

Appel-Hole v Wyeth-Ayerst Laboratories

2006 NY Slip Op 30002(U)

March 27, 2006

Supreme Court, New York County

Docket Number: 0115937

Judge: Charles E. Ramos

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

PRESENT: Charles Edward Ramos

PART 53 3

Justice

CLARA Appel - Hole

INDEX NO.

115937/99

MOTION DATE

MOTION SEQ. NO.

007

MOTION CAL. NO.

WYETH - APPELLANT vs. ...

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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MAR 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with
accompanying memorandum decision and order.

Dated: 3/27/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x
IN RE: NEW YORK DIET DRUG LITIGATION
-----x
CLARA APPEL-HOLE and ALAN HOLE,

Index No. 700000/98

Index No. 115937/99

Plaintiffs,

-against-

WYETH-AYERST LABORATORIES, A DIVISION
OF AMERICAN HOME PRODUCTS CORP.,
AMERICAN HOME PRODUCTS CORP., WYETH
LABS, INC., and INTERNEURON
PHARMACEUTICALS, INC.,

Defendants.

-----x

Charles Edward Ramos, J.S.C.:

In motion seq. no. 007, Parker and Waichman LLP (P&W), on its own behalf and on behalf of its clients, moves pursuant to CPLR 2221 for leave to renew or reargue its motion to intervene (previously denied by order dated November 24, 2003). In addition to P&W, proposed intervenors referred to as the "Abramova Plaintiffs," also seek leave to intervene. In the event intervention is granted, P&W and the Abramova Plaintiffs seek disclosure of certain documents referred to as submissions in support of the amended order dated November 7, 2001, which approved the settlement of this action and will then seek to vacate that settlement order.¹

In this action, known as the *New York Diet Drug Litigation*, New York County Index No. 700000/98, plaintiffs asserted claims

¹ To the extent this motion seeks to vacate the settlement, that request for relief has been informally modified by the movants during the course of this litigation. Although the motion appears to seek vacatur, movants only claim is against settling counsel, not against the settling defendant. Therefore, the settlement with the defendant shall remain undisturbed.

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of personal injury and loss of consortium allegedly due to the ingestion of "fen-phen" diet drugs.² Some of those plaintiffs and others are here challenging a settlement approved by our predecessor court (Freedman, J.) by her order dated November 7, 2001, which, *inter alia*, held that the terms of the settlement were fair and reasonable and conformed with all ethical requirements. In that settlement, defendant, American Home Products ("AHP"), offered a large sum of money³ to settle virtually all claims.⁴

The ethical issues raised in this case arise out of one of the thorniest areas in tort law--the process to be applied in the settlement of mass tort litigation. Because of the large number of claimants whose cases are settled at one time (in this case over 5,000), mass tort settlements often take the form of collective settlement structures. The alternative to a collective settlement would require the piecemeal analysis of the merits of each claim and individual settlements thereafter, as contemplated when the classic case dominated tort law (one injured plaintiff and one or more allegedly responsible defendants). This would consume the lifetime of many of the claimants themselves when there are thousands of claims to be

² This court's previous decision and order in this action, dated November 24, 2003, further sets forth the background of this case.

³ The parties have agreed to keep the settlement amount confidential.

⁴ A small percentage of the claimants did not settle.

compromised. As a consequence, counsel and the courts have devised means of settlement expedition, such as the placing of claimants in objective categories of severity of injury, age, gender, economic status, and each claimant's relationship to the acts of the defendant, and then entering into a mass settlement. Because of the large number of clients, great care must be exercised to insure that each client understands the settlement offer and is treated fairly. Ethical rules guide the actions of counsel in these circumstances.

This mass settlement was further complicated by the need to pay a portion of the attorneys' fees earned by settling counsel to other attorneys who referred additional clients. Therefore, claimants who were the original clients of the settling attorneys, Napoli Kaiser & Bern ("Napoli Firm"), would generate greater net legal fees for the firm than would clients who were referred to them by other attorneys (e.g. P&W and others).

