

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3X
4 WILLIAM BUCKWALTER, BEVERLY
BARKER, and CHRISTINE DICKEY,

Index No.

5 Plaintiffs,

CLASS ACTION COMPLAINT

6 v.

7 NAPOLI, KAISER & BERN, LLP, PAUL J.
8 NAPOLI, and GERALD KAISER and
MARC JAY BERN

9 Defendants. x

10
11 Plaintiffs, based upon personal knowledge as to their own actions, and upon information and
12 belief and the investigation of their counsel as to all other allegations, for their class action complaint
13 alleges as follows:

14 **I. NATURE OF THE ACTION**

15 1. This is a proposed class action brought on behalf of a class of former diet drug
16 litigants, represented by the law firm Napoli, Kaiser & Bern LLP (“NKB”) and the individual
17 defendants Paul J. Napoli (“Napoli”), Gerald Kaiser (“Kaiser”) and Marc J. Bern (“Bern”)
18 (Defendants Napoli, Kaiser and Bern are collectively referred to herein as the “Individual
19 Defendants”; NKB and the Individual Defendants are collectively referred to herein as “NKB”).
20 Plaintiffs and the members of the Class were clients of NKB in connection with claims for personal
21 injury arising from their use of so-called “diet drugs.”

22 2. NKB is a law firm that holds itself out as focusing primarily on representing injured
23 persons. The Individual Defendants are the founders and partners of the law firm. In the nationwide
24 diet drug litigation, NKB represented thousands of injured individuals and, according to its website,
25 was “appointed as Liaison Counsel to the Steering Committee for the New York Plaintiff’s mass tort
26 Fen-Phen litigation.” NKB also sponsored a website devoted to diet drug litigation which purported

1 to offer information regarding the drugs, related medical conditions and the litigation. In these ways,
2 NKB held itself out to its own clients and others as experienced diet drug counsel.

3 3. The nationwide diet drug litigation had arisen out of the popular and widely-used
4 weight loss drugs Pondimin and/or Redux. They were part of the diet drug family known as Fen-
5 Phen. Several manufacturers, including American Home products (“AHP”), had marketed and
6 profited from the sales of the drugs for years before scientific and medical studies revealed that the
7 drugs were unreasonably dangerous to users and consumers in that they posed a serious risk of
8 valvular heart disease, primary pulmonary hypertension (“PPH”), brain serotonin neurotoxicity and
9 other health problems. The FDA ordered a recall of the drugs in September 1997, but it was too late.
10 Many of the 18 million Americans who had relied on the drugs to lose weight had been permanently
11 and even fatally harmed. The nationwide diet drug litigation arose out of these injuries. Cases were
12 filed across the country and eventually combined through Multi-District Litigation proceedings.

13 4. In late 1999, the MDL case was settled with the only solvent defendant, AHP. The
14 settlement included matrices for determining individual damages. Certain factions of plaintiff’s
15 personal injury lawyers criticized the settlement as undervaluing individual claims *and* under-
16 compensating certain lawyers. The national Settlement capped attorney fees at 9%, as opposed to
17 the 25 to 33% contingent fees many lawyers proceeding on a non-class action basis had negotiated
18 with their clients.

19 5. NKB, and particularly individual defendants Napoli, Kaiser and Bern, were among
20 the most vocal critics of the National Settlement. They were openly critical of the settlements. In
21 reaction to the settlement, NKB developed, agreed to and executed a scheme for extracting more
22 fees out of the diet drug litigation (“The NKB Fen-Phen Aggregate Settlement Scheme”) to the
23 benefit of the Individual Defendants and at the expense of their unsuspecting clients.

24 6. The scheme was predicated on AHP’s position. The drug giant was desperate to put
25 the diet drug chapter of its corporate history behind it, both to improve its financial bottom line and
26 the image of its other products. AHP stock price was sinking under the pressure of AHP’s exposure

1 in the high-profile litigation. AHP's ability to put diet drugs behind it would be undermined if
2 enough individuals opted out. If NKB's inventory of opt-out cases from the National Settlement was
3 large enough, it would pose a credible threat and AHP would be forced to deal with NKB
4 independently.

5 7. As part of the scheme, NKB began a massive campaign to obtain "opt out" plaintiffs.
6 The firm, either on its own, or through law firms with which it had secret referral arrangements,
7 conducted an advertising campaign soliciting plaintiffs and opt outs. As part of the scheme, the
8 firm's lawyers aggressively criticized the National Settlement, claiming that the settlement amounts
9 were so low that the lawyers representing the class should be investigated. The firm promised it
10 would do better. Its campaign was successful, and the firm, according to its own proclamation, was
11 retained by over 5800 clients.

12 8. The roughly one dozen lawyers at NKB could not handle the 5800 individual cases
13 they were committing to prosecute. Those individual cases would have required separate filings,
14 depositions, expert testimony and costs. The stage was thus set for the unlawful scheme and
15 enterprise from which this lawsuit derives. Contrary to what their clients were led to believe, NKB
16 and the Individual Defendants did not intend to take the cases to trial or even to prosecute the cases
17 individually. With the threat of 5800 cases in its control, NKB approached AHP and initiated the
18 scheme outlined below.

19 9. The Fen-Phen Aggregate Settlement Scheme was multi-faceted and had at its core the
20 following agreed terms:

- 21 • The Individual Defendants agreed to form and jointly conduct the affairs of the
22 NKB Fen-Phen Aggregate Settlement Enterprise which consisted of NKB and a
23 network of referring lawyers;
- 24 • NKB and the Individual Defendants agreed to aggressively recruit and otherwise
25 assemble a large inventory of individual opt-outs from the National Settlement on
26

1 the pretense that their claims would be prosecuted against AHP individually and
2 that as a result they would recover far more than under the National Settlement;

- 3 • NKB and the Individual Defendants agreed among themselves not to prosecute or
4 try the claims of the thousands of Fen-Phen clients they signed up as individual
5 cases;
- 6 • Instead, NKB and the Individual Defendants agreed in advance instead to settle
7 the individual cases with American Home Products *en masse* without any
8 meaningful consideration of the circumstances of the individual cases and without
9 disclosing this fact to the affected clients;
- 10 • The purpose of this scheme was to minimize the cost and effort on behalf of NKB
11 and the Individual Defendants and to maximize the profits to them;
- 12 • As part of the *en masse* settlement on behalf of individual clients, NKB would
13 secretly retain sole discretion over determination of individual settlement
14 amounts;
- 15 • NKB and the Individual Defendants agreed to do this with the understanding that
16 this would mean that individual cases would likely be settled for less than they
17 could bring if they were tried separately;
- 18 • Internally, NKB agreed to settle the claims of clients it originated for higher
19 amounts than the claims of individuals who were referred by other lawyers. In
20 the latter cases, NKB would have to share a fee with the referring lawyers; in the
21 former cases NKB would keep the entire fee;
- 22 • NKB and the Individual Defendants agreed in advance on a method to compel
23 individual plaintiffs to acquiesce in the settlements it recommended;
- 24 • NKB and the Individual Defendants agreed to conceal the Fen-Phen Aggregate
25 Settlement Scheme from their clients and in the future to jointly take any steps
26 necessary to conceal the scheme. NKB and the Individual Defendants agreed to

1 do this in derogation of their fiduciary duties to their individual clients and their
2 duties under the Rules of Professional Conduct.

3 10. Thus, as part of the scheme, NKB reached an aggregate settlement with AHP which
4 was apparently negotiated in part by a lawyer from Texas that the plaintiffs and the class did not
5 hire. The amount of the aggregate settlement, and the terms and the identity of the participants in the
6 process have never been revealed to plaintiffs and the Class. What has been discovered is that NKB
7 reached a lump sum settlement with AHP for all of its cases that exceeded in total several hundred
8 million dollars. NKB did so without receiving client approval. NKB then went back to each of its
9 diet drug clients and pretended that it had negotiated a specific offer with AHP for each plaintiff's
10 case. In fact, there had been no negotiation of individual cases with AHP. After reaching a global
11 settlement with AHP, the settlement numbers offered individual plaintiffs had been determined
12 solely by NKB. If the client rejected the amount, NKB would come back with another amount until
13 the client accepted. The clients thought that NKB was negotiating on their behalf with AHP. The
14 clients never were aware that they were, in effect, negotiating with the lawyers they trusted, not the
15 defendant in the lawsuit. In essence, individual NKB clients would unknowingly negotiate with
16 NKB lawyers, against each other, for a share of the finite fund NKB had secretly created.

17 11. Defendants' settlement negotiations with individuals followed a common *modus*
18 *operandi*. Individuals would be presented with settlement offers which NKB lawyers claimed were
19 AHP's best offer, as negotiated by NKB lawyers. Clients were told that the amount was
20 recommended by NKB lawyers based on their assessment of the individual's injuries. The
21 settlements were presented by mail, hand delivery, or even in person in hotel rooms – always with a
22 release and a sense of urgency if not an implied or actual attempt to coerce a settlement. The
23 message was that this was AHP's final offer and that the release had to be signed immediately or the
24 offer would be lost. No time was given to review the terms of the release. These initial offers were
25 notable for the shocking difference between the amount offered and the amounts that NKB and the
26 Individual Defendants had promised their Fen-Phen clients they would likely receive if they opted

1 out and pursued their cases on an individual basis. If the clients resisted or even questioned
2 accepting the settlement offered by the NKB lawyer, or asked to see a medical doctor, the NKB
3 lawyers or staff unleashed the intimidation tactics they had agreed to in advance. The lawyer or staff
4 person would bully the NKB client by insisting that they should be grateful, they were not really
5 injured and that the offer was the maximum offer they would ever get. Often a “nurse” was brought
6 in to give Fen-Phen clients her expert opinion that they could do no better. The nurse was actually a
7 J.D./RN on the NKB payroll.

8 12. Typically, NKB opened up these individual settlement negotiations with their own
9 clients by “recommending” a \$10,000 settlement. By comparison, NKB knew that individuals with
10 similar injuries were getting much larger settlements and jury verdicts when their claims were
11 pursued zealously.

12 13. The NKB Diet Drug litigants were not sophisticated litigants. In the interest of
13 slimming, their bodies had been harmed by a drug unfit for human consumption. The National
14 Settlement had given them no relief and now their own lawyers, once so aggressively optimistic
15 about their claims, were insisting that they were not really injured after all. It was a predictable part
16 of the Fen-Phen Aggregate Settlement Scheme that many NKB Fen-Phen litigants acquiesced to the
17 bullying and sign the release presented by NKB without reading it. Those with the fortitude to resist
18 further, or to threaten bar complaints over the tactics used by NKB, were often “rewarded” by
19 having the NKB lawyers magically multiply what was said to be American Home Products’ “best
20 offer” right before their eyes.

21 14. The Fen-Phen Aggregate Settlement Scheme was hugely successful from the
22 perspective of NKB and the Individual Defendants. Virtually all of the claims of its clients settled
23 by NKB and the Individual Defendants pursuant to the Scheme, and NKB and the Individual
24 Defendants made tens of millions in fees for little effort and no risk.

25 15. In violation of their fiduciary obligations to plaintiffs and the Class, defendants
26 (1) failed to fully investigate and assess individual claims, (2) failed to obtain client approval to

1 negotiate a lump sum for all clients with AHP, (3) entered into an aggregate settlement with AHP of
2 all claims without authority, approval or disclosure, (4) concealed all of the above from plaintiffs
3 and the Class, (5) acted in a position of disabling conflict as they were secretly having their own
4 clients compete for a limited fund that they had created, and (6) intimidated and coerced their clients
5 into accepting settlements.

6 16. The Fen-Phen Aggregate Settlement Scheme conducted by NKB and the Individual
7 Defendants was in violation of the RICO statutes and was also carried out via hundreds, if not
8 thousands, of acts of mail and wire fraud in violation of federal and state law.

9 II. PARTIES

10 17. Plaintiff William Buckwalter is a resident of Snohomish, Washington. He took the
11 diet drugs from April 24, 1996 through January 27, 1997. Mr. Buckwalter retained an Arizona firm,
12 Goldberg & Osborne, to represent him in his claim against the diet drug manufacturer. That firm
13 was secretly a part of NKB's referral network and his case was referred to NKB in return for a
14 referral fee. Mr. Buckwalter accepted a settlement of his claim as recommended by NKB in 2001.
15 Mr. Buckwalter had a four way bypass for elevated pulmonary pressure.

16 18. Plaintiff Beverly Barker is a resident of Henderson, Nevada. She took the diet drug
17 Fen-Phen from February 1997 to April 1997. Mrs. Barker retained Goldberg & Osborne to represent
18 her in her claim against the diet drug manufacturer. That firm referred her case to NKB. Ms. Barker
19 had no health problems prior to use of the diet drugs. She was told by NKB her case was worth
20 millions. When she refused the shocking offer to settle presented by NKB, Bern threatened her, told
21 her that her case was "a joke" and that he would drop the case. She eventually accepted a
22 settlement.

