. This categorization affects the definition of all five Brown subclasses and, among other things, controls the extent to which those who used diet drugs for 60 days or less can obtain reimbursement for the cost of echocardiograms, and the instances in which class members can receive damages for their injuries or exercise "opt out" rights. But in representing the Jeffers class, the Jeffers class counsel denigrated the concept of "FDA positive" as simply "a thumbnail way of distinguishing between disease level of regurgitation," characterizing it as "kind of an arbitrary standard that [the FDA] selected to do some initial research." 3/17/99 Tr. at 12. Obviously, to

the extent that there is any basis for concluding that it is proper to use the concept of "FDA positive" to define the basic structure of the Brown settlement, the putative Brown class deserves to be represented by attorneys who have not already taken a position in a related case that the concept of "FDA positive" is "an arbitrary standard." Allowing the Jeffers class counsel to represent the Brown class, in light of this key contrary factual position taken by them on behalf of another current client, certainly "may" adversely affect the Brown class, again barring the representation under Rule 1.7(b).

In sum, given both Rules 1.7(a) and 1.7(b), it is plain that every attorney who has served as counsel on Jeffers must withdraw from any involvement in Brown. Any effort by the Jeffers attorneys to persist in representing the Brown class will violate Rule 1.7(a), because it will adversely affect their representation of the Jeffers class. It will also violate Rule 1.7(b) because it may adversely affect their representation of the Brown class. The only way that both the Jeffers class and the Brown class can each be zealously and effectively represented, free from conflicts of interest, is to have entirely different attorneys handling each case. As the Supreme Court concisely summarized the point in Ortiz, "an attorney who represents another class against the same defendant may not serve as class counsel." 119 S. Ct. 2295 at 2319 (citation omitted).

C. The Rest of the Proposed Class Counsel Have Preexisting Duties to One or More Already Certified State-Wide Class Actions That Prevent Them From Adequately Representing the Putative Brown Class

Rules 1.7(a) and (b) also require the withdrawal of all attorneys listed on the Brown class action complaint and settlement who are currently representing one or more state-wide class actions.[26] Any effort by these attorneys to represent the Brown class violates Rule 1.7(a) because, just as with the Jeffers class, the Brown settlement would release all the claims made in the currently pending state-wide medical monitoring class actions, without giving the members of those state-wide class actions anything more than Brown class members who hail from states that have unfavorable law on medical monitoring and in which no class action has been certified. See Brown Settlement Agreement, Part VI-B, at 114-15; Part VIII-C(5), at 127.

Any effort by these attorneys to represent the Brown class also violates Rule 1.7(b), as the

preexisting duty of loyalty by these attorneys to the members of the state-wide class actions who they represent precludes them from carrying forward with the Brown settlement as currently formulated. For example, these attorneys' duties to the members of the state-wide class actions may require them to bring motions in the Brown class action seeking to invalidate the Brown settlement on a variety of grounds (for example, attacking the failure of the settlement to treat the members of the state-wide class actions as preferred subclasses, or seeking to exclude the members of these state-wide class actions from the Brown class action entirely). Obviously, the attorneys for state-wide classes cannot carry out these duties consistent with their duty to have undivided loyalty to the Brown class with respect to the current settlement.

For purposes of the rules of professional conduct, the attorneys handling state-wide class action litigation who are disqualified from serving as "Brown class counsel" are not just the three attorneys and law firms that have signed the pleadings in Brown, and the PMC attorneys and law firms that are handling state-wide class actions. (See notes 6 and 7, supra.) Rather, the conflicted attorneys include all the attorneys and law firms that are presently representing any certified state-wide class action. Under the Brown settlement, see Brown Settlement Agreement, Part VIII-E, at 129-33, each of these attorneys and law firms is eligible to apply for a share of the guaranteed $200 million in attorneys fees made available under the settlement, in compensation for their role in bringing about the Brown settlement. If these attorneys for state-wide class actions stand to obtain fees from the proceeds of the Brown class action as compensation for their work to create the Brown proceeds, they have an attorney-client relationship with the Brown class. Thus, they are subject of the same conflicts problems under Rules 1.7(a) and (b) as the attorneys for state-wide class actions who have actually signed the pleadings in Brown.