The record on this motion, which includes a number of previously sealed documents and an affidavit of a former member of the Napoli Firm, has unfortunately raised serious questions regarding the settlement process herein, including claims that:

(1) claimants who were Napoli Firm clients were offered disproportionately larger settlements because the firm unfairly inflated settlement offers for its clients so that the attorneys' fees earned by the firm would be greater;

(2) unknown to the claimants, their cases were not settled for an amount negotiated for each claimant with AHP, rather their claims were settled based upon the Napoli Firm's own evaluation of the value of each claim

in light of a lump sum offer;⁵

(3) the Special Master⁶ appointed by the settling court did not make individual evaluations of the settlement offers in each case as was represented by the Napoli Firm to its clients and to the settling court; and

(4) the ethics opinion submitted in support of the settlement was flawed and based upon less than a full understanding by the expert of the circumstances surrounding the settlement and the applicable law.

Notwithstanding the Napoli Firm's protestations to the contrary, no court, trial or appellate, has ruled on these issues in a contested hearing. This is explained by the fact that the order of compromise sought to be vacated here, dated November 7, 2001, was submitted to our predecessor court and executed, *ex parte*.⁷

This Court's inquiry into what was disclosed to our predecessor court regarding those objections and allegations of wrongdoing prior to the execution of the order of settlement reveals that that court considered the objections and allegations to be serious, but in the order sought to be reargued herein (dated November 24, 2003), our predecessor court denied P&W's

⁵ The affidavit of a former Napoli Firm associate, Stephen David Murakami spells out in greater detail the plaintiffs' claims of misrepresentations and ethical violations.

⁶ Michael Dontzin was appointed by Justice Freedman to mediate and monitor the settlement process.

⁷ This *ex parte* submission was made notwithstanding the fact that the Napoli Firm had been put on notice that movants P&W (who were not attorneys of record at that time) acting as attorneys for a number of referred claimants, had specific objections to the settlement, including the alleged manipulation of the settlement itself.

motion to challenge approval of the settlement, directing that such challenge should be made in either of the companion cases of *Parker & Waichman v Paul J. Napoli*, New York County Index No. 605388/2001 or *Abramova v Napoli*, New York County Index No. 601332/2003. It should be noted that once these allegations of wrongdoing were disclosed, Justice Freedman unsealed the confidential files in this action in the interests of the public and of the plaintiffs in *P&W* and *Abramova* because the only way these plaintiffs could prove the alleged misconduct was by examining the settlement documents. She stated:

"More generally, the interests of justice require that the plaintiffs in *P&W* and *Abramova* have an opportunity to prove their cases. Finally, the serious charges against Napoli, Kaiser & Bern, if true, would be of concern to both Napoli, Kaiser's clients and the general public."
Order Freedman, J., dated November 23, 2003.

In light of a recent determination by the Appellate Division, First Department in the companion case of *P&W*,⁸ this Court grants reargument and will now consider the issues raised by the clients and referring attorneys. In its decision and order in the appeal in *P&W*, the Appellate Division stated that the claim asserted in that case, which is now asserted herein, constituted an improper collateral attack on a prior order. The Appellate Division quoted authority to the effect that the proper remedy for fraud committed in an action (this claim) must be exercised in that action. It therefore follows that this action is the proper venue, as referred to in the Appellate Division

⁸ *Parker & Waichman v Napoli*, 2006 NY Slip Op 03967.

decision. Contrary to the November 24, 2003 order sought to be reargued herein, this action (not *P&W* or *Abramova*) is where these issues must be finally determined. Therefore reargument must be and is hereby granted and likewise the motion to intervene is granted.

When the settling court was informed of the claims of ethical and professional misconduct that were asserted by a former associate of the Napoli firm (Mr. Murakami), she referred those claims for later action, such as this. Justice Freedman directed Mr. Murakami and *P&W* to come forward with evidence to support those allegations. This Court now stands in her shoes. She never had the opportunity to adjudicate these claims of misconduct.⁹ Clearly, these allegations must be dealt with on the merits as they are much too serious to be pushed aside or further delayed.

The Nature of the Settlement

The motion papers direct a great deal of attention to the issue of whether or not this settlement was on an aggregate or collective basis. If the settlement was aggregate, that would automatically trigger the need to disclose conflicts of interest pursuant to Disciplinary Rule, 5-106, 22 NYCRR § 1200.25.