23 19. Plaintiff Christine Dickey is a resident of Datil, New Mexico. She took the diet drug
24 Fen-Phen from June 1996 to August 1996. Ms. Dickey retained an Arizona law firm to represent her
25 in her claim against the diet drug manufacturer. She was informed by NKB that her case was worth
26 \$50,000,000 and that they would not settle her case for less than \$5,000,000. She was also told to

1 have a right Heart Catheter procedure. A week before the procedure, Berns called and informed her
2 that she did not have a case of PPH (explained below). Ms. Dickey had the procedure anyway and it
3 showed PPH. She then went on a bulletin board urging NKB clients to obtain medical advice. She
4 then received calls from Bern demanding that she retract her posting or she would be sued. She
5 settled her case for far less than promised. That firm referred the case to NKB and she settled her
6 claim as part of the NKB global settlement.

7 20. Defendant Napoli, Kaiser & Bern LLP (“NKB”) is a limited liability partnership with
8 offices in New York City, New York; Sayville, New York; and Mineola, New York. NKB is also
9 known as Napoli, Kaiser, Bern & Associates, LLP. NKB holds itself out as a firm specializing in
10 “severe” personal injury litigation, including products liability and negligence. The firm sponsors a
11 website it calls “The Personal Injury e-Resource.”¹ NKB represented the plaintiffs and the class in
12 the settlement of their individual lawsuits against American Home Products (“AHP”) involving the
13 diet drug Fen-Phen.

14 21. Upon information and belief, defendant Paul J. Napoli (“Napoli”) is a resident of
15 New York. He is a member of the New York State Bar. He is a founder and senior partner of NKB.
16 Mr. Napoli was a principal in NKB’s representation of the plaintiffs and the class in their claims
17 against AHP.

18 22. Upon information and belief, defendant Gerald Kaiser (“Kaiser”) is a resident of New
19 York. He is a member of the New York State Bar. He is a founder and senior partner of NKB.
20 Mr. Kaiser was a principal in NKB’s representation of the plaintiffs and the class in their claims
21 against AHP.

22 23. Upon information and belief, defendant Marc Jay Bern (“Bern”) is a resident of New
23 York. He is a member of the New York State Bar. He is a founder and senior partner of NKB.
24 Mr. Bern was a principal in NKB’s representation of the plaintiffs and the class in their claims
25 against AHP.

26 ¹ NKB website.

1 **III. JURISDICTION AND VENUE**

2 24. This Court has subject matter jurisdiction over Count I pursuant to 28 U.S.C. § 1331
3 and 18 U.S.C. § 1964(a) and (c).

4 25. This Court has jurisdiction over the remaining Counts pursuant to 28 U.S.C. § 1332
5 as the amount in controversy exceeds \$75,000 and plaintiffs and defendants are diverse.

6 26. Defendants each have committed acts in this District in furtherance of the claims
7 alleged herein, including violations of 18 U.S.C. § 1961, *et seq.* Venue is, therefore, proper pursuant
8 to 28 U.S.C. § 1391 and 18 U.S.C. § 1965 (a).

9 **IV. STATEMENT OF FACTS**

10 **A. Background: The Diet Drugs and The Litigation**

11 **1. The Diet Drugs**

12 27. The drugs Pondimin (also known as Fenfluramine²) and/or Redux (also known as
13 Dexfenfluramine) (collectively referred to as “Diet Drugs”) were wildly popular and widely used
14 weight-loss drugs. They were part of the diet drug family known as Fen-Phen. The manufacturers,
15 American Home Products, Inc, Wyeth Laboratories, Inc. and A.H. Robins Company, Inc. (“Diet
16 Drug Defendants”), aggressively marketed and profited from the sales of the diet drugs.
17 Nationwide, it was estimated that 18 million individuals used the drugs.

18 28. This litigation arises out of claims regarding the health effects of the two related
19 prescription drugs – fenfluramine and dexfenfluramine. Fenfluramine is an appetite suppressant that
20 affects blood levels of the neurotransmitter, serotonin. Dexfenfluramine, the “d-isomer” of
21 fenfluramine, is chemically related to fenfluramine and acts as an appetite suppressant by stimulating
22 the release of serotonin from nerve cells in the brain and by reducing the reuptake of the released
23 serotonin. In 1973, the United States Food and Drug Administration (“FDA”) approved A.H.
24 Robins, Inc.’s new drug application to market fenfluramine in the United States.

25
26

² Fenfluramine is best know as the “Fen” in Fen-Phen.

1 29. Before 1989, A.H. Robins, Inc. was responsible for the marketing, sale and labeling
2 of fenfluramine in the United States. In 1989, AHP acquired A.H. Robins. Following the
3 acquisition, fenfluramine was marketed by AHP under the trade name “Pondimin.” Between
4 December 1989 and September 15, 1997, AHP was the only company to market fenfluramine in the
5 United States and had the exclusive responsibility for its regulatory compliance, adverse event
6 reporting, safety surveillance and labeling.

7 30. Sales of Pondimin were relatively flat until 1992. In 1992, a series of articles by
8 Michael Weintraub, M.D., were published in the Journal of CLINICAL PHARMACOLOGY AND
9 THERAPY, in which Dr. Weintraub advocated the use of fenfluramine together with the drug
10 phentermine for weight loss management without the adverse side effects associated with the use of
11 fenfluramine alone. This regimen popularly became known as “Fen-Phen.” With the introduction of
12 “Fen-Phen” therapy to the market place, sales of Pondimin skyrocketed. From January 1995 to mid-
13 September 1997, approximately 4,000,000 persons in the United States took the drug Pondimin.

14 31. Dexfenfluramine, the chemical cousin of Pondimin, was developed by Les
15 Laboratories Servier S.A. (“LLS”) in France. The drug afforded the same anorexic effects as
16 Pondimin without the need to add phentermine to ameliorate adverse side effects. Before 1994, the
17 Lederle Division of American Cyanamid Company had the right, together with Interneuron
18 Pharmaceuticals, Inc., to develop and promote dexfenfluramine in the United States under the trade
19 name “Redux.” In 1994, AHP acquired American Cyanamid. Following that acquisition,
20 responsibility for the development and promotion of Redux in the United States in conjunction with
21 Interneuron was assumed by AHP. Interneuron received approval to market Redux in the United
22 States in mid-1996. As with Pondimin, sales of Redux were brisk. From June 1996 through
23 September 15, 1997, two million people in this country took Redux.

24 32. The distribution of Redux users by age and sex was virtually the same as that for
25 Pondimin. Most of the individuals who took the diet drugs Pondimin and Redux were middle-aged
26 women.

1 33. Before Pondimin and Redux were withdrawn from the market in 1997, AHP received
2 considerable information from a number of sources that both drugs could cause damage to the valves
3 in the heart leading to valvular regurgitation. This information consisted of reports in the medical
4 literature, reports from animal studies, reports concerning heart valve damage in patients taking
5 drugs with similar effects on serotonin metabolism, adverse event reports and reports from a doctor
6 commissioned to analyze certain facts for Interneuron. Notwithstanding this information, during the
7 period of time AHP marketed dexfenfluramine and fenfluramine, it failed to investigate these
8 reports, to look at whether or not the drugs were cardiotoxic or to label the drugs as being potentially
9 harmful to the heart valves.

10 34. In March 1997, researchers at the Mayo Clinic in Rochester, Minnesota began
11 observing an association between the use of fenfluramine and/or dexfenfluramine and a particular
12 type of valvular heart disease. Eventually, the Mayo Clinic researchers observed this unusual form
13 of valvular heart disease in 24 women who has used fenfluramine in combination with phentermine.
14 The findings of the Mayo researchers were first brought to the attention of the public in a July 8,
15 1997 press release and were eventually published on August 28, 1997, in the NEW ENGLAND
16 JOURNAL OF MEDICINE.

17 35. On July 8, 1997, the FDA issued a public health advisory, followed by letters to
18 700,000 physicians requesting information about similar patients. Based on information the FDA
19 received in response, the FDA requested the withdrawal of fenfluramine and dexfenfluramine from
20 the U.S. market. On September 15, 1997, AHP and the FDA announced that there would be no
21 further sales of Pondimin and Redux in the United States. Subsequently, the causal relationship
22 between valvular heart disease and the use of dexfenfluramine and fenfluramine was investigated
23 and confirmed in three epidemiological studies published in the NEW ENGLAND JOURNAL OF
24 MEDICINE in September 1998.

25 36. A wave of litigation followed. As of November 1999, approximately 18,000
26 individuals who used Pondimin or Redux filed lawsuits against AHP. Many of these lawsuits

1 involved actions in which individuals sought to recover for personal injuries, primarily valvular heart
2 disease, that they sustained as a result of using Pondimin or Redux. They sought: (1) to create an
3 equitable fund to provide medical screening services to patients who had used Pondimin and/or
4 Redux for varying periods of time to determine if they had asymptomatic valvular heart disease;
5 and/or (2) to recover the amounts expended by consumers to purchase Pondimin and/or Redux or to
6 obtain echocardiograms as a consequence of exposure to these drugs; and/or (3) to recover personal
7 injury damages on behalf of classes of persons who took Pondimin and/or Redux.

8 37. To the extent that these actions were filed in the federal judicial system, the Judicial
9 Panel for Multidistrict Litigation entered an order transferring all of the actions to the United States
10 District Court for the Eastern District of Pennsylvania for coordinated and/or consolidated pretrial
11 proceedings under MDL Docket No. 1203. As the transferee court, this court entered an order
12 creating and appointing a Plaintiffs' Management Committee ("PMC") to oversee the conduct of the
13 coordinated/consolidated pretrial proceedings on behalf of the plaintiffs.

14 2. The Settlement of the MDL Case

15 38. Defendant NKB and the Individual Defendants represented thousands of class
16 members in the Fen-Phen Class Litigation.³ According to its website, NKB was "appointed Liaison
17 Counsel to the Steering Committee for the New York plaintiffs' mass tort Fen-Phen litigation."⁴

18 39. In October 1999, a nationwide Class Action Settlement Agreement with American
19 Home Products ("National Settlement Agreement") was reached on behalf of the class.⁵ Pursuant to
20 the National Settlement Agreement, AHP agreed to pay up to \$3.75 billion dollars to settle the
21 claims. Judge Louis Bechtle, presiding judge over the Federal Court Diet Drug Litigation, U.S.
22 District Court for the Eastern District of Pennsylvania, ultimately approved the settlement.

23
24 ³ At one point, it was reported that Paul J. Napoli represented 5,000 former Fen-Phen users. Mealy's Litigation
Reporter: Fen-Phen / Redux (Feb. 2000)

25 ⁴ www.napolikaiser.com/firm.cfm

26 ⁵ Nationwide Class Action Settlement Agreement with American Home Products Corporation (dated Nov. 18,
1999).

1 40. The National Settlement Agreement included extensive and complex matrices to
2 determine settlement amounts to be given to individuals. A Settlement Trust Fund was established.
3 The Settlement Trust Fund was comprised of two funds: Fund A and Fund B. Fund A consisted of
4 \$1 billion dollars to provide medical monitoring to people who used Pondimin and/or Redux and
5 were asymptomatic; some people who did have symptoms such as chest pain and shortness of
6 breath, but who had not had an echocardiogram and some people who did have an echocardiogram
7 documenting mild mitral regurgitation. Fund B was established to compensate diet drug users for
8 heart valve injuries.

9 41. The National Settlement Agreement drew immediate criticism. In summary, critics
10 claimed that compensation matrices excluded too many claims and compensated qualifying claims
11 inadequately. The settlement matrix ranges set forth for certain class members were small compared
12 to the large figures many class members had been led to expect by their lawyers.⁶ Further, primary
13 pulmonary hypertension (PPH), described in detail below, was excluded from the National
14 Settlement Agreement. This was a significant exclusion. According to one lawyer quoted at the
15 time of the National Settlement: “[The PPH cases] are very severe cases and they are being dealt
16 with on an individual basis and they are a finite group,” with liability to American Home Products
17 “probably well in excess of \$1 billion.”⁷

18 **B. The Medical Circumstances of the Class**

19 **1. The Risk of Valvular Heart Disease**

20 **a. The Heart**

21 The principal risk created by use of fenfluramine and dexfenfluramine is the risk of valvular
22 heart disease (“VHD”). The human heart has four chambers. The upper chamber on the right side
23 of the heart (the right atrium) functions to receive deoxygenated blood from the body. The lower
24

25 ⁶ National Class Action Settlement

26 ⁷ Mealy’s Litigation Report: Fen-Phen / Redux (Nov. 11, 1999) (quoting Arnold Levin of Levin, Fishbein, co-
chair of the diet drug MDL Plaintiffs’ Management Committee and MDL plaintiffs’ liaison).