This result is also required for practical reasons, to ensure that the Brown settlement terms do not operate to induce attorneys for the state-wide class actions to abandon their duty of loyalty to the state-wide classes they represent. If the attorneys for the state-wide class actions could be considered immune from scrutiny under Rules 1.7(a) and (b), and on that basis could be eligible to be paid fees from the Brown proceeds, they would have an incentive to abandon their loyalty to the members of the

currently certified state-wide class actions, stop litigating those actions, and allow the Brown settlement to release all the claims advanced in those actions. They would then apply for a share of the $200 million in Brown proceeds that will be available for attorneys' fees — even though the result of their abandoning the state-wide class actions so as to be able to collect a fee in Brown will be that their state-wide class action clients will receive nothing more than persons located in other states with unfavorable law and no certified class.[27]

In other words, the only way to preserve the loyalty owed the members of the state-wide classes is to be sure that the Brown settlement does not compromise these attorneys' vigorous representation of the interests of their current clients in the state-wide class actions. It would thus appear that every attorney or law firm currently representing plaintiffs in a state-wide class action, whether or not they signed the Brown pleadings, should at minimum either file objections to the proposed Brown settlement, which treats their clients no better than people in other states whose legal position is less advantaged, or file an irrevocable waiver of any interest in any of the attorneys fees' payable from the Brown proceeds. Such actions would help to remove the taint that has been created by the Part VIII-E of the Brown settlement with regard to these attorneys' exercise of their professional duties on the state-wide class actions.

D. All of the Proposed Class Counsel Have a Preexisting Interest in a Pre-Scripted Outcome in Brown, Preventing Them From Adequately Representing the Putative Brown Class

Separate from the various conflicts faced by the Brown counsel between the interests of one client and those of another are the conflicts posed by Brown between the Brown counsel's responsibilities to a third person, and their own interests — both of which conflict with the interests of the Brown class. Rule 1.7(b) provides in relevant part as follows (emphasis added):

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after full disclosure and consultation.

The Brown counsel's proposed representation of the Brown class violates this rule because prior to filing the Brown class action, the Brown counsel entered into a contract with a third person — AHP — in which they acquired an interest in a large sum of money in exchange for their agreement to represent the Brown class, once certified, in a specific, pre-scripted way.

The original Brown class action complaint, filed October 12, 1999, pleads a negligence claim and seeks damages and medical monitoring relief for the benefit of the Brown class. On the face of it, the complaint seeks to litigate these claims to judgment. Under Rule 1.7(b), the Brown class counsel did not have authority to represent the Brown class unless, on the date they filed this complaint seeking to litigate these claims, they were free from any responsibility "to a third person," and were free from any preexisting economic interest, that would hinder their ability to decide how best to carry out the interests of the Brown class. But on that date, their ability to represent the Brown class was "materially limited" by such factors, in light of the agreements entered into by Brown class counsel with AHP on October 6 and 7, 1999, a week before they filed the Brown class action complaint in which they first sought to act as counsel on behalf of the putative Brown class.

Prior to filing the Brown class action complaint, Brown class counsel materially limited their representation of the putative Brown class in several different ways. First, as already discussed, in the October 6 letter sent by Brown class counsel to AHP, Brown counsel agreed that during the Brown litigation they would commit themselves to a number of scientific positions unfavorable to the Brown

class, including the position that there is no reliable evidence that diet-drug users will develop significant heart-valve problems if they took diet drugs for 90 days or less. See pp. 31-32 & note 23, supra. Second, Brown counsel agreed that they would make no effort to seek certification of the Brown class for litigation purposes. See Memorandum of Understanding ("MOU"), filed October 7, 1999, at 9 ("The Parties shall seek certification of a nationwide class solely for settlement purposes (the 'Settlement Class')"). This was an enormously important limitation on Brown class counsel's ability effectively to represent the Brown class.[28] Third, Brown counsel, prior to filing the Brown class action and hearing from any of the members of the putative Brown class, committed themselves by contract to recommend a particular settlement, set out in elaborate detail, regardless of what input they received from the Brown class as to how the case should proceed. See MOU at 1-2; see also pp. 5-9, supra. In all three respects, Brown class counsel were contractually obligated to AHP, by virtue of the October 6 letter to AHP and the December 7 MOU, to handle the Brown representation in a particular way, once the Brown complaint was filed and the representation of the putative class began. Any one of these items is enough to require withdrawal under Rule 1.7(b).[29]