The Rule provides:

A lawyer who represents two or more clients shall not

⁹ Mr. Napoli urges that Justice Freedman's dismissal of Mr. Murakami's complaint in his action against the Napoli Firm is dispositive of these issues of misconduct. It is not. That dismissal was of Mr. Murakami's compensation claims, not the misconduct claims by these plaintiffs asserted here.

make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and risks involved, including the existence and nature of all the claims involved and the participation of each.¹⁰

Professor Bruce Green was retained by the Napoli Firm to opine on whether or not this was an aggregate settlement and on the ethical standards applicable to this case. He admitted at his deposition that when he was first retained, Paul Napoli referred to the settlement in this case as an "aggregate settlement."¹¹ Deposition of Bruce Green, page 99, line 5. The Napoli Firm has nevertheless maintained that this was not an aggregate or collective settlement, and that, therefore, the firm was relieved of the obligation to make full disclosure of conflicts of interest to its clients.

Based upon the hypothetical set of facts presented to Professor Green by the Napoli Firm (in a conversation, not in a written letter of engagement), Professor Green concluded that the

¹⁰ No penalty is specified for a violation of this Rule. However, in *Arce v Burrow*, 958 SW2d 239, 245 (Tex App 1997) aff'd in part, rev'd in part, 997 SW2d 229 (Tex 1999), that court held that attorneys who represent multiple clients engage in improper aggregate settlements when they settle all cases without individual negotiations on behalf of any one client. It opined that the remedy for violating the fiduciary duty to multiple clients might be as severe as complete fee forfeiture if the attorneys committed the breach intentionally, willfully, recklessly, maliciously, or with gross negligence.

¹¹ At his deposition, Professor Green read from his notes of his phone conversation with Paul Napoli as follows: "Defendants want to pay lump sum aggregate settlement although framed as individual settlements with individual amounts...It was a term used by Napoli. It was not my characterization or interpretation."

proposed settlement agreement was not an aggregate settlement. The Napoli Firm relies on his opinion to contend that the firm had no duty to inform its clients of the true nature of the offer and settlement. This Court cannot agree.

It should be noted that the Rules governing professional conduct do not define what an aggregate settlement is, a fact admitted by Professor Green when he testified that he was unaware of any definition.

But, as Professor Erichson stated:

Nonetheless, in terms of what makes a settlement meaningfully collective, there is no bright line between all-or-nothing settlements and walk-away or tiered walk-away settlements. All of them involve collective conditions and thus present the lawyer-client and client-client conflicts of interest. A settlement with a walk-away provision set at ninety-nine percent, for example, functions almost identically to an all-or-nothing settlement in that the lawyer has a strong self-interest in ensuring that virtually every client accepts the deal, and clients who favor the settlement are pitted against those who do not. The higher the proportion permitted to decline the settlement, the larger the safety valve, but the meaningful line is between settlements with collective conditions and those without.

Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 Notre Dame L. Rev. 1769, May 2005.

This Court has read the sealed settlement agreement.¹² It is clearly a lump sum collective or aggregate settlement. The agreement itself is complex (as were the steps leading up to it) but in essence it provides that AHP agreed to pay a lump sum to the Napoli Firm, which sum was described as "the sum of the

¹² This Court's discussion of the settlement agreement will avoid disclosure of confidential terms or client information.

individual settlement amounts listed in Exhibit 3." Settlement Agreement dated January 22, 2001.¹³ One of the keys to understanding why this was an aggregate or collective settlement is that Exhibit 3 which contained the "individual settlement amounts" referred to in the settlement agreement, did not exist at the time the agreement was entered into. The amounts set forth in Exhibit 3 were not amounts negotiated for each client with AHP. The "individual settlement amounts" were not known at the time, they were to be subsequently determined in the process being challenged herein.

The Napoli Firm was to give AHP a rolling series of settlement amounts prior to payment. Section 5. (a) of the settlement agreement states:

The determination of the individual settlement amounts for each of the Settling Claimants will be set forth in Exhibit 3, which (i) will be prepared, signed and notarized by the Settling Attorneys [the Napoli Firm] and (ii) disclosed to AHP in installments before the dates when the Settling Attorneys seek the payments called for in paragraph 13 [the lump sum settlement in installments]. [Matters in brackets added].