1 chamber of the right side of the heart (the right ventricle) pumps the deoxygenated blood through the
2 pulmonary arteries into the lungs where carbon dioxide is removed from the blood and replaced with
3 oxygen. The upper chamber on the left side of the heart (left atrium) receives and collects
4 oxygenated blood which has been pumped from the lungs to the heart through the pulmonary veins.
5 The lower chamber on the left side of the heart (the left ventricle) pumps oxygenated blood from the
6 heart through the aorta and into the arterial system.

7 42. Just as the heart has four chambers, it also has four valves. The valve structures
8 function to assure that blood moves through the heart in a forward direction and that effective blood
9 flow is maintained. The valve located between the right atrium and the right ventricle is the
10 tricuspid valve. The valve between the right ventricle and the pulmonary artery is the pulmonic
11 valve. The valve located between the left atrium and the left ventricle is the mitral valve. The valve
12 located between the left ventricle and the aorta is the aortic valve.

13 **b. VHD in General**

14 43. VHD is a group of different conditions which cause a disruption in the normal
15 structure and/or function of the heart valves. When a patient suffers from VHD, blood that is
16 supposed to move in a forward direction through the heart leaks backward or “regurgitates” through
17 the diseased valve. The existence of VHD and the extent of regurgitation associated with it can be
18 diagnosed with echocardiography – a non-invasive study in which ultrasound waves are used to
19 image cardiac structure and blood flow in the heart.

20 44. The levels of valvular regurgitation caused by the varying conditions underlying
21 VHD vary in severity. The degree of valvular regurgitation is measured by an echocardiogram in
22 accordance with standardized techniques and criteria. Using these techniques of measurement, the
23 degrees of valvular regurgitation are characterized as trace, mild, moderate or severe.

24 45. Mild or greater aortic regurgitation (“AR”) and moderate or greater mitral
25 regurgitation (“MR”) is frequently referred to as “FDA positive regurgitation” based on the FDA’s
26 observation that “[m]inimal degrees of regurgitation (*i.e.*, trace mild mitral regurgitation or trace

1 aortic regurgitation) are relatively common in the general population and are not generally
2 considered abnormal.” Experts agree that the FDA case definition – which has come to be known as
3 “FDA Positive” – is the appropriate way to define medically relevant valvular regurgitation.
4 Specifically, all the experts testified that the lesser degrees of regurgitation – including mild mitral
5 regurgitation – are common in the general population and have no medical significance.

6 46. The existence and degree of symptoms caused by VHD and the medical care required
7 to manage such disease vary significantly depending upon the degree of valvular regurgitation that
8 the patient presents. Trace AR, trace MR, and mild MR are completely asymptomatic conditions
9 that do not impose any limitations on a patient’s ability to function normally. Without some
10 additional factor, such as impaired mobility of the valve “leaflets,” patients with trace AR, trace MR
11 and mild MR do not require medical management or treatment.

12 47. Mild AR is an asymptomatic condition that does not impose any limitation on an
13 individual’s ability to function normally. However, mild AR poses two distinct health risks. First,
14 the abnormal aortic valve is susceptible to bacteria introduced into the blood stream through invasive
15 procedures, such as surgery or normal dental hygiene. This, in turn, creates an increased risk of the
16 patient suffering an infection of the heart valve and surrounding heart muscles known as “bacterial
17 endocarditis.” Bacterial endocarditis is an extremely serious and often fatal condition. Patients
18 suffering from bacterial endocarditis can develop severe regurgitation or peripheral emboli which, in
19 turn, can lead to developing AR and should receive screening echocardiograms.

20 48. At the other end of the spectrum of VHD, severe AR and severe MR are conditions in
21 which the percentage of blood ejected from the heart (the “ejection fraction”) can fall significantly
22 below normal. With chronic severe aortic and mitral regurgitation, patients are often asymptomatic
23 at first and become symptomatic when the heart function begins to fail. When such patients are
24 symptomatic, their symptoms will include shortness of breath, fatigue and/or diminished exercise
25 capacity.

26

1 49. Severe valvular regurgitation leads to a volume overload of the heart. The size of the
2 left atrium and/or left ventricle tends to increase in response to the volume overload created by
3 severe regurgitation. This phenomenon is described as left ventricular and/or left atrial “dilatation”
4 (“LV/LA”). In addition, the thickness of the walls of the atrium and/or ventricle also tends to
5 increase in response to the volume overload created by severe regurgitation. This process is known
6 as left ventricular hypertrophy and/or left atrial hypertrophy. Over time, heart function will
7 deteriorate, and as the left ventricular ejection fraction decreases, the pressure within the left
8 ventricle increases. This, in turn, will lead to an increase in the pulmonary venous pressures and an
9 increase in the pulmonary artery pressure. This secondary pulmonary hypertension (PH) is a marker
10 of significant cardiac dysfunction and may not return to normal even after valve surgery. In
11 addition, the hypertrophy and dilatation may also be permanent conditions that may not be corrected
12 medically or surgically following valve repair or replacement.

13 50. When dilatation and/or hypertrophy progress to a sufficient level of abnormality, the
14 patient is exposed to the following risks, among others:

15 a. The patient is at risk of developing chronic atrial fibrillation in the case of
16 severe MR, that can lead to a stroke or peripheral embolus;

17 b. The patient is at risk of developing ventricular fibrillation or ventricular
18 tachycardia, dangerous arrhythmias, that can precipitate the patient’s sudden death;

19 c. The patient has a high risk of developing congestive heart failure, an often
20 fatal condition; and

21 d. The patient is at risk of developing permanent pulmonary hypertension (PH),
22 that can lead to persistent symptoms of shortness of breath, fatigue, congestive heart failure and
23 death.

24 **c. VHD and Diet Drugs**

25 51. The relationship between the ingestion of the fenfluramine derivatives and VHD has
26 been subject to extensive scientific investigation. Since the withdrawal of Pondimin and Redux

1 from the market in September 1997, a number of investigators have conducted controlled studies
2 that have compared the prevalence of valvular regurgitation among patients who previously took
3 fenfluramine, dexfenfluramine or the Fen/Phen combination to similarly situated subjects (*i.e.*,
4 matched controls) who had not taken diet drugs. There are 14 principal studies and a number of
5 other investigations that studied a total of more than 12,000 patients who took fenfluramine and/or
6 dexfenfluramine for varying lengths of time. As stated in a February 1999 Review article that
7 summarized a number of these studies, “Fenfluramine and more recently its d-isomer
8 Dexfenfluramine have been the most extensively studied anorexic drugs for the past 30 years.”

9 52. As a result of the unprecedented amount of study that diet drug-related valvulopathy
10 has received, experts have reached a conclusion regarding the nature of the disease process, the
11 effect of duration of use, latency, progression, incidence and prevalence. *It appears clear that the*
12 *fenfluramine derivatives, Pondimin and Redux, cause valvular heart disease by producing plaque*
13 *that become “stuck-on” to the valve structures causing regurgitant lesions. An enormous body of*
14 *epidemiologic data from the authoritative, reliable studies described above establishes with a high*
15 *degree of confidence that the population of patients who took fenfluramine and/or dexfenfluramine*
16 *for less than three months does not have a significant increased risk of FDA Positive levels of*
17 *valvular regurgitation.*

18 53. The state of scientific knowledge concerning diet drug induced valvular heart disease
19 was summarized by a prominent pharmaco-epidemiologist, Hershel Jick, in a recent editorial in the
20 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION as follows:

21 [M]illions of patients were prescribed Fenfluramines prior to 1997.
22 For the substantial majority who took the drug for less than three
23 months, the risk of heart valve disorders appears to be minimal. In
24 those who took the drugs longer than three months, many will have
25 developed echocardiographic evidence of cardiac valve disorders;
26 particularly mild AR. In the majority of instances, these abnormalities
 most likely are benign and are unlikely to lead to clinical disease.
 However, a small proportion of patients have substantially increased
 risk for clinically important valvulopathy and cardiovascular
 consequences as a result of taking anorexigens. However, because
 Fenfluramines have been unavailable since 1997, judgments about the

1 overall consequences of Fenfluramine use are likely to be limited to
2 their results of those studies already completed.

3 **2. The Risk of Primary Pulmonary Hypertension (“PPH”)**

4 54. PPH is a disease that affects pulmonary circulation. PPH is characterized by scarring
5 and fibrosis of the pulmonary arteries which carry deoxygenated blood from the right side of the
6 heart to the lungs. This scarring prevents the blood cells from effectively absorbing oxygen as they
7 pass the alveoli in the lungs. Moreover, the scarring within the pulmonary arteries obstructs the flow
8 of blood within the vessels, causing the blood pressure in the pulmonary arteries to rise. The right
9 ventricle of the heart attempts to overcome the increasing resistance to the flow of blood through the
10 pulmonary arteries by growing larger and more muscular. Ultimately, this dilatation and
11 hypertrophy of the right ventricle will cause the heart to fail and result in the patient’s death.

12 55. PPH is a relentlessly progressive disease that leads to death in virtually all
13 circumstances. The only approved treatment for the disease involves the administration of a drug
14 known as Prostacyclin (“Flolan”), which must be administered continuously through an intravenous
15 pump. Flolan is not a cure for the disease. If it is used successfully, it can reduce the patient’s
16 symptoms and delay death for a few years. Administration of the drug is accompanied by a high
17 incidence of serious complications. The drug can cause death if administered to patients who do not
18 suffer from PPH, and is thus contraindicated for use in such patients.

19 56. Finally, PPH is a diagnosis of exclusion. Therefore, in order to reach the diagnosis,
20 all “secondary” causes of pulmonary hypertension must be excluded. These include diseases known
21 to be associated with pulmonary hypertension such as collagen vascular disease, congenital systemic
22 to pulmonary shunts, portal hypertension, toxin-induced lung disease, significant obstructive sleep
23 apnea, interstitial fibrosis (such as silicosis, asbestosis, or granulomatous disease), HIV infection and
24 others.

25 57. The normal incidence of PPH in the population is 1 to 2 new cases per million people
26 per year. Two well-done epidemiologic studies establish that the use of fenfluramine and

1 dexfenfluramine cause PPH. In 1996, Dr. Abenhaim and his colleagues published the results of the
2 International Primary Pulmonary Hypertension study. This study demonstrated that the risk of
3 developing PPH in individuals who used fenfluramine longer than three months increased twenty-
4 three fold. In March 2000, the journal CHEST published the results of an epidemiologic study
5 entitled the Surveillance of North American Pulmonary Hypertension. This study confirmed the
6 association between the use of fenfluramine derivatives and PPH.

7 **C. Napoli Kaiser & Bern Capitalizes on Class Opt-Out Opportunity**

8 58. NKB's reaction to the National Settlement was swift and incisive. The National
9 Settlement included a negotiation of attorney fees. The National Settlement provided for a \$200
10 million fee cap for all counsel involved in the medical monitoring fund *and* a total nine percent fee
11 from the compensation fund. The attorney fees were dramatically less than fees courts traditionally
12 award in this type of litigation, which would be in the 20 to 25 percent range, and much less than the
13 fees NKB was counting on.

14 59. NKB considered the lower fees they would reap as a result of the national matrices
15 and lashed out at the National Settlement Agreement and the settling lawyers. Marc Bern was the
16 outspoken leader of a select group of Fen-Phen class counsel that aggressively and publicly attacked
17 the National Class Settlement Agreement.⁸

18 60. The premise of the attack on the National Settlement Agreement was simple: Bern,
19 NKB and other objectors argued that the "matrix" benefits for injuries under the national settlement
20 were substantially below "real world" settlement value for individuals willing to bring individual
21 claims and risk going to trial. The National Settlement Agreement provided several opportunities
22 for individuals to opt-out. Bern articulated the paradigm of the client who would opt out:

23 Let us examine the fate of the intelligent client who opts out. Her case
24 will come to trial . . . At that point, either AHP will want to settle the
25 cases, as it has done so to date, by making a fair offer, or the plaintiff
will go to trial and *is expected to win and that verdict may include*

26 ⁸ NKB website and various news articles, including two authored by Marc Bern.