A second aspect of Rule 1.7(b) is implicated here as well, the aspect that prohibits a representation if the representation would be adversely affected "by the lawyer's own interests." It is bad enough that Brown class counsel, before undertaking the Brown representation, took on a responsibility to AHP to carry out the representation in a pre-scripted way. Worse, in so doing, the Brown class counsel arranged with AHP to have AHP pay a guaranteed $200 million toward an attorneys' fee award, and not to object to the Court awarding this full amount to Brown class counsel. See MOU, Part IV-6, at 43-45. This $200 million fund represents an especially enticing economic interest in that, under the terms of the Brown settlement, any monies not awarded by the Court to Brown class counsel will be returned to AHP — with the functional result that presumably no one would object to a fee award of the entire $200 million (as the only beneficiary of any amount not paid, AHP, had sworn not to object). Because this agreement was reached before the filing of the Brown complaint, which created the putative Brown class through its class action allegations, it constitutes a preexisting economic interest that conflicted with the loyalty that would be owed by Brown counsel to the Brown

class once the representation began. Under the terms of the MOU, the Brown counsel would receive access to this $200 million fund if, but only if, they handled the representation of the Brown class exactly as agreed to with AHP in advance. Only a performance precisely in conformance with the agreement would lead to payment of this money; any other decision made by the Brown class counsel in the exercise of their professional responsibilities would not. This preexisting economic interest in a given outcome, producing a $200 million fund, is an obvious violation of Rule 1.7(b)'s prohibition on a lawyer taking on a new representation where the representation "may be materially limited by . . . the lawyer's own interests."[30]

* * *

For all of these reasons, based on factual grounds that Brown class counsel have had an opportunity to deny and that are uncontroverted, the constitutional and Rule 23(a)(4) requirement that the Brown class be adequately represented by counsel who are free of preexisting conflicts cannot be met with respect to the proposed Brown class counsel. Therefore, the joint motion seeking conditional certification based on the premise that these counsel will represent the Brown class cannot be granted.

V. CONCLUSION

For the reasons stated, plaintiffs Jane Scuteri, et al., respectfully request that the Court deny the joint motion to conditionally certify the instant "lawsuit" as a class action.

Dated: December 6, 1999

Respectfully submitted,

PAUL J. NAPOLI
MARC JAY BERN
NAPOLI, KAISER & BERN, LLP
115 Broadway, 12th Floor
New York, NY 10006
(212) 267-3700

Attorneys for Plaintiffs Jane Scuter, et al.

Of Counsel:

KENNETH J. CHESEBRO
1600 Massachusetts Avenue
Cambridge, MA 02138
(617) 661-4423

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum of Plaintiffs Jane Scuteri, et al., in Opposition to Joint Motion for an Order Conditionally Certifying a Class Action to Effectuate a Class Settlement was filed with the Clerk of the Court this 6th day of December, 1999, and served upon the following parties via Federal Express as follows:

Arnold Levin, Esq.
Levin, Fishbein, Sedran & Berman
510 Walnut Street
Suite 500
Philadelphia, PA 19106
(215) 592-1500

Peter L. Zimroth, Esq.
Arnold & Porter
399 Park Avenue
New York, NY 10022
(212) 715-1000

Gene Locks, Esq.
Greitzer & Locks
1500 Walnut Street
20th Floor
Philadelphia,
(215) 893-0100

PAUL J. NAPOLI

Dated: December 6, 1999

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[1] Plaintiff Jane Scuteri is a class representative in a currently certified class action in the Supreme Court of New York, County of New York (Cunningham v. Gate Pharmaceuticals, No. 401962), and appears in this case on behalf of the Cunningham class. Plaintiffs Mary Lee Cunningham and Diane McNulty, who are members of the Cunningham class, appear in their individual capacities. Also appearing in their individual capacities are the following plaintiffs who are presently members of the six other currently certified state-wide class actions, as follows: James John Filipek and Linda Busby (Illinois); Leonard Corbin and Joan Bakanowsky (New Jersey); Lois Gambino and Margaret O'Mara (Pennsylvania); Regina Hillery and Teddy Oran Eplina (West Virginia); Steven Berkiwitz and Erma Fields (Texas); and Helen Coleman and Mary Maytum (Washington). Finally, appearing in their individual capacities are the following plaintiffs who are presently members of the currently certified Jeffers class action pending in this Court (see Pretrial Order No. 865), who reside in the following states: Evelyn Amend and Dona Reid (Arizona); Charlene Allspaugh and Kathy Burrow (California); Doris Atanmo and Susan Hagy (Ohio); and Linda Caston and Jo Butterfield (Utah).

[2] This opposition brief is being filed within the normal time permitted by the applicable rules, which this Court has authorized notwithstanding the rulings that it has already issued with respect to the joint motion. See Pretrial Order No. 1001 at 2 n.1; 11/30/99 Tr. at 74.

[3] See, e.g., Deutsch, A Lawyer Opponents Can Like, N.Y. Times, July 4, 1999, § 3, at 2, col. 5 (describing genesis of Owens Corning's National Settlement Program); National Settlement Program Expected to Cost Owens Corning $728M in 1999, Mealey's Litigation Report: Asbestos, July 16, 1999 (describing operation of program); Owens Corning Subsidiary Integrex is Born Out of Its NSP, Andrews

Publications, Asbestos Litigation Reporter, Oct. 15, 1999 (noting that, "[a]fter resolving nearly 240,000 pending asbestos personal injury actions through its National Settlement Program (NSP), Owens Corning has launched a wholly owned subsidiary, Integrex, in order to market its claims handling expertise to others.").