Allegedly, the process being challenged was that the Napoli Firm, without disclosure to its clients, divided up the lump settlement between its clients so that the total of the settling claims equaled the lump sum settlement amount being offered. Therefore, the settlement agreement required the Napoli Firm to "back into" the lump sum settlement amount by having its clients

¹³ The Settlement Agreement was also conditional in that it withheld a portion of the settlement amount in the event executed releases and dismissals were not obtained from all or substantially all of the settling claimants.

agree to accept individual settlements (determined and offered by the firm) that totaled no more than the lump sum offered. This settlement agreement matched each client against the other clients of the firm because they were each in competition with the others for a share of the lump sum settlement. This triggered conflicts, lawyer-client and client-client.

If the movants are correct, that the Napoli Firm did not disclose to each client that the client was in competition with the firm's other clients, the firm's clients were at a great disadvantage when they sought to decide if they should accept what they mistakenly believed to be a direct settlement offer from the defendant, AHP.

Conflicts

Attorney conflicts of interest with very serious consequences can arise out of the joint representation of multiple clients. This problem was highlighted in *Amchem Prods v Windsor*, 521 US 591 (1997), in which the United States Supreme Court set a "zero tolerance" standard for conflicts in aggregate settlements. The Court held that a group of claims that could not be tried as a class action could not, as an alternative, be settled as a group. The court further held that mass tort cases should be governed by the aggregate settlement rule (which requires complete transparency) because the collective nature of these settlements create lawyer-client and client-client conflicts of interest.

The most collective [settlements] are those in which a defendant agrees to pay a lump sum to settle an entire

group of claims, leaving the allocation of that sum to the plaintiffs and their lawyer. At the opposite end, the least collective agreements are those in which each plaintiff's settlement amount is negotiated individually.¹⁴

id.

The nature of the settlement in this case exemplifies the "most collective" or "most aggregate" settlement definition because AHP agreed to pay a lump sum to settle with a group of claimants, with the sum each plaintiff was to receive being determined by plaintiffs rather than by an individual offer to each plaintiff by AHP.

The Duty to Disclose

The Napoli Firm seeks to define an aggregate settlement as one that is not just collective, but also one that requires all plaintiffs to agree. The firm argues that because a few clients out of the 5,000 did not agree to settle, disclosure of conflicts was not required. Notwithstanding the arguments of counsel, whether or not the present case fits a particular definition of "aggregate settlement" is not the point. The issue is "was there a duty to fully disclose conflicts of interest and was that duty discharged?" This Court holds that the Napoli Firm's duty to fully disclose conflicts of interest is determined not only by the aggregate settlement rule, but also by the general rule that client consent must be informed consent. The firm had a duty to

¹⁴ It should be noted that the settlement in this case differs with the example given by Professor Erichson. In this case the claimants assert they did not even know what the deal was. They were allegedly unaware of the collective nature of the offer.

disclose to its clients what the conflicting interests were. In this mass settlement, the conflict was that all claimants were vying for a share of what was a lump sum offer. They were each in competition with each other.

In his examination before trial, Professor Green confirmed this Court's view that the duty to fully disclose to the client was not to be determined by slavish adherence to the aggregate settlement rule, but rather the duty to insure informed consent when he stated:

...whether or not it was an aggregate settlement or even if it were not, there would be a duty to communicate with the client information that the client could make an informed decision whether to accept the settlement and so in my view, at the time the aggregate settlement rule was really just a specialized application of rules that anyway would be applicable duty to communicate with the client.. .
Deposition of Bruce Green, page 31 line 18 to page 32 line 4.

The Ethical Considerations also provide some guidance. EC §5-14 provides:

Maintaining the independence of professional judgment required of a lawyer precludes acceptance or continuation of employment that will adversely affect the lawyer's judgment on behalf of or dilute the lawyer's loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.¹⁵

EC §5-16 provides:

¹⁵ "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Disciplinary Rule 22 NYCRR § 1200.1 (Definitions).

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free of any potential conflict and to obtain other counsel if the client so desires. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict, and should accept or continue employment only if each client consents, preferably in writing. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, the lawyer should also advise all of the clients of those circumstances.

And EC §5-19 provides.

[...] Nevertheless, the lawyer should explain any circumstances that might cause a client to question the lawyer's undivided loyalty. Regardless of the belief of a lawyer that he or she may properly represent multiple clients, the lawyer must defer to a client who holds the contrary belief and withdraw from representation of that client.

Finally, Disciplinary Rule DR-5-105, 22 NYCRR § 1200.24

(Conflict of Interest; Simultaneous Representation) provides:

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).