1 *punitives. In either case the client will have gotten many multiples of*
2 *the sum on the [national settlement] grid, and faster too.*⁹

3 He also identified numerous individual PPH settlements with AHP up to \$6 to \$7 million per case.
4 Bern, on behalf of NKB, suggested that an attorney who accepted payment under the National
5 Settlement Agreement for a client whose injury is worth more would be committing “malpractice.”
6 He said that he would opt out virtually all of his clients.¹⁰ In December 1999, Bern criticized the
7 National Settlement Agreement for excluding primary pulmonary hypertension (PPH). Bern wrote:

8 While these are probably only in the hundred, *they are very large*
9 *damage cases.* Various press articles have stated that settlement by
10 AHP have been up to \$6 or \$7 million per case.¹¹

11 The purpose of publishing such criticism in the legal press was to attract other lawyers disenchanted
12 with the National Settlement Agreement to turn to NKB their own stables of opt-out Fen-Phen
13 clients in return for eventual fees.

14 61. Marc Bern publicly purported to be so incensed by the inadequacy of the National
15 Agreement for many individual plaintiffs, including NKB’s diet drug clients, that he was planning to
16 ask the federal courts to consider removing the entire plaintiffs’ negotiating team *on the theory that*
17 *they breached their fiduciary duty to class members and to pursue individual lawyers’ “very serious*
18 *ethical breaches” to diet drug users on behalf of some of the thousands of diet drug users NKB*
19 *represented.*¹²

20 62. In an article appearing in the NEW JERSEY LAW JOURNAL, Bern claimed that the
21 potential settlement “low balls potential plaintiffs” and that a cap of \$1,485,000 is far to low where
22 the drug caused death or serious injury. Referring to the amounts in the matrix “it stinks.”¹³

23 ⁹ P. Rheingold & Marc J. Bern, “Criticism of the AHP [National] Settlement Plan,” MEALEY’S LITIGATION
24 REPORTER (Nov. 11, 1999) in which individual defendant Marc Bern acknowledges “various press articles” reporting
25 PPH settlement by AHP up to \$6 to \$7 million per case.

26 ¹⁰ MEALEY’S LITIGATION REPORT : FEN-PHEN / REDUX (Nov. 11, 1999).

¹¹ P. RHEINGOLD & M. BERN, “Criticism of the AHP Settlement Plan,” MEALEY’S LITIGATION REPORT : FEN-PHEN
/ REDUX (Dec. 15, 1999).

¹² NEW JERSEY LAW JOURNAL (Nov. 29, 1999) (quoting Marc Jay Bern).

¹³ NEW JERSEY LAW JOURNAL November 24, 1999.

1 63. The scenarios described by Bern and others appealed to many individual class
2 members who had expected big compensation and were disappointed by the minimal amounts
3 offered by the national matrices. NKB and the Individual Defendants quickly rushed into the post-
4 settlement fray, taking advantage of the disillusionment and signing up thousands of opt-out
5 claimants, who were led to believe their cases would receive the individual treatment and “day in
6 court” referred to by defendant Bern and other NKB lawyers. The NKB objective, however, was
7 different. What NKB did not disclose to these people was that its objective was to assemble a large
8 enough “inventory” of cases to leverage a wholesale settlement between NKB and AHP: minimal
9 work for maximum profit for the law firm.

10 64. NKB and the Individual Defendants had agreed among themselves to an organized
11 and unethical scheme. NKB’s aggressive recruitment of thousands of individuals to opt out of the
12 national Fen-Phen settlement to bring individual claims against American Home Products was the
13 first step. The second step was to settle the thousands of claims on a wholesale basis for a lump
14 settlement fund. Once the settlement agreement with American Home Products was reached,
15 individual settlement amounts would be left to the sole discretion of the NKB lawyers, including the
16 Individual Defendants.

17 65. The NKB group turned to their website as a forum for attacking the National
18 Settlement Agreement: urging existing clients to opt out and recruiting new clients with claims
19 against American Home Products to opt out of the settlement and sign up with NKB. According to
20 the NKB website, NKB and the Individual Defendants were a team that focused primarily on
21 representing personal injury victims. The firm website, www.napolikaiser.com, promoted the firm’s
22 expertise, including courtroom prowess and dedication to taking cases to trial.

23 66. The firm also “sponsored” a website dedicated to the Fen-Phen litigation, “The Phen-
24 Fen e-Resource,” www.dietdrugsettlement.com, and “educational” site where it answered its own
25 “Frequently Asked Questions” about the national settlement and offered the official NKB
26

1 professional opinion on the settlement. In short, the NKB website asserted: “It is our firm’s opinion
2 that the payout leaves much to be desired.”

3 67. The invective against the National Settlement found on the website was so extreme,
4 that AHP and plaintiffs’ counsel moved before Judge Bechtel to have certain portions of the website
5 closed down because of “false and misleading” information or to have the address changed because
6 it was too close to that of the official National Settlement site: www.settlementdietdrugs.com.¹⁴ The
7 diet drug MDL court eventually issued a temporary restraining order in connection with the NKB
8 site contents.¹⁵

9 68. Marc Bern and NKB carried the focus on individual verdicts and settlements in the
10 millions out of legal journals into their contacts with clients and potential clients. In part, they
11 encouraged clients and potential clients to opt-out by leading them to expect individual cases and
12 staggering results. For example, at the NKB website encouraging opt-outs, NKB highlighted million
13 dollar verdicts:

14 [I]n a recent Texas case, Debbie Lovett, the jury awarded \$23.5
15 million dollars; yet under the National Settlement Agreement], she
16 would only receive \$6000 under the settlement plan. . . . In the only
17 other cases that have gone to a jury verdict was the most recent jury
verdict that resulted in an award of 150 million dollars for five
individual plaintiffs in Mississippi.¹⁶

18 NKB also vowed to take the individual cases to court. In fact, the NKB website promises that “[a]
19 primary reason for our success in litigation is our firm’s reputation for a willingness to proceed to
20 trial, if necessary.”

21 69. In addition to recruiting directly, NKB and the Individual Defendants teamed up with
22 law firms nationwide who acted as brokers in referring cases. The broker firms would place
23 advertisements seeking clients. The brokering firm would sign up clients and refer them to NKB in
24 exchange for a share of the eventual fees. Often clients were surprised the first time NKB contacted

25 ¹⁴ MEALEY’S LITIGATION REPORT : FEN-PHEN / REDUX (Feb. 2000)

26 ¹⁵ DIET DRUGS LITIGATION REPORTER (Mar. 2000).

¹⁶ www.fen-phen-eresource.com/faq.cfm

1 them. Their cases had been brokered over to NKB by the originating law firm without their
2 knowledge.

3 70. Certain plaintiffs became part of NKB's opt-out pool unwittingly. It was a NKB
4 "policy" to opt plaintiffs out of the National Settlement without their knowledge. For example, one
5 NKB client was a class representative in the New York Diet Drugs Litigation. After hearing about
6 the National Class Settlement on the news, she contacted NKB about the status of her case. To her
7 surprise, defendant Marc Jay Bern informed her that he had decided to opt her out of the national
8 settlement, as it was not in her best interest. She had never been consulted about the decision, nor
9 informed until she called him. At the time she was angry that he would take this step without
10 conferring with her, but decided: "he was the lawyer, he should know."

11 71. NKB staff, including paralegals, were instructed to promise individuals large
12 settlements or verdicts if they signed with NKB.

13 72. The unfolding of events and individual litigation over the following confirmed that
14 NKB's objective was not to ensure that individual Diet Drug victims received just compensation for
15 their injuries, but to ensure that NKB and the Individual Defendants maximized the fees they could
16 extract from the cases. If NKB could develop a large enough collection of individuals to opt-out of
17 the National Settlement and pursue individual claims against American Home Products, NKB and
18 the Individual Defendants would be assured high fees, certainly many, many multiples of those they
19 would be awarded under the National Settlement Agreement.

20 **D. NKB's Aggregate Treatment of Individual Cases**

21 73. If an individual had direct contact with NKB, the Individual Defendants or their staff
22 at the time of signing a contingency fee agreement, it was likely the last time they would hear from
23 the firm until settlement. Individuals who attempted to contact NKB would be given cursory
24 treatment by staff or terse responses from NKB lawyers, or ignored completely. Individuals could
25 not even obtain confirmation as to whether a lawsuit had been filed on their behalf.
26

1 74. The firm’s aggressive recruiting techniques had resulted in the signing up of
2 thousands of opt-out plaintiffs from other firms in addition to the thousands of plaintiffs it had
3 represented in the nationwide class action. As a small firm consisting of fewer than 20 lawyers and
4 with the other cases the firm was handling other than Fen-Phen opt-outs,¹⁷ NKB could not zealously
5 litigate the claims of all of the clients it had signed up. In fact, the firm could not even afford the
6 filing fees for the 5600 individual diet drug clients they had committed to represent. NKB could not
7 even answer the simple inquires of all of the clients it had signed up. Without the knowledge or
8 authority of their individual clients, NKB began to file massive multiple plaintiff cases. It was not
9 uncommon for NKB to file one complaint on behalf of 1600 unrelated plaintiffs.

10 75. This wholesale treatment of plaintiffs who expected that their lawyers would
11 represent them zealously *and* individually was part of NKB and the Individual Defendants’ scheme
12 to maximize their personal profit at the expense of the group of individuals they had amassed.

13 76. NKB and the Individual Defendants were aware of the jury and settlement awards in
14 other individual cases and the lucrative potential of its own batch of cases.

15 77. NKB and the Individual Defendants made sure that American Home Products was
16 aware that NKB and the Individual Defendants had signed up thousands of individuals to opt-out of
17 the National Settlement. They did this both by direct contact with American Home Products and by
18 publicizing the number of individual cases they were amassing. This was part of the NKB Scheme
19 to leverage their case inventory into lucrative fees for NKB and the Individual Defendants. At the
20 time American Home Products wanted to close the Fen-Phen chapter of its corporate and financial
21 history which was a drain on its bottom line and image, NKB was a threat to finality.¹⁸ NKB
22 understood that American Home Products was concerned that it faced hundreds of millions of
23 dollars in exposure to such claims, claims it had anticipated would be resolved by the National
24

25 ¹⁷ www.napolikaiserberns.com.

26 ¹⁸ “AHP Tries to Reassure Investors In Wake of \$56 Million Verdict,” Mealey’s Fen-Phen Report (April 2001)
(AHP has moved to reassure investment analysts that the company’s plan to put diet drug litigation behind it is still on
track after a \$56.5 million Texas state court jury verdict.”).

1 Settlement. AHP's response to the threat was to make it go away and go away quickly. Of course,
2 as NKB knew, the only way to do this was quick cash.

3 78. NKB and certain of the Individual Defendants met with representatives of American
4 Home Products to discuss NKB's case inventory. As a result of a series of meetings between
5 American Home Products and NKB and at NKB's suggestion, AHP offered to settle the claims of all
6 of the individual Fen-Phen plaintiffs whom NKB represented for a lump sum. As part of the
7 settlement, NKB would agree to end recruitment of additional clients and to stop prosecution of the
8 cases of its existing clients. AHP placed few restrictions on the release of the settlement funds. The
9 lump sum was payable to NKB in installments. In exchange for a certain number of releases, AHP
10 would deposit in a NKB bank account a sum of money. Determination of individual settlement
11 amounts for the claims of the thousands of individuals NKB represented and distribution of the
12 funds would be left to the sole discretion of NKB. This is known as the NKB Fen-Phen Aggregate
13 Settlement.

14 79. At the time, both NKB and AHP understood that given the number of clients it
15 represented, that the lump sum settlement would necessarily result in individual settlement amounts
16 that were substantially lower than what an individual claimant could obtain if he or she were
17 represented by a lawyer committed to the zealous advocacy of his or her case. From AHP's
18 perspective, the Fen-Phen Aggregate Settlement was designed and intended to save AHP hundreds
19 of millions of dollars in claims and to obtain releases from each claimant thereby eliminating a huge
20 liability and reducing litigation costs, boosting its bottom line and helping to put the Fen-Phen
21 debacle behind it.

22 80. For NKB and the Individual Defendants, the Settlement was a huge windfall. A lump
23 sum settlement was part of the Scheme they had developed to maximize their attorney fees and
24 minimize work. NKB could avoid litigating the cases individually, yet still receive something for
25 every client who had signed up. NKB would save a huge investment in time and resources. At the
26

1 same time, it eliminated all risks associated with filing the cases and bringing them before a jury or
2 judge.

3 81. NKB agreed to the settlement – without consulting any of the thousands of
4 individuals it represented or even considering how individual claims would be evaluated to
5 determine what share of the lump settlement fund they would receive. By agreeing to such a
6 settlement, NKB also abrogated its fiduciary duties to its individual clients and its ethical obligation
7 to represent all clients zealously. In addition, the settlement compromised individuals' property
8 rights in their cases.