[4] See, e.g., Stephen Labaton, Asbestos Cases in for Overhaul by Lawmakers, N.Y. Times, June 28, 1999, at A1 (describing strong support for proposed "legislation that would alter the current legal regime for handling asbestos cases by setting up" the Asbestos Resolution Corporation, "a new Federal agency that would be responsible for trying to resolve the claims before they enter the courts."); Stephen Labaton, How a Company Lets Its Cash Talk, N.Y. Times, Oct. 17, 1999, § 3, at 1 (describing genesis of this proposal, spearheaded by GAF Corp.).

[5] See Letter from Marc Jay Bern and Paul J. Napoli to Arnold Levin, Esq., and Gene Locks, Esq., dated November 29, 1999; Letter from Arnold Levin to Hon. Louis C. Bechtle dated November 30, 1999. At the show cause hearing held on November 30, 1999, Mr. Levin placed into the record both his letter to the Court and the faxed copy of the letter sent to him on November 29; in response, Mr. Napoli submitted an original copy of the November 29 letter. In our November 29 letter, at 2, we requested any Brown class counsel to "apprise us of their analysis," by December 1, if they believed "that anything set out in this letter is factually or legally incorrect." Mr. Levin's letter is the only written response from Brown class counsel addressing the substance of our letter, and it deals solely with the legal framework used to evaluate conflicts issues in the class action context. We respond to that analysis in Part II-A of this brief. See note 17, infra. For present purposes, the point is that, after having been accorded an opportunity in writing and/or at the November 30 hearing to address the factual matters summarized in our letter, no Brown class counsel has disputed that factual summary.

[6] The MOU was individually signed, under the heading "Class Counsel," and "for the Plaintiffs' Management Committee" ("PMC") by three members of the PMC, Arnold Levin of the law firm of Levin, Fishbein, Sedram & Berman; Stanley Chesley of the law firm of Waite, Schneider, Bayless & Chesley; and John J. Cummings of the law firm of Cummings, Cummings & Dudenhefer. MOU at 46. The other members of the PMC, for whom these three individuals signed, are Roger Brosnahan, Elizabeth J. Cabraser, Stanley M. Chesley, Michael D. Hausfeld, William S. Kemp, Dianne Nast, J. Michael Papantonio, John M. Restaino, Jr., and Darryl J. Tschirn. In addition, Mr. Levin's partner, Michael D. Fishbein, also signed "for the Plaintiffs' Management Committee."

Further, members of the PMC or their law firms signed separately. Dianne Nast of the law firm of Roda & Nast signed under the heading "For Subclass 1(a)." MOU at 47. Richard Lewis of the law firm of Cohen, Milstein, Hausfeld & Toll signed under the heading "For Subclass 1(b)." Id.

These lawyers and law firms were also signatories to the final Settlement Agreement filed on November 19, 1999.

[7] Three attorneys and law firms, none on the PMC, signed under the heading "Class Counsel": Gene Locks of the law firm of Greitzer & Locks; Sol H. Weiss of the law firm of Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley; and Christopher Placitella of the law firm of Wilentz, Goldman & Spitzer. Three other attorneys and law firms signed under headings listing Subclasses 2(a), 2(b) and 3. All of these lawyers and law firms were also signatories to the final Settlement Agreement filed on November 19, 1999. (On November 30, 1999, Mr. Placitella and his law firm filed a motion to withdraw as Brown class counsel.)

[8] Of course, because the issue goes to the basis of federal jurisdiction under Article III, this Court would be required to address it sua sponte even if no party raised it. Metro. Wash. Airports Auth. v. Citizens For the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 265 n.13 (1991).

[9] For example, in Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971), both sides argued the same position and jointly sought the same ruling — a judicial determination that a statute was constitutional. Id. at 47. "Confronted with the anomaly that both litigants desire precisely the same result," the Supreme Court held that "[t]here is, therefore, no case or controversy within the meaning of Art. III of the Constitution." Id. at 47-48. In Muskrat v. United States, 219 U.S. 346 (1911), the Supreme Court dismissed for want of a case or controversy a friendly suit brought by several Indians in a representative capacity on behalf of all other similarly situated members of their tribe, in order to obtain a judicial ruling on the legality of a claims resolution scheme. Id. at 360. The Court noted that the defendant (like AHP in the present "lawsuit") had invited the lawsuit and agreed in advance to pay the plaintiffs' attorneys fees, and had "no interest adverse to the claimants." Id. at 360-61.

