

recordings with regard to all other echocardiograms performed on the plaintiff (i.e., any echocardiograms that do not serve as the basis for the Intermediate Opt-Out), the plaintiff must serve an authorization for the release of such medical records at the time of service of Echocardiogram Discovery.

3. Each plaintiff must serve the Echocardiogram Discovery described in the previous paragraph in accordance with the following schedule:

- a. For each Intermediate Opt-Out case that is presently before this Court, each plaintiff's Echocardiogram Discovery shall be served within twenty-one (21) days of the date of this Order.
- b. With respect to Intermediate Opt-Out cases commenced in this Court after the date of this Order, each plaintiff's Echocardiogram Discovery shall be served within twenty-one (21) days from service of the complaint on any defendant;
- c. With respect to cases transferred to this Court from other courts within the State after the date of this order, plaintiff's Echocardiogram Discovery shall be served within twenty-one (21) days from the transfer date.

4. At the time a plaintiff serves his or her Echocardiogram Discovery, that plaintiff shall also submit a Request for Judicial Intervention.

5. In addition, with respect to Intermediate Opt-Out cases commenced after the date of this Order, each plaintiff shall attach to his or her complaint a copy of the echocardiogram

report that allegedly qualifies him or her as an Intermediate Opt-Out. With respect to Intermediate Opt-Out cases commenced prior to the date of this Order, unless previously produced, each plaintiff shall serve a copy of the echocardiogram report that allegedly qualifies him or her as an Intermediate Opt-Out at the same time that plaintiff serves his or her Echocardiogram Discovery.

6. This Order supplements, but not does not replace or supersede, the provisions and disclosure requirements provided for in Case Management Order No. 2 dated July 9, 1998.

Verified Complaints by Adoption for Intermediate Opt-Out Plaintiff

7. Plaintiffs' Amended Master Complaint, approved by this Court in CMO No. 3, contains certain allegations that plaintiffs allege may be suitable for incorporation by reference in individual Intermediate Opt-Out cases. It is envisioned that, in many Intermediate Opt-Out cases, there will only be a Verified Complaint by Adoption for Intermediate Opt-Out Plaintiffs, incorporating by reference allegations from the Amended Master Complaint. Defendants reserve the right to move against the Amended Master Complaint in all cases which incorporate its allegations by reference. Any party desiring to make such a motion shall first request a conference with the Court to discuss a schedule for the briefing and argument of the motion and, to the extent applicable, a narrowing of the issues. Any such motion shall be served in accordance with Case Management Order No. 1.

8. Allegations in the Amended Master Complaint are not deemed automatically included in any particular Intermediate Opt-Out case. Plaintiffs wishing to incorporate by reference any or all of the causes of actions in the Amended Master Complaint for Intermediate Opt-Out Plaintiffs shall do so by listing them and filling in the requested

information on a Verified Complaint by Adoption for Intermediate Opt-Out Plaintiffs in the form attached as Exhibit A. The Court notes that the Verified Complaint by Adoption for Intermediate Opt-Out Plaintiffs is intended to expressly disclaim the adoption of any allegations, causes of actions, or requests for relief that are inconsistent with the terms and conditions of the Nationwide Class Action Settlement Agreement. Only one plaintiff and any derivative plaintiffs (e.g., a spouse) may appear on a Verified Complaint by Adoption for Intermediate Opt-Out Plaintiff. Counsel for any plaintiff filing a Verified Complaint by Adoption for Intermediate Opt-Out Plaintiff must sign said complaint as required by 22 NYCRR § 130-1.1-a.

9. A Verified Complaint by Adoption for Intermediate Opt-Out Plaintiff shall be served, together with an appropriate summons, on each named defendant in accordance with the CPLR's provisions for service of process or as set forth in Case Management Order No. 1.

10. Within thirty (30) days of the signing of this Order, any plaintiff may amend and serve in accordance with this CMO any previously filed complaint asserting an Intermediate Opt-Out claim to adopt all or a portion of the allegations contained in the Master Complaint for Intermediate Opt-Out Plaintiffs by serving a Verified Complaint by Adoption for Intermediate Opt-Out Plaintiff. Leave to amend a complaint in the manner set forth above is hereby granted without the necessity of filing a motion pursuant to CPLR § 3025.

Verified Answers By Adoption

11. Any defendant having previously filed a Master Answer to the Master Complaint, as described in CMO No. 3, may thereafter incorporate the terms of that Master Answer in any action assigned to this Court in the manner set forth below. The filing of a

Master Answer does not prejudice or affect in any way a defendant's right to move against the Master Complaint as it may be made applicable (in accordance with the terms of this Order) to any individual action. Plaintiffs reserve the right to move against any Master Answer.

12. A defendant that has filed a Master Answer may respond to a Verified Complaint by Adoption for Intermediate Opt-Out Plaintiff served upon it by serving a Verified Answer by Adoption to Master Complaint for Intermediate Opt-Out Claim substantially in the form attached hereto as Exhibit B or, alternatively, may respond in any other manner it deems appropriate (including, but not limited to, serving a separate Answer or moving against the Complaint).