9 82. Plaintiffs and the class have not been able to determine the precise amount of NKB's
10 lump sum settlement with AHP. It is believed to be in the hundreds of millions of dollars. NKB's
11 contingency fee, pursuant to the agreements individual clients signed, was believed to be 33 1/3% of
12 this amount.

13 83. By agreeing to the settlement and the lump sum settlement fund, NKB violated its
14 fiduciary duty to its clients. NKB also willfully breached its ethical obligations to represent each
15 client zealously, to avoid conflicts of interests among multiple clients and conflicts of interest
16 involving the law firms' and individual attorneys' own interests. NKB agreed to the settlement
17 despite the fact that the settlement was directly contrary to the Code of Professional Responsibility
18 which required NKB to disclose terms and participants in aggregate settlements to their clients and
19 to obtain their informed consent.

20 84. By agreeing to the settlement, NKB and the Individual Defendants had also set the
21 stage for the Fen-Phen Aggregate Settlement Scheme, the next steps which were implemented as
22 described below. In the next several months, as NKB lawyers rushed to procure signed releases so
23 AHP would deposit more and more and more cash into the NKB bank accounts, the individuals
24 whose interests NKB purported to protect would be forced to negotiate against their own lawyers as
25 well as each other to secure even minimal settlements.

26

1 **E. NKB's and the Individual Defendants' Operation of the Fen-Phen Aggregate**
2 **Settlement Scheme**

3 **1. The Typical Settlement Scheme**

4 85. NKB operated the Fen-Phen Aggregate Settlement Scheme as follows: A NKB
5 lawyer, would recruit and sign up clients. The client would be opted out of the National Settlement
6 Agreement, either knowingly or unknowingly, to pursue his or her claim against AHP individually.
7 NKB would not always file a lawsuit or, if they did, they filed a multiple plaintiff lawsuit. Once
8 NKB had amassed thousands of opt-out Plaintiffs, NKB met with AHP and agreed on a lump sum
9 for all of its cases. It was then solely up to NKB to settle the individual claims and obtain releases
10 and then draw from the settlement. There was no formula for setting a dollar amount for individual
11 claims. The NKB attorneys had complete discretion. There was no oversight. The average time
12 spent considering a claim was minimal. No meaningful consideration was given to each plaintiff,
13 they were merely assigned a settlement dollar amount. NKB had an incentive to settle the cases of
14 the clients it originated for more than it settled referred cases for, because it had to split fees for the
15 referred cases. The clients NKB originated and therefore did not have to share fees on, were known
16 as "direct" clients.

17 86. As described above, after signing a contingency fee agreement, the next time the
18 client would hear about his her case is when NKB would call, write or show up with a settlement
19 figure and release and announce that the case could be settled, but that it had to be done so
20 immediately.

21 87. The uniform letter sent by NKB, usually by defendants Marc Jay Bern and Paul J.
22 Napoli stated as follows:

23 Dear [_____]:

24 As you know we have been actively negotiating with *American Home*
25 *Products*, the manufacturer of the diet drugs Redux and Pondimin.
26 The purpose of this letter is to recommend an amount which we
believe represents a fair and reasonable settlement amount given the
facts and circumstances of your case.

1 * * *

2 Our firm presently represents numerous diet drug clients. While we
3 are going to attempt to settle all, or virtually all, our cases with AHP in
4 the same negotiation, we are evaluating each case individually to give
5 you the best estimate of the present value of your individual case.
6 When evaluating your case, we are looking mainly at the results of
7 your echocardiogram and heart catheterization; whether you have had
8 a valve replacement or repair; whether you have been diagnosed with
9 primary pulmonary hypertension; and whether you have experienced
10 any unusual complications as a direct result of taking Redux and
11 Pondimin. Additionally the length of time you took the drug and your
12 age are relevant to our evaluations.

13 It is solely your option as to whether you wish to settle your case for
14 what we recommend. Our recommendation is our best estimate as to
15 the present settlement value of your case based upon the information
16 in our files and our discussions with AHP. Our recommendation is not
17 meant as an estimate as to what a jury would award if your case went
18 to trial. Our firm has been trying personal injury lawsuits for decades,
19 and have seen juries award a lot less than we anticipated and in some
20 cases nothing. There is no way to predict the ultimate outcome. We
21 can only discuss settlement values based on our professional judgment,
22 training and experience in this area of the law. *Our recommendation
23 is based on the final offer made by AHP to settle your case and we
24 believe under all the existing facts and circumstances is fair and
25 reasonable.*

26 In light of all these factors, we recommend that you accept our
recommendation on your behalf. We can settle your claims against
American Home Products for the gross amount of \$10,000. Attorneys'
fees and costs will be deducted from that figure.

* * *

*Based on our review of your case, we have negotiated a settlement
amount of \$10,000.00.* If you wish to proceed to trial and not settle for
our recommendation, you certainly have this option. However, should
you wish to reject our advice in this regard, we do ask that you please
call us to discuss this first. We would like to emphasize that we
cannot predict when your case may go to trial or when the defendants
would wish to try to settle your individual case. It could be many
months to many years. You also need to be aware that your costs will
be much higher if your case proceeds to trial. In fact it is not
uncommon in litigation such as this for the costs to run \$100,000-
\$200,000 or higher to try a single case. Moreover, if your receive a
large verdict, then American Home Products will likely appeal.
Finally, if the jury awards you punitive damages against American
Home Products, the government does tax you on these damages. You
would **not** be taxed on the settlement we are recommending.

1 You also need to be aware that in mass tort litigation (such as Diet
2 Drug litigation), it is not uncommon for large companies to declare
3 bankruptcy. Dow Corning did this in the Breast Implant litigation, and
4 numerous asbestos manufacturers have done this. American Home
5 Products is certainly a big company which appears to have “deep
6 pockets.” No company, however, can repeatedly afford to pay verdicts
7 the size of which you may have read or heard about. There are 45,000
8 people who “opted-out” of the global settlement to pursue their claims
9 in court, just like you. If American Home Products were to declare
10 bankruptcy, this would likely delay the payment of money to you for
11 many years.

12 * * *

13 We ask that you carefully consider the matters discussed in this
14 correspondence and we recommend that you grant us the authority to
15 settle your case for the amount reflected above.

16 If your [sic] agreeable to entering into a settlement of the amount set
17 forth above, please sign the attached acceptance and return in the
18 envelope provided at your earliest convenience. . . . If, on the other
19 hand, you want to discuss this matter further or are unwilling to
20 provide us with the authority to settle your case for the amount set
21 forth above, please contact our office immediately to discuss this
22 matter further.

23 Very Truly Yours,

24 NAPOLI, KAISER, BERN & ASSOCIATES, LLP

25 /s/ Marc Jay Bern

26 Paul J. Napoli

Marc Jay Bern

88. The \$10,000 “final offer” was the common amount offered. NKB attempted to settle the bulk of its inventory of cases referred by other lawyers for between \$10,000 and \$25,000. This would minimize the referral fee NKB would have to pay to referring lawyers, and leave more settlement fund money – and thus more direct fees – for NKB direct clients and NKB.

89. This letter, which was mailed or hand-delivered by NKB to its clients on thousands of occasions, and the contents of which NKB was aware of, did not disclose: (a) that NKB had already agreed with AHP not to litigate or try the client’s case; (b) that the “negotiation” referred to in the letter was not a true “negotiation,” but was subject to an agreement severely limiting the client’s

1 rights and the scope of the negotiation; (c) that there was no true negotiation as that term was
2 understood by an ordinary person, particularly because NKB acted with its own interests first in
3 accepting a lump sum settlement and agreeing not to litigate or try the cases individually; (d) that the
4 offer was an offer made by NKB, not a “final offer” from AHP; (e) that the client’s right to recovery
5 was limited based on the fact that there was a finite sum of money to distribute among all NKB
6 clients by the NKB lawyers; and (f) that the amount was far below what a truly litigated case was
7 worth.

8 90. In addition, the letter, which was mailed in substantially the same form by NKB to its
9 clients on thousands of occasions, included many deliberate inaccuracies, which NKB was aware of
10 and knowingly included in the letter: (a) that NKB was “[e]valuating each case individually to give
11 you the best estimate of the present value of your case;” (b) that case evaluations were made based
12 on objective medical factors; and (c) that the NKB recommendation is “based on the final offer made
13 by AHP to settle your case.”

14 91. The letter was also shocking for the other suggestions it made: (a) that the claims
15 NKB had encouraged plaintiffs to bring as individual suits suddenly were not valuable; (b) that
16 plaintiffs should rush to settle because AHP might go bankrupt; and (c) that 45,000 opt-out plaintiffs
17 were competing against each other to get claims in and paid.

18 92. Because of the existence of the agreement among NKB lawyers to settle the
19 individual cases *en masse* for a common settlement fund, without litigating or trying them
20 individually, NKB never undertook the types of actions that lawyers routinely undertake in
21 representing clients. For example, NKB did not sit with its clients and provide a range of the
22 potential damages that the client might receive if he or she proceeded to trial instead of accepting a
23 settlement. NKB did not discuss with clients the true costs or, more importantly, the benefits of
24 proceeding to trial, or the facts known to NKB, that plaintiffs in other cases had received hundreds
25 of thousands or even millions of dollars when they litigated through trial. NKB did not do so
26 because it had decided not to litigate its client’s cases.

1 93. The foregoing procedure was used by NKB with plaintiffs and the members of the
2 Class. It is believed that based on this letter alone NKB settled hundreds, if not thousands, of cases
3 for less than individuals would have received if the cases had been litigated and tried individually.

4 **2. Refusing to Authorize Settlement**

5 94. Other plaintiffs rejected NKB’s “recommendation” to settle or asked for more
6 information on the terms of settlement. As part of the Fen-Phen Aggregate Settlement Scheme,
7 NKB and the Individual Defendants had decided in advance on an approach to these individuals.
8 NKB lawyers and staff would contact the hold-outs directly to pressure them to settle.

9 95. In concert with his partners, Bern launched a nationwide mission to intimidate
10 individuals into settlement. Bern set up telephone conversations or meetings in hotel rooms with the
11 reluctant plaintiffs in their hometowns. His mission, as agreed by the NKB partners as part of the
12 Enterprise, was simple: to “browbeat” individual plaintiffs into settling. Internally, at NKB, these
13 hotel meetings were known as the “Bern’s Road Show” or the Marc Bern “National Tour.”

14 **a. Meetings in hotel rooms**

15 96. The “Bern’s Road Show” starred Bern but followed a tightly-controlled formula
16 scripted and agreed to by all of the NKB partners and the Individual Defendants. Bern would meet
17 the plaintiff, and sometimes the plaintiff with spouse, in the hotel room. Bern would repeat the
18 settlement amount and if the plaintiff persisted in his or her refusal to settle, Bern would unleash the
19 invective. He would berate his or her case, belligerently insisting that the plaintiff was not really
20 injured and that he or she was “lucky” that they were being offered as much as NKB had come up
21 with for him or her. Bern threatened that the firm would withdraw from the case and abandon the
22 plaintiff, leaving the plaintiff to start over again, if he or she would not settle. Individuals subjected
23 to this treatment describe feeling scared and humiliated and stupid.

24 97. The clients were, for the most part, inexperienced litigants who were first victimized
25 by the drug company that had sold them diet pills that physically injured them and then forced to
26 defend their cases to their own lawyers. Many succumbed immediately to the lawyers’ bullying.

1 98. As telling evidence that the clients were actually negotiating against their own
2 lawyers and that those lawyers held full discretion over the settlements in their hands, if the plaintiff
3 still managed to refuse, or threatened or actually walked out of the room, the settlement amount Bern
4 was offering would suddenly be upped unilaterally by the lawyer.

5 Some examples of this tactic include the following:

6 99. Individual experiences in negotiating claims with NKB lawyers further betray the
7 total control these lawyers held over individual settlement amounts. For example, Byron Barber and
8 his wife, Vicki Barber, retained Paul Napoli to represent his claims against AHP for injuries
9 sustained by ingesting Pondimin for approximately 10 months from 1996 to 1997. Despite repeated
10 efforts on Mr. Barber's part, Mr. Barber could not get a case update from NKB or the NKB go-ahead
11 to have an echocardiogram.

12 100. Mr. Barber was highly dissatisfied by NKB's representation of him and his claim and
13 expressed his displeasure in strong terms to NKB lawyers, including defendant Paul Napoli and on
14 the Internet. At NKB's urging, Mr. Barber first agreed to settle his claims against AHP without
15 medical confirmation or even individual evaluation of his claims, but then reneged on the agreement
16 after realizing NKB's disinterest in fully evaluating his claims. Mr. Barber accused NKB of legal
17 malpractice, negligence, coercion, intimidation, and breaching his fiduciary duties to Mr. Barber as
18 his client.