[10] It might be argued that the willingness of federal courts to handle consent decree cases in which the parties sometimes file a complaint and simultaneously an agreed judgment, in which the defendant promises to alter allegedly unlawful conduct, supports a finding of justiciability here. But in consent decree cases there is no reason to doubt that if the defendant had not consented to the decree banning future misconduct, and if the decree had not been approved by the courts, the plaintiff (typically the government) could have resorted to litigation to achieve its aims. After all, consent decree cases are by their nature future oriented, involving continuing conflict between the parties over a concern by the plaintiff about possible future misconduct by a defendant that the plaintiff seeks to have addressed through an injunction. See Swift & Co. v. United States, 276 U.S. 311, 326 (1928) (injunction concerned "not with past violations, but with threatened future ones"); SEC v. Randolph, 736 F.2d 525, 527-28 (9th Cir. 1984) (case justiciable because of "prospective injunctive relief" against "future violations of securities laws" barring insider trading). Cf. Northeastern Fla. Contractors v. Jacksonville, 508 U.S. 656, 662 (1993) (voluntary cessation of challenged conduct does not deprive federal court of jurisdiction to determine legality of practice).

Thus, in the consent decree context, even when the parties come to the Court with a prepackaged result for which they seek the Court's approval, there is nothing in the situation raising a doubt about whether, absent the parties' agreement, the plaintiff would proceed to litigate the case. By contrast, here counsel for the proposed Brown class promised, in the MOU executed on October 7, 1999, that whatever eventually happened with the "lawsuit" that they were about to file in an effort to effectuate the agreed-on ADR mechanism, they would not seek to certify a class in order to litigate anything in the class action complaint.

[11] As of 1993, at least thirteen states recognized a common-law claim for loss of parental consortium. See Guenther v. Stollberg, 495 N.W.2d 286, 287 (Neb. 1993) (listing the states of Alaska, Arizona, Louisiana, Massachusetts, Michigan, Montana, Oklahoma, Texas, Vermont, Washington, West Virginia, Wisconsin and Wyoming).

[12] It appears that under both federal and state law, a person's effort to waive "any and all claims of any kind whatsoever, past, present or future, known or unknown" with respect to a given transaction "is unenforceable because it purports to require the signor to waive unknown future claims. Such a waiver is void as against public policy." FASA Corp. v. Playmates Toys, Inc., 892 F. Supp. 1061, 1064, 1066 (N.D. Ill 1995). See also Fair v. International Flavors & Fragrances, Inc., 905 F.2d 1114, 1115 (7th Cir. 1990) (ERISA decision noting that the argument "that courts should not recognize general releases of claims not known to or contemplated by the parties at the time of the release . . . has a firm basis in law"); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 896 & n.27 (3d Cir. 1975) (holding that release purporting to extinguish any and all future claims for violations of the federal antitrust law is void or voidable as against public policy). Of course, if it is against public policy

for the very person who might later accrue a cause of action to waive it in advance, it is difficult to imagine how it could be consistent with public policy to permit a handful of named plaintiffs in a class action to waive the future claims of millions of class members in advance.

[13] Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367, 375-79, 385-86 (1996), is entirely consistent with this principle, and does not impinge on the Article III point we make here, because there both the state-law claims and the exclusively federal claims arose from the identical factual predicate involving the same transaction. See also In re Asbestos Litigation, 90 F.3d 963, 993, 1017-18 (5th Cir. 1996) (Smith, J., dissenting), rev'd, Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999).

[14] In their memorandum filed in support of the joint motion, with respect to Rule 23(a)(4) proposed Brown class counsel limit themselves to discussing their general experience and competence and reviewing the asserted inclusiveness of the negotiations leading to the settlement, and the fairness of the result. Plaintiffs' Memorandum of Law in Support of Joint Motion, filed Nov. 19, 1999, at 44-45. These points do not answer the argument that we advance in Part IV of this brief. No matter how competent and personally honorable proposed Brown class counsel may be in general, they cannot represent the Brown class if doing so would conflict with their duties to other, already certified classes, or if doing so poses a conflict with their preexisting contractual duties to a third party or their preexisting economic interests.

The whole point of having bright-line rules of professional conduct barring an attorney from taking on a new representation where doing so might conflict with his or her prior commitments or interests is that such rules are enforced without regard to any particularized inquiry into whether the work of the particular attorney will actually be affected by the conflict. A finding that conditional certification must be denied because Rule 23(a)(4)'s "adequacy of representation" requirement cannot be met with respect to the currently proposed Brown class counsel in no way requires the Court to decide whether these attorneys have done anything "unethical," any more than the rule that this Court would have to recuse itself if it owned a single share of AHP stock would require one to believe that ownership of the stock would actually affect the Court's decisions.