13. A Verified Answer by Adoption to Master Complaint for Intermediate Opt-Out Claims shall be served on the plaintiff and each defendant appearing in the action to which the answer applies.

Venue

14. The parties reserve all rights to contest the venue of any Intermediate Opt-Out case as of right without the obligation to take any action otherwise required by the CPLR (including without limitation service of a demand), subject to further order of the Court.

Other Matters

15. The entry of this Order does not constitute a finding by the Court, or an agreement by the parties, as to the truth, validity, sufficiency or availability of any fact, cause of action, claim for relief, affirmative defense or any other matter stated in the Master Complaint, Verified Complaint by Adoption for Intermediate Opt-Out Plaintiffs, Master

Answer, or Verified Answer by Adoption to Master Complaint for Intermediate Opt-Out Claims.

16. Defendant's Liaison Counsel is hereby directed to serve a copy of this order with notice of entry on all counsel listed on the Master Service List filed in these cases pursuant to Case Management Order No. 1 (except where such counsel has requested removal from the Master Service List) and upon counsel for any plaintiff who has filed an Intermediate Opt-Out case that is currently before this Court.

SO ORDERED:

Dated: October 21, 2002
New York, New York


Helen E. Freedman, J.S.C.

Oct. 30. 2002 2:49PM

RIS LEGAL SERVICES NY

No. 6628 P. 8

Exhibit A



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN RE: NEW YORK DIET DRUG LITIGATION

Index No. 700000/98

Plaintiff,

Index No.

-against-

[insert defendants],

**VERIFIED COMPLAINT
BY ADOPTION
FOR INTERMEDIATE
OPT-OUT PLAINTIFF**

Defendants.

**COUNSEL ARE CAUTIONED THAT THEY SHOULD USE PRUDENCE IN
CHECKING ONLY THOSE DEFENDANTS AND CAUSES OF ACTION
APPLICABLE TO THE FACTS OF THE INDIVIDUAL CLAIM.**

COMPLAINT AND ADOPTION BY REFERENCE

1. Plaintiff, _____, brings this complaint to assert his/her claim as an Intermediate Opt-Out plaintiff pursuant to and in accordance with the terms and conditions of the Nationwide Class Action Settlement Agreement in In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation, MDL No. 1203 (E.D. Pa.).
2. Plaintiff states his/her claim against the defendants indicated below as follows and incorporates by reference the relevant portions of the Amended Master Complaint on file with the New York County Clerk, in the matter entitled In Re: New York Diet Drug Litigation, now pending in the Supreme Court of the State of New York, New York County, before the Hon. Helen E. Freedman, Index No. 700000/98. Those allegations in the Amended Master

Complaint that are inconsistent with the terms, conditions, and/or restrictions regarding Intermediate Opt-Out claims by the Nationwide Class Action Settlement Agreement are expressly disclaimed.

3. Plaintiff, _____, a citizen and resident of _____, claims damages as a result of loss of consortium.

4. The plaintiff has suffered injuries as a result of having ingested defendants' products:

- ___ FENFLURAMINE
- ___ DEXFENFLURAMINE

alone and/or in combination with each other and/or in combination with the drug phentermine. The defendant(s) listed below, by its/their actions or inactions, proximately caused plaintiff's injuries.

5. As a result of the injuries that plaintiff has sustained, he/she is entitled to recover compensatory damages.

6. That between _____ and _____ the plaintiff ingested one or more of the above referenced drugs.

7. As a result of the plaintiff's ingestion of the drugs, plaintiff was injured.

8. To the extent that this complaint includes a claim for loss of consortium, the plaintiff is entitled to recover compensatory damages.

9. Plaintiff ___ has ___ has not filed an Initial Opt-Out, opted for the Accelerated Implementation Option, or otherwise received cash benefits under the Nationwide Class Action Settlement Agreement. (If plaintiff's response is affirmative, describe.) _____

10. Pursuant to the terms and conditions of the National Diet Drug Settlement Plan, plaintiff properly executed and filed an Intermediate Opt-Out (Orange #2) form, which is attached hereto, on _____, 200_.

11. Plaintiff alleges that he/she first had one or more heart valves diagnosed as "FDA Positive" on or about _____.

12. Plaintiff alleges that the first diagnosis by an echocardiogram of an "FDA Positive" condition occurred on _____, at which he/she was diagnosed as experiencing (check where appropriate and use additional sheets if Intermediate Opt-Out claim is based upon more than one echocardiogram, include dates of other diagnoses of "FDA Positive" condition):

- _____ mitral valve regurgitation that was diagnosed as
 - _____ severe
 - _____ moderate
 - _____ mild
 - _____ trace
 - _____ no regurgitation

- _____ aortic valve regurgitation that was diagnosed as
 - _____ severe
 - _____ moderate
 - _____ mild
 - _____ trace
 - _____ no regurgitation

A copy/copies of the echocardiogram report(s) on which this complaint is based is/are attached hereto.

13. Plaintiff's claims and damages in this action are based solely upon the specific heart valve(s) diagnosed as "FDA Positive" that is/are referred to in the previous paragraph.