19 101. Mr. Barber persisted and his condition was finally diagnosed as Mild Primary
20 Pulmonary Hypertension in June 2001 by Dr. Richard Channick of the University of California at
21 San Diego Medical Facility. The results were forwarded to defendant Paul Napoli.

22 102. Despite the medical evidence, Napoli initially insisted that Mr. Barber was not injured
23 and refused to consider settling his claim for more. As Mr. Barber persisted, however, Napoli
24 relented. He finally agreed to settle Mr. Barber's claims for \$500,000 (NKB initially tried to settle
25 Barber's case for \$23,500, a fraction of the \$449,381 he would have received under the national
26 settlement) on the condition that Mr. and Mrs. Barber retract all of the negative comments they had

1 made about him and write a letter stating that Napoli did a good job, they were not coerced and, in
2 fact, were delighted by NKB's representation of their interests. The letter and release had to be
3 executed immediately. Mr. Barber refused to sign and instead, faxed Napoli a letter stating that the
4 \$500,000 settlement of the Barbers' claims against AHP should not be contingent upon the Barbers'
5 satisfaction with the NKB legal services.

6 **b. Telephone Tactics**

7 103. NKB telephone tactics to force clients to settle were consistent with the "Bern Road
8 Show." Bern or Napoli would get the client on the phone and loudly berate him or her for not
9 accepting the settlement that NKB was "recommending." NKB lawyers would accuse the non-
10 settling clients of having no real injury. NKB lawyers often feigned looking at the individual's file
11 by rustling a piece of scrap paper into the phone. Again, if a client resisted hard enough in the face
12 of NKB intimidation, the settlement amount would be increased. It was not uncommon for a "final
13 settlement offer" to go from tens of thousands to hundreds of thousands within minutes, with no
14 outside consultation.

15 **c. Registered Nurse on NKB Payroll "Recommends" Settlement**

16 104. The use of a registered nurse/lawyer was another critical component of the Fen-Phen
17 Aggregate Settlement Scheme as planned by NKB and the Individual Defendants. Clients resistant
18 to settlement were often introduced, either in person or by phone, to a medical professional
19 experienced in Diet Drug litigation who would help "explain," in her expert opinion, why the
20 settlement recommended by NKB was excellent compensation for their injuries. The nurse was
21 Debra Polito. Polito was a nurse, a lawyer, a longtime friend of Bern's and on the NKB payroll and,
22 at one point, on the NKB letterhead. In fact, she had nothing to do with the Diet Drug Litigation.

23 105. Polito was not asked to use her medical training to review client records, recommend
24 or evaluate assigned settlement amounts. In fact, according to one insider, at the time NKB settled
25 the cases, Polito had not even appeared at the firm. Polito's role was to run an assembly line for
26 clients resisting settlement. One week after she appeared in the NKB offices in January 2001, the

1 New York clients were scheduled to come to the NKB offices so she could convince them to settle.
2 She would meet with approximately 45 people a day in 15-minute increments. Typically, she would
3 say: “I am a nurse and the offer is fair and reasonable and this is a good settlement for you.” She
4 did not disclose that she was a lawyer employed by the law firm nor the fact that she had no
5 experience with diet drug cases. Later, a charge for “expert witness fee for Debra Polito” appeared
6 on client closing documents. Often the so-called “expert” fees were dated before she ever came to
7 NKB.

8 **F. The Falsified Settlement Documentation**

9 106. The NKB Fen-Phen Aggregate Settlement Scheme continued even after clients
10 agreed to a settlement figure with NKB. NKB and the Individual Defendants agreed to falsify
11 certain costs appearing on the Detailed Client Settlement Statements to maximize the NKB profits
12 from the fraudulent scheme.

13 107. As with any contingent fee agreement, the NKB agreement with the clients provided
14 for costs to be deducted from the gross settlement amount. NKB took this opportunity to fabricate
15 costs it had never incurred, to exaggerate costs it had incurred, to charge individual clients
16 individually for costs incurred by the clients collectively and to deduct all of these costs from
17 individual client settlements. Once collected off the top of the settlement funds, the bogus charges
18 would be deposited in NKB’s bank account. Thus, these charges resulted in less money for clients
19 and referring lawyers and more money for NKB and the Individual Defendants.

20 108. The bogus costs included large charges for fees of expert doctors the clients had never
21 consulted nor even heard of. In one instance, Christine Dickey was charged \$20,000 for expert fees
22 for two doctors she had never seen.

23 109. Clients were also consistently charged \$22.84 for an expert fee for Deborah Polito,
24 the lawyer/ RN on the NKB payroll. On some Detailed Client Settlement Statements, “expert” fees
25 for Polito were charged prior to her first day of work at the firm and were charged for work that was
26 actually being done by firm associates and staff.

1 110. Individual clients were charged \$40.00 hand delivery fees for deliveries to the
2 defendants that were incurred only one time on behalf of large groups of clients.

3 **G. Other Individual Verdicts and Settlements**

4 111. Over the years since the first individual Fen-Phen cases have been brought, juries
5 have continued to award substantially in excess of the amounts NKB clients were forced to settle for
6 as part of NKB's Fen-Phen Aggregate Settlement Scheme.

7 112. Newspaper accounts and specialized litigation reporters report other individual
8 verdicts and settlements for individuals which demonstrate potential results of prosecuting the cases
9 individually, as NKB promised it would, and thus, what NKB's individual clients lost by having
10 their claims handled, instead, *en masse*.

11 a. In July 2001, a Texas state court judge cited the state's cap on punitive
12 damages and cut most of a \$56.5 million jury verdict for a former diet drug user who sued American
13 Home Products. The judge cut the jury's \$11.25 award from compensatory damages to a little under
14 \$5 million; and the jury's \$45 million punitive damage award to \$3.4 million, awarding a total award
15 of \$8.2 million to the cafeteria worker who suffered "moderate aortic regurgitation" but continued to
16 work;¹⁹

17 b. Also in Texas in 2000, a 55-year-old Houston woman who had developed
18 valvular heart disease requiring the replacement of two heart valves as a result of fen-phen usage,
19 settled her lawsuit against AHP for between \$8 to \$10 million;²⁰

20 c. In 2000, an Oregon state court jury awarded a \$29 million fen-phen verdict in
21 a case on behalf of a mother and a son who each suffered from "*mild heart valve damage*" as a result
22 of diet drug use. One of the two also had pulmonary hypertension (PH) caused by the drugs. The
23 jury awarded total actual damages of \$3.897 million and punitive damages of \$25.35 million. AHP
24 was found 100 percent liable for negligently causing the plaintiffs' injuries, failing to adequately
25

26 ¹⁹ Mealey's Fen-Phen Report (Aug. 2000); Mealey's Fen-Phen Reporter (July 2001).

²⁰ Breast Implant Litigation Reporter (Mar, 27, 2000).

1 warn of risks, and fraudulently misrepresenting information about Pondimin to physicians. Counsel
2 for the two claimed that under the National Settlement, the two would have qualified for payments
3 of about \$6,000 each plus up to \$400 each for prescription reimbursement costs;²¹

4 d. In February 2000, a Philadelphia jury awarded \$8 million to a 65 year old
5 woman who suffered from PPH related to her use of Fen-Phen. The plaintiff had sued both
6 American Home Products and her physician. The jury found each 50% liable;²²

7 e. In December 2000, a Mississippi state court jury returned the \$150 million
8 verdict on behalf of 5 plaintiffs, as featured on the NKB website. During closing arguments,
9 plaintiffs' counsel asked for \$130 million. About two hours later, the jury returned with \$30 million
10 for each plaintiff;²³ and

11 f. Also in Mississippi in 2000, a group of approximately 2000 plaintiffs settled
12 their claims against AHP for approximately \$200 million.²⁴

13 **H. NKB and the Individual Defendants Jointly Act to Conceal the Fen-Phen Aggregate** 14 **Settlement Scheme**

15 113. Secrecy was essential to the formation and success of the Fen-Phen Aggregate
16 Settlement Scheme. Were the terms of the agreement, the settlement fund with AHP and the truth
17 behind the settlement negotiations known, many of the individual clients would have objected and/or
18 demanded more money and/or insisted that their cases be treated individually or even tried.

19 114. The prospect of thousands of such demands would have been unacceptable to NKB
20 and would have jeopardized the success of the settlement from the lawyers' standpoint. The
21 settlement fund installments from AHP were not guaranteed. If NKB could not deliver the requisite
22 number of releases in the time period they agreed to with AHP, the settlement funds would not be
23 deposited into the NKB bank account.

24 ²¹ Mealey's Litigation Reporter: Fen-Phen / Redux (Mar. 2000).

25 ²² Mealey's Litigation Report: Fen-Phen/ Redux (Feb. 2000).

26 ²³ Mealey's Litigation Report: Fen-Phen / Redux (Jan. 2000).

²⁴ "Miss. Fen-Phen Drug Case Settled," AP ONLINE (Oct. 5, 2000).

1 115. NKB and the Individual Defendants agreed to keep the terms of the settlement,
2 including the distribution of the funds by AHP, secret – a secret from all but the most entrusted law
3 firm lawyers and employees as well as the affected clients.

4 116. Defendants’ interest in preserving secrecy concerning the method by which the
5 settlement of individual claims were negotiated was furthered by the Confidential Release,
6 Indemnity and Assignment NKB agreed to have all of its settling clients execute. The
7 confidentiality portion of the release provided:

8 That neither Claimant, his/her family, his/her agents or representative,
9 nor his/her attorneys, their agents, representatives or employees, will
10 disclose to any person or entity the amount of money paid in
11 settlement of this case or any of the other terms and/or condition of
12 this settlement agreement relating to the settlement of these claims.

11 The penalty for breaching the confidentiality agreement was set at \$100,000, an intimidating sum to
12 the clients who signed the agreement.

13 117. These confidentiality provisions were intended by NKB and the Individual
14 Defendants to prevent the discovery by plaintiffs, the class and other persons of interest from
15 discovering the true nature and extent of defendants’ fraudulent and deceitful schemes. They had the
16 purpose of discouraging claimants from subsequent efforts to investigate the circumstances
17 surrounding their settlement.

18 118. NKB’s intent to discourage claimants from investigating the circumstances
19 surrounding their settlement continues to this day, as set forth below.

20 119. On September 17, 2001, Christine Dickey wrote to NKB at the Mineola, New York
21 office she had dealt with to obtain records of her lawsuit. It was not her first request, but she had
22 still not obtained her records. Still bruised from the abuse she had taken from NKB lawyers bullying
23 her into settling her claim, she asked not to be contacted by phone or e-mail:

24 9/17/01

25 Dear Mr. Bern

26 At this time, *again*, I am asking for copies to, include, but not limited to:

- 1 1. Negotiations of settlement offers from AHP.
- 2 2. Final settlement papers signed by My Husband & I January of 2001
- 3 in Albuquerque NM.
- 4 3. Bills from doctors hired to examine my case.

5 Please have my copies sent to me within 14 days of receipt of this
6 letter. Please do not attempt to contact me by phone or e-mail. Please
7 use U.S. Postal service only.

8 Sincerely,

9 Christine M. Dickey

10 [address]

11 cc: NY Bar Assoc.

12 120. Defendant Paul Napoli's formulaic response on behalf of the firm was unbelievable
13 and illustrates the depths to which the Enterprise would go to maintain secrecy:

14 September 21, 2001

15 Re: Your case

16 Dear Ms. Dickey

17 We are in receipt of your letter dated September 17, 2001, due to the
18 disaster at the World Trade Center we are unable to get access into our
19 office. We believe that all the documents you have requested have
20 been destroyed in the disaster. When we are able to return to our
21 office in the next 60-90 days we will forward any remaining remnants
22 on your file that we are able to locate.

23 Very Truly yours,

24 NAPOLI, KAISER, BERN & ASSOCIATES

25 Paul J. Napoli

26 This was a form letter. Other former clients had sent similar inquiries regarding their files and
received the identical letter in return. In fact, although NKB's New York office was located within
rescue zone for the terrorist attacks on the WTC, it was two blocks away and, according to one
worker still employed by NKB at the time of the attack, was not damaged. The weekend after the
attack, NKB partners had obtained access to the building and moved all Fen-Phen related documents

1 to defendant Kaiser's house on Long Island for safekeeping. By September 22, 2001, the day after
2 NKB issued its form letters, the City of New York Emergency Mapping Center reported on its
3 website that the NKB building had been "Inspected But Not Affected."