C. In the situations covered by DR 5-105 [1200.24] (A) and (B), a lawyer may represent multiple clients if a

disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Therefore, if it is likely that a conflict exists, as here where the recovery of one client is at the expense of the recovery of another, full disclosure must be made.

The aggregate settlement rule can be understood as a particular application of the rule on concurrent conflicts of interest. Both prevent lawyers from trading off client interests against each other without the clients' consent.

Erichson, supra.

In addition, the Napoli Firm made a representation in the settlement agreement itself, that they would comply with the disciplinary rules which require disclosure to clients, specifying New York's aggregate settlement rule as one of the applicable rules. The agreement provides at ¶ 5(c):

To the extent applicable, the Settling Attorneys represent that they have complied, and will comply, with Rule 1.8 of the ABA Model Rules of Professional Conduct, DR 5-106 of the Code of Professional Responsibility [22 NYCRR § 1200.25, McK. Consol. Laws], and the counterpart of any other applicable state rule, to the extent such provisions are applicable to this settlement.

In light of the fact that the settlement was an aggregate settlement or at least contained conflicts, full disclosure to the claimants was required. This Court finds that the Napoli Firm had a duty to inform its clients of the full nature of the settlement, particularly: (1) if the specific offers were not offers by AHP, then who was offering them these settlement amounts; (2) if the offers were the Napoli Firm's evaluation of

the relative merits of each client's case, then what were the details and the basis for their offer, and (3) if it was true that all clients were to be paid out of one lump sum.

The Probative Quality of Professor Green's Opinion

The Napoli Firm seeks to make great use of the opinion letter it obtained from Professor Green. A careful reading of his deposition and his opinion letter reveals a less than clear picture of what Professor Green knew about the proposed settlement. This Court's reading of the settlement agreement and of the affidavits submitted on this motion makes it clear that AHP made no individual settlement offers. Professor Green's deposition casts serious doubt that he was privy to all of the facts and circumstances necessary in forming a probative opinion because he appeared to have a very different view of the facts.

Q. Were you aware of any individual offers that were made by American Home or Wyeth to any individual plaintiffs at the time you wrote the letter?

A. My understanding at the time was that, again, there were individual settlements. I don't know if offers is the right word, but individual proposed settlements, 5,000 plus individual proposed settlements.
Deposition of Bruce Green, p 47.

Q. I will rephrase it. Did you believe at the time you wrote this letter, that American Home's offering was of a total lump sum to be divided somehow?

A. No.
id., page 55, lines 19-15.

Although these questions were answered over objection (as were almost all of the questions in this extremely difficult deposition), the Napoli Firm's own expert was not approving what is alleged to have occurred here in this settlement. His view, and this Court's view, is that disclosure is required in the

circumstance when a finite sum of money is to be divided among a number of clients who are all simultaneously represented by the same attorney.

In addition, Professor Green's opinion letter dated January 9, 2001, sets forth his understanding of the facts as represented to him by the Napoli Firm. This statement of facts as he understood them, which formed the basis of his opinion, differs substantially from the facts as revealed in this record.

His letter states:

For each of the clients individually, you have negotiated a settlement amount...The settlement amount offered to any individual client is not contingent on other claimants' acceptance of their settlement offers...[Y]ou propose to enter into individual settlements ... rather than "an 'aggregate' settlement offer to be divided up among all of the plaintiffs." Citing, Roy Simon, *Simon's New York Code of Professional Responsibility*...As Professor Simon discusses in his treatise, an example of an aggregate settlement would be where "a lawyer represents five employment discrimination plaintiffs and the defendant employer makes a lump-sum (i.e. 'aggregate') offer of \$100,000 for all five plaintiffs..."... Further, in the event of an aggregate settlement that must then be divided among the claimants, each claimant may have an interest in maximizing his or her share of the aggregate settlement, but the co-claimants' lawyer cannot advocate for one client vis-a vis the others. Nor could the lawyer discourage any one client from accepting the settlement without undermining other clients interest in accepting it. **Here, where the individual amounts are offered to each individual client, these problems are simply not present.** (emphasis added).

If disclosure of the conflicts was not made, as the plaintiffs contend, there was a violation of the Disciplinary Rules by the Napoli Firm.