ALLEGATIONS AS TO DEFENDANTS

14. The following entities are named as defendants herein and the allegations with regard thereto in the Master Complaint for Intermediate Opt-Out Plaintiffs are herein adopted by reference.

___ WYETH, formerly known as AMERICAN HOME PRODUCTS CORP.

___ OTHER:

THEORIES OF RECOVERY

15. The following claims asserted in the Master Complaint and the allegations with regard thereto in the Master Complaint are herein adopted by reference except where inconsistent with the terms, conditions, and restrictions regarding claims by Intermediate Opt-Out plaintiffs:

SECTION A. PRODUCT LIABILITY OF MANUFACTURERS, SUPPLIERS AND DISTRIBUTORS

- | | |
|------------------------------|-----------------------------|
| ___ FIRST CAUSE OF ACTION | NEGLIGENCE |
| ___ SECOND CAUSE OF ACTION | STRICT PRODUCT LIABILITY |
| ___ THIRD CAUSE OF ACTION | BREACH OF EXPRESS WARRANTY |
| ___ FOURTH CAUSE OF ACTION | BREACH OF IMPLIED WARRANTY |
| ___ FIFTH CAUSE OF ACTION | FRAUD AND MISREPRESENTATION |
| ___ SIXTH CAUSE OF ACTION | NEGLIGENCE PER SE |
| ___ EIGHTH CAUSE OF ACTION | CONCERT OF ACTION |
| ___ NINTH CAUSE OF ACTION | ALTERNATE LIABILITY |
| ___ TENTH CAUSE OF ACTION | MARKET SHARE LIABILITY |
| ___ ELEVENTH CAUSE OF ACTION | ENTERPRISE LIABILITY |

SECTION B. SPECIAL PLAINTIFFS

 NINETEETH CAUSE OF ACTION LOSS OF CONSORTIUM

16. Plaintiff asserts the following additional theories of recovery against these Defendant(s): _____

17. Plaintiff does not assert any claim for punitive, exemplary, or multiple damages.

WHEREFORE, plaintiff prays that they recover from these Defendants as follows:

- a. For their general and compensatory damages in an amount greater than the jurisdictional amount of all lower courts, exclusive of interest and costs, and in accordance with the terms and conditions of the Nationwide Class Settlement Agreement;
- b. For the costs of this litigation, in accordance with the terms and conditions of the Nationwide Class Settlement Agreement; and
- c. For such other and further damages and relief as this Court may deem appropriate and in accordance with the terms and conditions of the Nationwide Class Settlement Agreement.

Dated: New York, NY
[date]

[counsel]

Oct.30. 2002 2:51PM

RIS LEGAL SERVICES NY

No.6628 P. 14

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN RE: NEW YORK DIET DRUG LITIGATION

Plaintiff,

-against-

WYETH,

Defendant.

Index No. 700000/98

Index No.

**VERIFIED ANSWER
BY ADOPTION OF
WYETH TO INTER-
MEDIATE OPT-
OUT COMPLAINT**

1. Defendant Wyeth, by and through its undersigned attorneys, as and for defendant's verified answer to the Verified Complaint by Adoption for Intermediate Opt-Out Plaintiff ("Complaint") of the above-referenced plaintiff dated _____, incorporates by reference the relevant portions of the Amended Master Answer filed by defendant herein with the New York County Clerk, in the matter entitled In Re: New York Diet Drug Litigation, Index No. 700000/98, now pending in the Supreme Court of the State of New York, New York County, before the Honorable Helen E. Freedman, and in all other respects, denies the allegations made by the plaintiff.

2. As and for their affirmative defenses, said defendant, by and through its undersigned counsel, on information and belief, incorporates all affirmative defenses listed in defendant's Amended Master Answer except the Thirty-Second Affirmative Defense.

and belief, alleges the following additional affirmative defenses:

Plaintiff is a member of a class which is subject to the provisions of a Nationwide Class Action Settlement Agreement with American Home Products Corporation (the "Settlement Agreement"), approved by the United States District Court for the Eastern District of Pennsylvania. By reason of that Settlement Agreement, plaintiff's causes of action are barred in whole or in part by the doctrines of merger, bar, collateral estoppel, res judicata, release, discharge, accord and satisfaction, and covenant not to sue and are barred by an injunction entered by that Court.

Plaintiff's causes of action are barred in whole or in part by the applicable statute of limitations, to the extent not otherwise provided in § IV.D.3.c, § IV.D.4.c, and/or § VII.B.4 of the Settlement Agreement.

Plaintiff's causes of action are barred in whole or in part by the doctrines of laches, waiver and estoppel, to the extent not otherwise provided in § IV.D.3.c, § IV.D.4.c, and/or § VII.B.4 of the Settlement Agreement.

WHEREFORE, the defendant Wyeth demands judgment in its favor dismissing the Complaint and each and every cause of action thereof as against said defendant and denying to plaintiff the relief sought in the Complaint, and further awarding to defendant the fees, costs and disbursements incurred by defendant in the defense of this action.

Dated: New York, New York
[date]

ARNOLD & PORTER

By: _____
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Defendant Wyeth