4 121. NKB took other measures to cloak the NKB Fen-Phen Aggregate Settlement Scheme
5 in secrecy including the monitoring of an internet bulletin board dedicated to discussion of Fen-Phen
6 related issues including medical conditions, litigation, law firms and settlements. Several NKB
7 clients ventured onto the site to air their confusion, concerns and suspicions concerning the way in
8 which NKB was handling their cases. Most often the posts were made by individuals using screen
9 names to protect their real identities. If NKB learned, or even suspected, the identity of the clients
10 making the posts critical of the firm or the settlements, retribution was swift and certain. NKB
11 lawyers would contact the authors or suspected authors of critical posts and threaten to withdraw
12 representation.

13 122. In these ways, NKB attempted to erect roadblocks to the release of client files and
14 other client information. It did so to discourage release of the files and potential exposure of the
15 Fen-Phen Aggregate Settlement Scheme and the related unorthodox and unethical handling of the
16 individual claims by the law firm as well as the exposure of the illegitimate costs which were
17 deducted from individual client settlements.

18 123. Defendants' continuing conspiracy to prevent the discovery of the fraudulent and
19 deceitful settlement schemes, by the wrongful threat of a \$100,000 fine for breaching a
20 confidentiality agreement as well as the refusal to provide client files when requested, has in the past
21 and continues to preclude plaintiffs and class members from learning the true nature of how they
22 were defrauded and otherwise cheated by virtue of unfair, deceptive and fraudulent claims practices
23 by defendants.

24 **I. Fraudulent Concealment**

25 124. Defendants are estopped from relying on any applicable statutes of limitation by virtue
26 of their acts of fraudulent concealment, as set forth above. These acts include, but are not limited to:

1 (a) the agreement by NKB and the Individual Defendants to keep the Fen-Phen Aggregate
2 Settlement Scheme top secret; (b) efforts by NKB and the Individual Defendants to keep all
3 settlements confidential; (c) requiring clients who settled to sign oppressive Confidential Release,
4 Indemnity and Assignment documents which purported to impose a \$100,000 penalty if the client
5 discussed the settlements without advising clients that such penalties were unreasonable and likely
6 unenforceable; (d) refusing to turn over client files after a valid request from former clients or other
7 lawyers and/or denying the existence of files after a valid request from other lawyers;²⁵ and
8 (e) failure to disclose to clients the terms of settlement made by AHP.

9 V. CLASS ALLEGATIONS

10 125. This action is properly brought as a class action under Rule 23(a) and 23(b)(2) and
11 (b)(3) of the Federal Rules of Civil Procedure for the following reasons. The requirements of the
12 Rule are met with respect to the class defined below.

13 126. Numerosity of the class. Membership in the class is so numerous as to make it
14 impractical to bring all class members before the Court. The identity and exact number of class
15 members is unknown, but can be quickly determined from defendants. It is estimated to be between
16 4,000 and 5,000.

17 127. Class Definition. Plaintiffs bring these claims on behalf of themselves and the
18 following class of persons:

19 All persons who were represented by Napoli, Kaiser & Bern LLP in
20 connection with diet drug claims against American Home Products
21 who opted out of the national settlement and/or whose diet drug claims
22 against AHP were settled by NKB as part of the NKB Aggregate
23 Settlement with AHP.²⁶

24 128. Typicality of Claims. Plaintiffs are members of the Class of individuals described
25 herein who were victimized by the conduct of defendants. Plaintiffs have the same interest in this

25 ²⁵ Sept. 21, 2001 Letter from Paul J. Napoli to Christine Dickey (responds to her request for file by saying that
26 because of World Trade Center disaster they cannot get access to files which they believe have been “destroyed in the
disaster.” The building was not destroyed in the disaster.

²⁶ Plaintiffs reserve the right to amend this class definition prior to moving for class certification.

1 matter as all other members of the class, and plaintiffs' claims are typical of all members of the
2 class.

3 129. Existence of Common Questions of Law and Fact. There are numerous and
4 substantial questions of law and fact common to all of the members of the Class, which control this
5 litigation and predominate over any individual issues, which include but are not limited to the
6 following:

7 a. Whether NKB and the Individual Defendants agreed to the Fen-Phen
8 Settlement Scheme;

9 b. What the terms of the agreement were;

10 c. Whether NKB and the Individual Defendants conducted the affairs of the Fen-
11 Phen Settlement Enterprise;

12 d. What acts NKB and the Individual Defendants undertook to conceal the
13 enterprise; and

14 e. What duties were breached by NKB and the Individual Defendants.

15 130. Superiority. A class action is the appropriate method for the fair and efficient
16 adjudication of this controversy for the following reasons:

17 a. Without a class action, defendants' violations of the laws will continue
18 without remedy, and defendants will continue to enjoy the fruits and proceeds of their unlawful
19 misconduct;

20 b. Given (i) the substantive complexity of this litigation; (ii) the size of
21 individual class members' claims; and (iii) the limited resources of class members, few, if any, class
22 members could afford to seek legal redress individually for the wrongs that defendants have
23 committed against them;

24 c. This action will foster an orderly and expeditious administration of class
25 claims, economies of time, effort and expense, and uniformity of decision;

26

1 d. Inferences and presumptions of materiality and reliance are available to obtain
2 class-wide determinations of those elements within the class claims, as are accepted methodologies
3 for class-wide proof of damages; alternatively, upon adjudication of defendants' common liability,
4 the Court can efficiently determine the claims of the individual class members; and

5 e. This action presents no difficulty that would impede the Court's management
6 of it as a class action, and is the best (if not the only) available means by which members of the
7 Class can seek legal redress for the harm caused them by the defendant law firm and individual
8 lawyers.

9 131. With respect to equitable relief sought in the action, certification pursuant to (b)(2) is
10 appropriate.

11 132. In the alternative, certification of certain factual and legal issues pursuant to 23(c)(4)
12 is appropriate. Those issues include:

- 13 (a) Whether NKB and the Individual Defendants engaged in the scheme alleged
14 herein; and
15 (b) Whether by doing so defendants violated the law as alleged in the counts of
16 this complaint.

17 133. There is a community of interest in the subject matter of the suit and in the remedy
18 between plaintiffs and the class members which satisfied the basic criterion under Rule 23 of the
19 Federal Rules of Civil Procedure.

20 **COUNT I**

21 **VIOLATIONS OF THE RACKETEER INFLUENCED**
22 **AND CORRUPT ORGANIZATIONS STATUTE**

23 **(18 U.S.C. § 1962(C) AND (D))**

24 134. Plaintiffs incorporate by reference all preceding paragraphs as though fully set forth
25 herein. This claim arises under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),
26 18 U.S.C. §§ 1961-1968, and is asserted against each of the Individual Defendants.

1 135. At all times relevant hereto, defendants Napoli, Kaiser and Bern have each been a
2 “person,” as that term is defined in 18 U.S.C. § 1961(3).

3 136. Section 1962(c) of RICO provides that it “shall be unlawful for any person employed
4 by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign
5 commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs
6 through a pattern of racketeering activity. . . .” 18 U.S.C. § 1962(c). Section 1962(d) provides that
7 it “shall be unlawful for any person to conspire to violate” § 1962(c) of RICO. 18 U.S.C. § 1962(d).

8 137. At all times relevant hereto, NKB has been an “enterprise,” as that term is defined in
9 18 U.S.C. § 1961(4). This RICO enterprise, a law firm, had a structure and existence beyond the
10 pattern of racketeering activity (namely, mail and wire fraud) alleged herein).

11 138. In violation of 18 U.S.C. § 1962(c), the Individual Defendants, and each of them,
12 were employed by or associated with NKB, and they conducted or participated, directly or
13 indirectly, in the conduct of the law firm’s affairs through a pattern of racketeering activity.

14 139. The Individual Defendants’ predicate acts of “racketeering activity,” as that term is
15 defined in 18 U.S.C. § 1961(1)(B), include violations of the federal mail and wire fraud statutes, 18
16 U.S.C. §§ 1341 and 1343. The Individual Defendants’ pattern of racketeering activity dates from at
17 least 1999, continues to the present time, and threatens to continue into the future. Many of the
18 precise acts of mail and wire fraud committed by the Individual Defendants have been hidden and
19 cannot be alleged by plaintiffs without access to their records and the books and records of NKB.
20 Indeed, an essential part of the successful operation of the Fen-Phen Settlement Scheme was
21 dependent upon secrecy, and Individual Defendants took steps that were effective in keeping their
22 wrongdoing secret. However, plaintiffs can generally describe the occasions on which mail and wire
23 fraud occurred as part of the Individual Defendants’ conduct of the RICO enterprise. Plaintiffs can
24 specify other instances of mail and wire fraud as set forth below:
25
26

1 a. On or about December 1999, the Individual Defendants placed (or caused to
2 be placed) in the U.S. Mail a letter to each plaintiff and to thousands of its clients informing them of
3 the “negotiations” with AHP;

4 b. During 1999 and 2000, the Individual Defendants used (or caused others to
5 use) interstate wire facilities to place advertisements in newspapers seeking opt outs;

6 c. During 1999 and 2000, the Individual Defendants sent (or caused to send)
7 letters to each plaintiff and thousands of class members encouraging that they accept settlement, in
8 part due to a potential bankruptcy by AHP;

9 d. On thousands of occasions, as part of the Scheme, the Individual Defendants
10 used (or caused others to use) interstate wire facilities and the U.S. Mail to transmit checks to
11 individual plaintiffs;

12 e. On hundreds of occasions, if not thousands, as part of the Scheme, the
13 Individual Defendants used interstate wire facilities to speak with plaintiffs and members of the class
14 in furtherance of the Scheme.

15 140. The Individual Defendants’ predicate acts of “racketeering activity” also include
16 violations of 18 U.S.C. § 1503. It was the intent of the Individual Defendants to “corruptly,” as that
17 term is defined in 18 U.S.C. § 1503, obstruct, influence, and impede the administration of justice via
18 the operation of the Scheme. As part of this corruption and obstruction, the Individual Defendants
19 settled the pending loss cases filed on behalf of clients and then by virtue of the corrupt acts
20 described above, impeded the due and proper administration of these claims, and induced plaintiffs
21 and the class to settle claims at amounts lower than they would have absent the Individual
22 Defendants’ wrongful conduct.

23 141. The aforementioned predicate acts, among others, form a pattern of racketeering
24 activity related in their common objective of settling claims, based upon false and misleading
25 statements and information, as well as the omission and suppression of the truth with respect to
26 material facts and statements of law, all devised as a means of manipulating and persuading

1 unsophisticated and trusting claimants for the purpose of avoiding financial responsibility in the
2 settlement of hearing loss claims.

3 142. These fraudulent and misleading acts of omission and commission had the same or
4 similar purposes, results, participants, victims and methods of commission. These acts have been
5 consistently repeated and are capable of further repetition.

6 143. In violation of 18 U.S.C. § 1962(d), the Individual Defendants conspired to violate 18
7 U.S.C. § 1962(c). The Individual Defendants' conspiracy began prior to 1999, continues to the
8 present, and threatens to continue into the future. The object of the Individual Defendants' RICO
9 conspiracy was and is to further the financial interests of defendants. The Individual Defendants
10 determined and agreed to conduct the enterprise through a pattern of racketeering, and each one of
11 the Individual Defendants committed and/or agreed to the commission of, and knowingly
12 participated in, at last two predicate acts of racketeering activity within ten years of each other,
13 knowing that those predicate acts were part of a racketeering activity that would further the
14 conspiracy.

15 144. The Individual Defendants' violations of 18 U.S.C. §§ 1962(c) and (d) have
16 proximately caused direct injury to the Named Plaintiffs and Class members, each of whom has
17 received an unreasonable, and in many cases unconscionable, settlement as a direct result of the
18 Individual Defendants' fraudulent and deceptive claims practices scheme and defendants' pattern of
19 racketeering activity. As a direct and proximate result of the Individual Defendants' Scheme, the
20 Named Plaintiffs and the members of the Class suffered injury to their business or property. The
21 Named Plaintiffs' and class members' claims were valuable property rights that existed before
22 defendants embarked on their Scheme. The Individual Defendants' Scheme was designed to deprive
23 the Named Plaintiffs and class members of the full value of their property rights and was designed to
24 induce plaintiffs and members of the class to surrender their claims at less than full value. The
25 Individual Defendants' Scheme caused the Named Plaintiffs and Class members to extinguish their
26

1 property rights for an inadequate sum, thereby causing concrete monetary loss to the Named
2 Plaintiffs and Class members.

3 **COUNT II**

4 **BREACH OF DUTY OF CARE/ MALPRACTICE**

5 145. Plaintiffs incorporates by reference all preceding paragraphs as though fully set forth
6 herein.