This Court is not persuaded that the ethics opinion submitted in support of the settlement is dispositive (or even probative) on the question of whether this was an aggregate

settlement or if full disclosure by the Napoli Firm was required for a number of reasons. The opinion was based upon a hypothetical set of facts orally submitted to the expert by the firm before the settlement was entered into. There was no engagement letter setting forth a factual frame of reference. The factual allegations in this case are inconsistent with Professor Green's understanding of the facts as set forth in his opinion letter. And finally, in his deposition Professor Green refused to condone what is alleged to have occurred here, which leaves this Court with the task of determining the true facts. Are the facts as Mr. Murakami states in his affidavit or are they as the Napoli Firm contends?

Allegations of Affirmative Wrongdoing

The movants take their challenge of the Napoli Firm's behavior a step further by asserting that in a letter from the firm to each client (the "Letter"), the firm affirmatively misled their clients. Movants contend that not only did the firm fail to inform its clients of the nature of the lump sum offer and that conflicts of interest existed between clients vying for the same piece of the settlement pie, but also that the Napoli Firm made a number of specific misrepresentations as well.

This record reveals that the Napoli Firm sent the Letter in which they represented to each client that the firm sought to settle all or virtually all its cases in the same negotiation, and that the firm was evaluating each offer individually in order to give the client the best estimate of the present value of

their individual case. However, the Letter went on to state:

Our recommendation [to accept the settlement offer] is based on the final offer made by AHP to settle your case and we believe under all the existing facts and circumstances is fair and reasonable.

In light of these factors, we recommend that you accept our recommendation on your behalf....

Based on our review of your case, we have negotiated a settlement of \$ [a specific amount was set forth]. [matter in brackets added].

The acceptance to be executed by the client, prepared by the Napoli Firm, states:

I also understand that the final settlement offer was evaluated by the Special Master appointed by the court.

This Court finds that a claimant receiving such a Letter and the Form of Acceptance could have a reasonably held belief that the defendant AHP, had made a final offer in negotiations with the Napoli Firm in his/her case, that the final offer had been evaluated by the Special Master and that the Napoli firm was recommending that the client accept the final offer. A sufficient showing has been made by the movants that none of the representations set forth above were true. These allegations require further inquiry and a hearing.

This record (which is not the trial) does not reveal any offers (final or otherwise) to settle any individual claims. The Napoli Firm appears to have been offered one lump sum of money to settle all of its clients' cases who agreed to settle, provided a sufficient percentage agreed (it is also not denied by the Napoli Firm that the number of clients increased after the offer, further diluting the sum available for each claimant). In the

affidavit of Stephen Murakami, he states that the Napoli Firm did its own evaluation of the value of each claim in order to increase its own legal fees and then recommended that the client accept its (the Napoli Firm's) offer as if the offer had been made by the defendant AHP.

The representation to a client that a specific dollar amount was offered in a negotiation with the defendant to settle the client's case, when in fact the settlement offer was by the client's own attorney made upon the attorney's evaluation, if true, represents a serious breach of duty to the client.

In addition, it is unclear on this record to what extent the Special Master evaluated each offer (as was represented by the firm in the form of Offer of Acceptance to be signed by the client). Our predecessor court appointed the Special Master, but did not require him to evaluate each offer for fairness. The Special Master was charged with, *inter alia*, the task of determining if the settlement process was fair. In that context, he would not be expected to evaluate each settlement offer. Instead, he would use a strategy, such as random sampling, so that he could opine on the process generally.

However, when the Letter and the Form of Acceptance prepared by the Napoli Firm are read together, they appear to represent to the client and to the settling court that the Special Master evaluated individually negotiated final offers from AHP.

The Letter:

Based on our review of your case, we have negotiated a settlement of [a specific amount was set forth].

The acceptance:

I also understand that the final settlement offer was evaluated by the Special Master appointed by the court.

In contrast, the Murakami affidavit denies the evaluation was performed in all cases. The testimony of Professor Green is vague but suggests that the Special Master did not perform the evaluations. The affidavits submitted by the Napoli Firm and the Special Master in support of the settlement are also less than clear as to what the Special Master did.

The affirmation of Paul J. Napoli, dated November 1, 2001, which was submitted in support of the *ex parte* order approving the settlement states:

5. Additionally, the Special Master performed a random review of a sampling of the records for each client, in each category of injury, sufficient to support the reliability of each of the individual settlement offers.