Thus, an amicus brief filed last year in the U.S. Supreme Court that was joined by several leading legal ethics scholars urged the need, in the Rule 23(a)(4) context, to be "careful to avoid language that would suggest that an inadequate class lawyer is the equivalent of an unethical lawyer," thereby guarding against the danger of "less than vigorous" Rule 23(a)(4) review by judges who are understandably "loathe to pronounce lawyers 'unethical'." Brief of Legal Ethics, Civil Procedure, and Constitutional Law Scholars as Amici Curiae in Support of Petitioners, in Ortiz v. Fibreboard Corp., No. 97-1704 (filed Aug. 6, 1998) at 26. "This way of speaking may help the lower courts take the entire business more seriously and approach the task with less hesitancy," these scholars suggested. Id.

[15] See also Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045, 1123 (1995) ("[D]ue process must mean something other than the result is just; otherwise some lynchings would be consistent with due process. A 'fairness' hearing that appraises a settlement made outside the court's presence only as to the substantive fairness of the terms provides no more process than would be provided by a post-lynching hearing that assessed whether the dead guy really did commit the crime.").

[16] Apart from the requirement of Rule 23(a)(4), of course, the "adequacy of representation" requirement has deep roots in the constitutional requirement that absent class members can only be bound through procedures that meet the constitutional guarantee of procedural due process. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985); Hansberry v. Lee, 311 U.S. 32, 37 (1940); Postal Tel. Cable Co. v. Newport, 247 U.S. 464 (1918); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907). This is no accident: the provisions of Rule 23 were "carefully drawn to meet

constitutional requirements." 7B Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1789, at 251 (1986).

[17] Brown class counsel's sole response to the detailed letter circulated to them by undersigned counsel, alerting them to the conflict-of-interest issues discussed next in this brief, and requesting their response, see note 5, supra, was to cite six cases purportedly establishing that traditional conflict-of-interest rules "that have been developed . . . outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation," but instead that a "[b]alancing approach" should "be applied" in this context. See Letter from Arnold Levin to Hon. Louis C. Bechtle dated November 30, 1999 (filed with the Court at the November 30 show cause hearing) (citing Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588-91 (3d Cir.) (Becker, J.), cert. denied, 120 S. Ct. 178 (1999); In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 163-64 (3d Cir. 1987) (Adams, J., concurring), cert. denied, 472 U.S. 1008 (1985); In re Agent Orange Product Liability Litigation, 800 F.2d 14, 18-19 (2d Cir. 1986); Kincade v. General Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981); Laskey v. International Union, 638 F.2d 954, 957 (6th Cir. 1981); Maywalt v. Parker & Parsley Petroleum Co., 155 F.R.D. 494, 496-97 (S.D.N.Y. 1994), aff'd, 67 F.3d 1072 (2d Cir. 1995)).

Brown class counsel simply avoid the point: to the extent that these cases actually reflect any relaxation of standard conflict-of-interest rules, they do so only with respect to lawyers who are conflict-free at the start of the class action litigation, and who then encounter a possible conflict well into the litigation (typically in connection with one or more named plaintiffs or absent class members objecting to a settlement). These decisions obviously cast no doubt on the Supreme Court's recent emphasis that at the outset of "settlement class" litigation, the Rule 23(a) requirements, including the requirement of conflict-free counsel, demand heightened attention in light of the inherent dangers posed by any lawsuit that seeks to bind absent parties to the result. In this context, for purposes of review of conflicts of interest, there is every reason to view each class, as an entity, as a separate "client," see David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 918-42 (1998) — and to apply the traditional rule that an attorney may not take on a new client where doing so might conflict with his or her preexisting duties to the current client. Cf. id. at 939 n.71 ("a lawyer should not represent two clients who are each dealing with the same third person in a situation in which the interests of the two clients are potentially in conflict."). Indeed, the Supreme Court has endorsed just this view in the class action context, in relying on the rule that "an attorney who represents another class against the same defendant may not serve as class counsel." Ortiz, 119 S. Ct. at 2319 (citation omitted).