7 146. Plaintiffs and the Class had attorney client relationships with NKB and the Individual
8 Defendants. As part of this relationship, NKB and the Individual Defendants owed plaintiffs and the
9 Class a duty of good faith, fair dealing and loyalty. NKB also owed plaintiffs a duty to exercise the
10 degree of care, skill, diligence and knowledge commonly possessed by a reasonable, careful and
11 prudent lawyer in the practice of law in the community. NKB further owed the plaintiffs a duty to
12 comply with The Code of Professional Responsibility.

13 147. As a result of the foregoing conduct outlined above, NKB and the Individual
14 Defendants breached its duty of care owed to plaintiffs and the Class. Its participation in the Fen-
15 Phen Settlement Scheme violated the Lawyer's Code of Professional Responsibility, including the
16 following Disciplinary Rules:

17 a. DR 1-102 provides that a lawyer or law firm shall not violate a Disciplinary
18 Rule; or engage in conduct involving dishonesty, fraud deceit or misrepresentations. NKB and the
19 Individual Defendants breached this rule by failing to disclose to its clients the Settlement Scheme
20 and the aggregate nature of the Settlement Fund, including its role in determining individual
21 settlement amounts and the criteria used to determine these amounts. NKB and the Individual
22 Defendants further breached this rule by violating this disciplinary rule and the Disciplinary Rules
23 identified below;

24 b. DR 1-104 requires law firms and lawyers with management responsibility to
25 make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules. NKB
26 and the Individual Defendants violated this disciplinary rule by failing to make reasonable efforts to

1 ensure that subordinate lawyers did not violate the disciplinary rules and by directing the subordinate
2 lawyers to act in a way that NKB and the Individual Defendants knew violated the Disciplinary
3 Rules;

4 c. DR 2-101 prohibits lawyers, on behalf of himself, herself or partners or
5 associates, from disseminating or using or preparing any public communication or communication to
6 a prospective client containing statements or claims that are false, deceptive or misleading. NKB
7 and the Individual Defendants breached this disciplinary rule by making false, deceptive and
8 misleading statements concerning: (i) the amount individual plaintiffs could and would recover if
9 they signed up with NKB, and (ii) NKB's intent to prosecute the cases individually, up through and
10 including trial;

11 d. DR 5-101 prohibits lawyers from representing a client if the lawyer's
12 professional judgment on behalf of the client may be affected by the lawyer's own financial,
13 business, property or personal interests, unless a disinterested lawyer would believe the
14 representation of the client will not be adversely affected thereby and the client consents to the
15 representation after full disclosure of the implications of the lawyers' interest. NKB and breached
16 this disciplinary rule by failing to disclose its own interests in settling the cases on an expedited basis
17 which would compromise the individual cases by precluding them from being litigated individually
18 and going to trial and obtaining client consent for the conflict of interest between the clients' and the
19 lawyers' own interests;

20 e. DR 1-105 provides that the lawyer shall decline representation of multiple
21 clients if the representation would be likely to involve the lawyer in representing differing interests
22 or if the multiple representations would be likely to be adversely affect the independent professional
23 judgment on behalf of the client unless a disinterested lawyer would believe that the lawyer can
24 competently represent the interests of each and if each consents to the representation after full
25 disclosure of the implications of the simultaneous representation ages and risks involved. NKB and
26 the Individual Defendants violated this disciplinary rule by representing multiple clients against the

1 same defendant and agreeing to an aggregate settlement which created differing interests for the
2 individual clients and forced them, without their knowledge and consent, to compete against each
3 other for settlement awards from the aggregate settlement;

4 f. DR 5-106 prohibits a lawyer who represents two or more clients from
5 agreeing or participating in an aggregate settlement of the claims of the clients, unless each client
6 has consented after full disclosure of the implications of the aggregate settlement and the advantages
7 and risks involved, including the existence and nature of all the claims involved and the participation
8 of each person in the settlement. NKB and the Individual Defendants breached this disciplinary rule
9 by failing to disclose the following to its clients and to obtain their consent:

10 NKB and the Individual Defendants represented thousands of
11 individuals' claims against AHP;

12 All diet drug claims represented by NKB and the Individual
13 Defendants would be settled on an aggregate basis;

14 An aggregate settlement of all the claims involved certain advantages
15 and many risks;

16 Among the risks were the facts that (a) NKB clients would be
17 competing with one another for finite benefits in the aggregate
18 settlement fund; (b) because of the structure of the aggregate fund, and
19 NKB's sole discretion over the way in which funds would be
20 distributed, NKB clients would also be negotiating against NKB and
21 the Individual lawyers for its share of the funds;

22 The existence and nature of all the claims involved in the aggregate
23 settlement;

24 The participation of each person in the settlement; and

25 Other implications of the aggregate settlement, including the facts that
26 NKB and the Individual Defendants had agreed not file new cases in
court or to litigate any of its existing or future case; NKB and the
Individual Defendants had waived the right to a jury trial for existing
and future clients; if clients did not agree to the release their claims,
NKB would withdraw from representing them; NKB retained sole
discretion over the settlement amounts individuals would receive;
NKB had agreed to conceal the existence of the agreement from NKB
clients and from everyone else and would take all steps necessary to
conceal the Settlement Scheme;

1 g. DR 6-101 provides that a lawyer shall provide competent representation to a
2 client, which requires the lawyer to possess the legal knowledge, skill, thoroughness and preparation
3 reasonably necessary for the representation. This rule also prohibits a lawyer from neglecting a
4 matter entrusted to the lawyer. NKB and the Individual Defendants breached this rule by failing to
5 prepare for a proper and thorough representation of each client's case and instead, without adequate
6 investigation, discovery and thoroughness agreed to settle their clients' cases on an aggregate basis
7 without due consideration of the circumstances of each case. NKB and the Individual Defendants
8 also neglected the legal matters entrusted to them by failing to conduct by the same inadequate
9 investigation and discovery, and by settling the claims instead on a bulk basis. NKB further
10 breached their obligations under this disciplinary rule by urging clients to sign releases with AHP
11 which purported to impose a \$100,000 fine for breach of the confidentiality provisions of that
12 agreement without advising the clients that the fine was inherently unreasonable and likely
13 unenforceable;

14 h. DR 7-101 requires a lawyer to represent each client zealously. In carrying out
15 zealous representation, the rule prohibits the lawyer from failing to carry out a contract of
16 employment entered into with a client for professional services; and from prejudicing or damaging a
17 client during the course of the professional relationship. NKB and the Individual Defendants
18 breached this disciplinary rule by failing to carry out the contracts of employment they entered into
19 with plaintiffs and the class to represent them in their individual case through trial, if necessary; and
20 by entering into the aggregate settlement agreement which prejudiced plaintiffs and the Class in the
21 pursuit of their individual claims and damaged them by getting them less compensation for their
22 injuries than they were promised and deserved;

23 i. DR 7-102 prohibits a lawyer from knowingly making a false statement of law
24 or fact. NKB breached this fact by failing to disclose the aggregate settlement, its own role in the
25 settlement and other facts detailed above; and
26

- 1 c. Agreeing, without disclosure to plaintiffs and the Class, to waive the right to a
2 jury trial;
- 3 d. Failing to disclose the existence of a Settlement Scheme;
- 4 e. Failing to disclose that as a result of the NKB Fen-Phen Aggregate Settlement
5 Scheme, their clients' recoveries would be more limited than if they had pursued individual
6 settlements;
- 7 f. Acting in its own interest ahead of interests of plaintiffs and the Class in
8 violation of The Lawyers Code of Professional Responsibility;
- 9 g. Failing to turn over client files even when presented with repeated valid
10 requests to do so; and
- 11 h. Violating each of the ethical rules identified in Count II above.

12 152. As a direct and proximate result of defendants' scheme to defraud, class members
13 suffered injury to their business or property. The plaintiffs' and class member's diet personal injury
14 claims were valuable property rights that existed before defendants embarked on their scheme to
15 defraud. Defendants' fraudulent scheme was designed to deprive class members of the full value of
16 their property rights. Defendants' fraudulent scheme caused class members to extinguish their
17 property rights for an inadequate sum, thereby causing concrete financial loss to plaintiffs and class
18 members. Defendants' fraudulent scheme, including unprofessional and unethical conduct in breach
19 of their fiduciary duty to plaintiffs and class members, constitutes a forfeiture of any and all attorney
20 fees obtained as a result of the scheme.

21 **COUNT IV**
22 **CONSPIRACY**

23 153. Plaintiffs incorporates by reference all preceding paragraphs as though fully set forth
24 herein.

25 154. NKB and the Individual Defendants entered into an agreement, the purpose of which
26 was to unlawfully deprive plaintiffs and members of the Class of their right to a fair claims, or trial

1 or settlement, and to deprive plaintiffs and members of the Class of their right to lawyers committed
2 to pursue their case fully and with the zeal required by law.

3 155. The terms of the agreement included, but are not limited to:

- 4 a. NKB and the Individual Defendants agreed to establish and conduct the
5 affairs of an enterprise for the purpose of settling individual Fen-Phen claims;
- 6 b. NKB and the Individual Defendants agreed, without disclosing to clients, it
7 would settle all claims on a wholesale basis rather than individually;
- 8 c. NKB and the Individual Defendants agreed it would waive their clients' rights
9 to a jury trial;
- 10 d. NKB and the Individual Defendants agreed to conceal the terms of this
11 agreement from all NKB Fen-Phen clients;
- 12 e. NKB and the Individual Defendants agreed that to the extent necessary, the
13 Lawyer's Code of Professional Responsibility governing lawyers would be ignored and violated; and
- 14 f. NKB and the Individual Defendants agreed to accept sole discretion for
15 determining the amounts each of its clients would receive in settlement, knowing that they would
16 (a) unknowingly be negotiating against one another for a share of the settlement funds; and
17 (b) receive amounts less than would be awarded if class members had honest counsel.

18 156. As part and parcel of this agreement, NKB and the Individual Defendants agreed to
19 accomplish the purpose of the conspiracy through unlawful means including, but not limited to, the
20 illegal use of the mails and the wired, the obstruction of justice, statements made in violation of
21 applicable consumer protection statutes, and acts undertaken in violation of the code of professional
22 responsibility governing the conduct of lawyers.

23 157. As a direct and proximate cause of defendants' scheme to defraud, class members
24 suffered injuries to their business or property. The class members' personal injury claims were
25 valuable property rights that existed before defendants embarked on their scheme to defraud.
26 Defendants' fraudulent scheme was designed to deprive class members of the full value of their

1 property rights. Defendants' fraudulent scheme caused class members to extinguish their property
2 rights for an inadequate sum, thereby causing concrete financial loss to class members. Defendants'
3 fraudulent scheme, including unprofessional and unethical conduct in breach of their fiduciary duty
4 to plaintiffs and class members, constitutes a forfeiture of any and all attorney fees obtained as a
5 result of the scheme.

6 **VI. PRAYER FOR RELIEF**

7 WHEREFORE, plaintiffs and the class members demand judgment against the defendants as
8 follows:

9 A. Determining that the action is a proper class action, certifying an appropriate class
10 and appointing plaintiffs as class representative and plaintiffs' counsel s lead class counsel;

11 B. Finding defendants liable under each of the common law causes of action pleaded
12 above;

13 C. Granting extraordinary equitable and/or injunctive relief as permitted by law, equity
14 or statutory provisions sued hereunder, including attaching, impounding or imposing a constructive
15 trust upon or otherwise restricting the proceeds of defendants' ill-gotten gains to insure that plaintiffs
16 and the class members have an effective remedy;

17 D. Finding that defendants' professional misconduct and breaches of fiduciary duty to
18 plaintiffs and the class require defendant to disgorge the attorney fees they collected as a result of
19 that conduct;

20 E. Awarding treble damages as provided in 18 U.S.C. § 1964;

21 F. Awarding plaintiffs and class members their costs and disbursements incurred in
22 connection with this action, including reasonable attorney's fees, expert witness fees, and other
23 costs;

24 G. Directing the establishment of a Claims Resolution Facility for the determination of
25 any individual issues that remain after trial of class-wide issues; and

26 H. Granting such other and further relief as the Court deems just and proper.

1 **VII. JURY DEMAND**

2 Plaintiffs hereby demand a trial by jury.

3
4 DATED: New York, New York
5 December 3, 2001.

6 LOVELL & STEWART, LLP

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8
9 By _____

10 Christopher Lovell (CL 2595)
11 Gary S. Jacobson (GJ 2481)
12 500 Fifth Avenue
13 New York, New York 10110
14 (212) 608-1900

15 Steve W. Berman
16 Jeniphr A.E. Breckenridge
17 HAGENS BERMAN LLP
18 1301 Fifth Avenue, Suite 2900
19 Seattle, WA 98101
20 (206) 623-7292

21 Attorneys for Plaintiffs
22
23
24
25
26