The affirmation of the Special Master, Michael J. Dontzin, dated October 29, 2001, which was submitted in support of the *ex parte* order approving the settlement repeated this description of his efforts:

8. As Special Master, I performed a random review of a sampling of the records for each client, in each category of injury, sufficient to support the reliability of each of the settlement offers.

However, on this record it is unclear if the Napoli Firm ever informed its clients that the evaluation by the Special Master was merely "a random review of a sampling of the records." This proved to be troubling to Professor Green. In his deposition testimony, he made the following statements:

Q. If you sent it [the Letter] to an individual client

and the individual client is reading, it doesn't appear that the Special Master reviewed that client's settlement?

A. I think it is ambiguous.

Deposition of Bruce Green, page 132, line 3.

Q. I will rephrase it. Did you believe that the Special Master was going to review each of the settlement amounts for fairness?

A. I don't recall having a belief on that one way or the other. *id.*, page 161, line 17.

[...] I can't answer that because I can't answer exactly what Judge Dontzin meant by settlement offer in this context. *id.*, page 165, line 15 [...] these are really good questions for Judge Dontzin. *id.*, page 166, line 2.

Q. In reading this sentence, does it look like he looked at a sampling of records for each client?

A. I don't have the same reading you do. *id.*, page 171, line 3.

The Murakami affidavit is more direct. It states:

The Firm also told each client that the "settlement" amount being offered by AHP was ... evaluated and mediated by a retired judge who had experience and knowledge of the fen-phen litigation. For almost all of the firms' clients, all of that was a misrepresentation!

From a reading of the conflicting factual affidavits and affirmations, this Court is left with the same ambiguous reaction Professor Green expressed. In addition, the Napoli Firm's affirmations do not appear to support either the representation in the Letter nor the statement in the Form of Acceptance that each offer was evaluated by the Special Master.

The record on this motion is replete with factual disputes on virtually every issue. The affirmation of Paul J. Napoli responding to the supplemental submission of P&W sets forth his version of the facts and his subjective evaluation of their

meaning. It is not conclusive and does not refute the allegation that the settlement offers were from the Napoli Firm, nor does it refute the allegation that the Special Master did not review each and every settlement offer.

Accordingly, this Court finds that a sufficient showing has been made that the Napoli Firm may have violated the Disciplinary Rules and may have made material misrepresentations in the Letter and the Form of Acceptance. Therefore, the motion to intervene is granted as the interests of the various plaintiffs lie. The issue of P&W's awareness of the acts of professional misconduct, if any, or if the principles of waiver or estoppel will apply to its claim, must await the trial.

The final determination of the request to vacate (or modify) the prior settlement order will remain an open question to await a trial on the allegations of misrepresentations and of manipulation of the settlement; which includes the allocation of settlement amounts, expenses, and legal fees. The issue of the fairness of any specific allocation of the lump sum settlement offered to the plaintiffs will not be considered until these preliminary matters have been dealt with.

Accordingly, it is

ORDERED that the motion by P&W to reargue is granted and upon reconsideration the motion to intervene is granted, and it is further

ORDERED that the motion by the Abramova Plaintiffs to intervene is granted, and it is further

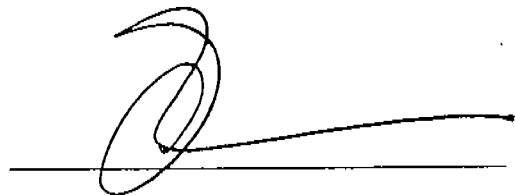
ORDERED that the motion to vacate (or modify) the prior (settlement) order dated November 7, 2001, will be determined at trial on the allegations of misrepresentations and of manipulation of the settlement, and it is further

ORDERED that in the event there is a vacatur or modification of the settlement order, absent further order of this Court, said vacatur or modification shall not prejudice the settling defendant, AHP, and it is further

ORDERED that the issue of the allocation of settlement amounts offered to the plaintiffs, expenses and legal fees will await the disposition of the trial set forth above, and it is further

ORDERED that the scope of disclosure will be determined at a discovery conference on such date as the parties agree to or as the Court directs.

Dated: March 27, 2007



J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED

MAR 27 2007

**COUNTY CLERK'S OFFICE
NEW YORK**

**CHARLES E. RAMOS
J.S.C.**