[18] Tracking the amendment to the Model Rules of Professional Conduct adopted by the ABA in 1993, Pa. R. Prof. Con. 8.5(b)(1) provides in relevant part that "[i]n any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be," for litigation, "the rules of the jurisdiction in which the court . . . sits, unless the rules of the court . . . provide otherwise." Further, the rules of the U.S. District Court for the Eastern District of Pennsylvania provide that the Pennsylvania Rules of Professional Conduct are applicable to proceedings in the Eastern District "except as otherwise provided by specific Rule of this Court." See Rule IV(B) of the Rules of Disciplinary Enforcement (available at ‹http://paed.uscourts.gov/ locrules/RULES.HTM›). Of course, the professional responsibility rules of other states may also apply with respect to attorneys licensed in those states. But at minimum, Brown class counsel, based on their involvement in the instant proceeding in Pennsylvania, are bound by Pennsylvania law.

[19] See, e.g., Memorandum in Support of Plaintiffs' Motion for Medical Monitoring Class Certification Under Federal Rule of Civil Procedure 23(b)(2), dated Sept. 14, 1998, at 2-6, 13-15 & n.11, 20, 25, 29-30 & n.22, 31 n.23; Plaintiff's Reply Memorandum to American Home Products Corporation's Opposition to the Jeffers' Motion for Class Certification, dated Mar. 15, 1999, at 23-26, 28-29, 34-35, 39-40, 47-48, 71-72, 75-76; 3/17/99 Tr. at 13-15, 28-36, 44-46, 57-58; Plaintiffs' Memorandum of Law in Support of Their Motion to Amend the Complaint and Motion for Class

Certification, dated June 24, 1999, at 1-2, 6-7.

[20] In its opposition to certification of the Jeffers class, AHP pointed out that a number of states have not approved a cause of action for medical monitoring, at least for asymptomatic plaintiffs. See Memorandum of the American Home Products Corporation Defendants in Opposition to Plaintiffs' Motions for Class Certification, dated Mar. 3, 1999, at 84-93. At oral argument, the PMC conceded this point, stating that "there are many states that [have] never addressed the issue of medical monitoring," 3/17/99 Tr. at 37, and that "there are some states that actually don't permit" medical monitoring causes of action in circumstances such as those presented by diet-drug cases. Id. at 191.

[21] In its opposition to class certification in Jeffers, AHP argued that "to date there are no studies suggesting that ingestion of fenfluramine or dexfenfluramine for three months or less causes any increased risk of either heart valve problems or PPH." Memorandum of the American Home Products Corporation Defendants in Opposition to Plaintiffs' Motions for Class Certification, dated Mar. 3, 1999, at 49 (emphasis added). In response, the PMC stated that "each member [of the Jeffers class] is at an increased risk for valvular heart disease by reason of exposure to defendant's diet drugs," and that there existed an "elevated risk of harm" that "applies across the board to each member of the class." Plaintiff's Reply Memorandum to American Home Products Corporation's Opposition to the Jeffers' Motion for Class Certification, dated Mar. 15, 1999, at 28-29. See also id. at 35 ("In this case, plaintiffs have proffered expert testimony and evidence from governmental and medical institutions that . . . all persons who used AHP's diet drugs for at least one prescription period are at a significant risk for VHD. **Each class member is at an elevated and significant risk of VHD**") (footnote omitted) (bolding in original); id. at 64 ("[P]laintiffs are confident that the medical and scientific evidence overwhelmingly supports them as to the merits of their claim"). At oral argument the PMC again emphasized that the risk imposed by diet-drug use is a function of a "biological gradient," not a clear-cut, fixed point of use, and that there was medical evidence that diet-drug users developed a "signature form of valvular heart disease after having taken these diet drugs for two months or less." 3/17/99 Tr. at 28-29. In so doing the PMC insisted that "it is inappropriate and arbitrary to simply draw the line at three months and say . . . before that there is no risk at all." Id. at 29. Given clear indications from the medical literature of an adverse impact "on the heart valves" in patients who "took the drug for one or two months," id. at 29, the PMC emphasized that "we believe that the proof is compelling that the increased risk is triggered at a minimum" of one month, stating: "The risk starts to increase, in a statistical way at one month." Id. at 58.

[22] See, e.g., Donna Shaw, "Two Lawyers Seem to Deny Own Claims in Fen-Phen Case," Philadelphia Inquirer, Nov. 19, 1999, at A1; Charles Ornstein, "Fen-Phen Secret Pact Criticized: Side Deal Contradicts Plaintiffs' Assertions," Dallas Morning News, Nov. 20, 1999, at 1A.

[23] This letter was written on the letterhead of the Diet Drug Litigation Negotiating Committee responsible for talks with AHP on the Brown settlement, was signed by two lead negotiators, Gene Locks and Michael Fishbein, and memorializes certain understandings reached during that negotiation. We know of no letter or other document prepared by any of the PMC attorneys or law firms, or any of the other Brown counsel, disputing that the members of the Committee, including Gene Locks and Michael Fishbein, had actual authority to write the letter, or repudiating anything in the letter. Thus, one can only conclude that the statements in this letter constitute the position of the entire team of Brown counsel, especially in light of the failure of any Brown counsel to dispute this point after reviewing our analysis set forth in undersigned counsel's letter to Brown counsel circulated on November 29, 1999. See note 5, supra.

[24] See Charles Ornstein, "Fen-Phen Secret Pact Criticized: Side Deal Contradicts Plaintiffs'

Assertions," Dallas Morning News, Nov. 20, 1999, at 1A. This article quotes Mr. Williams as stating that the contents of the October 6 letter "are totally inconsistent with what our expert committee has prepared. I don't understand them."

[25] Thus, in the briefs supporting class certification, the Jeffers class counsel emphasized that they were not seeking certification of any class covering personal injuries. See Memorandum in Support of Plaintiffs' Motion for Medical Monitoring Class Certification Under Federal Rule of Civil Procedure 23(b)(2), dated Sept. 14, 1998, at 3 ("Plaintiffs, and the plaintiff class, are not seeking compensation for personal injury."); Plaintiff's Reply Memorandum to American Home Products Corporation's Opposition to the Jeffers' Motion for Class Certification, dated Mar. 15, 1999, at 39 n.32 ("Neither personal injury nor long latency are at issue in this medical monitoring case."); id. at 43 (Jeffers class "does not seek to include personal injury plaintiffs"); id. at 48 ("**This case is not designed nor can it be employed to provide personal injury compensation in the form of lump sum payments**") (bolding in original); id. at 51 n.45 (distinguishing Jeffers class action from that in Amchem Products v. Windsor, 531 U.S. 591 (1997), "a nationwide settlement class **seeking personal injury damages**") (bolding in original).

[26] These appear to be, at minimum, Gene Locks and the law firm of Greizer & Locks, who currently represent state-wide class actions in New York, New Jersey and Pennsylvania, and Sol H. Weiss and the law firm of Anapol Schwartz Weiss Cohan Feldman & Smalley, who currently represent state-wide class actions in Pennsylvania and New Jersey. Various PMC attorneys and law firms may fit into this category as well.

[27] This result is particularly troubling with regard to New Jersey, in which a state-wide class action trial was in progress when the Brown class action settlement was announced. Rather than using the pendency of the New Jersey trial to win favorable terms for their New Jersey clients, the New Jersey counsel signed on to the national Brown settlement which treats the New Jersey clients no better than people in any other state, despite the undeniable fact that at the moment of settlement, New Jersey members of the putative Brown class had vastly more settlement leverage than many if not all other Brown class members.

[28] As Professor Coffee has explained, if counsel for a plaintiffs' class cannot threaten to litigate the class action to judgment, the lawsuit provides them with no leverage with which to induce the defendant to agree to a settlement that is commensurate with the strength of the legal claims of the plaintiffs' class. "Put simply, plaintiffs' attorneys in such a setting have only a limited franchise: they can settle, but not fight. Given these constraints, they are effectively negotiating with at least one arm tied behind their backs." John C. Coffee, Jr., The Corruption of the Class Action: The New Technology of Collusion, 90 Cornell L. Rev. 845, 854 (1995). The Supreme Court approved of this analysis in its Amchem decision. 521 U.S. at 621 ("Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer") (citing John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1379 (1995)).

[29] Rule 1.7(b) is not the only rule designed to ensure that the lawyer representing a particular client will exercise his or her best judgment on behalf of that client in selecting among the range of legal options, unhindered by commitments to a third party or preexisting economic interests. For example, Pa. R. Prof. Con. 2.1 provides that "[i]n representing a client, a lawyer should exercise independent professional judgment and render candid advice."

[30] It also appears to violate other rules. For example, Pa. R. Prof. Con. 5.4© provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service

for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Rule 1.8(a) sets forth a presumption that "[a] lawyer shall not . . . knowingly acquire . . . [a] pecuniary interest adverse to a client." Rule 1.8(f) provides that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Thus, it might be consistent with Rule 1.8(f) for AHP to promise Brown class counsel to make a payment, at the conclusion of the Brown litigation, of $200 million toward attorneys' fees, regardless of whether or not Brown was litigated or settled, and regardless of the outcome. Such an agreement would presumably not interfere with the Brown counsel's independence of professional judgment, because the payment would be unrelated to what decisions these counsel later made about the case. By contrast, here it is clear that AHP's agreement to pay the $200 million, which preexisted the filing of the Brown class action, depends on Brown class counsel performing in conformance with the script worked out with AHP in advance of the representation of the putative class.