

1 Elizabeth J. Cabraser (State Bar No. 083151)
William B. Hirsch (State Bar No. 111609)
2 Fabrice N. Vincent (State Bar No. 160780)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
3 275 Battery Street, 30th Floor
San Francisco, California 94111-3339
4 Telephone: (415) 956-1000

5 Attorneys for Individual and Representative Plaintiffs
and On Behalf of the Plaintiffs' Executive Committee
6 [Additional Counsel Listed On Signature Page]

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF LOS ANGELES- NORWALK DIVISION

9 IN RE DIET DRUGS,)

J.C.C.P. 4032

10 THIS DOCUMENT RELATES TO:)

DD Nos. 718 (Sharp); 572 (Tiffith)

11 **KATHY TIFFITH** and **SHERRI SHARP** on)
12 behalf of themselves and all others similarly)
situated and as private attorney generals,)
13 Plaintiffs,)

CLASS ACTION

v.)

14 **CALIFORNIA DIET CENTER**)
DEFENDANTS:)

**OPENING MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION OF
MEDICAL SCREENING RELIEF AND
PREFERENTIAL TRIAL SETTING**

15 MANHATTAN WEIGHT CONTROL;)
16 WEIGHT RELEASE AND WELLNESS)
CENTER; RESULTS PLUS MEDICAL)
17 GROUP; JOSEPH RAVENNA, JR. M.D.;)
WELLNESS GROUP MEDICAL CENTER;)
LA WEIGHT CLINIC;)

Dept.: SE-D

The Honorable Daniel S. Pratt

FENFLURAMINE AND)

Hearing Date To Be Assigned

18 **DEXFENFLURAMINE DEFENDANTS:**)

19 AMERICAN HOME PRODUCTS)
CORPORATION; WYETH-AYERST)
20 LABORATORIES COMPANY;)
INTERNEURON PHARMACEUTICALS,)
21 INC.; A.H. ROBINS COMPANY,)
INCORPORATED; LES LABORATOIRES)
SERVIER, SA)

22 **PHTERMININE DEFENDANTS:**)

23 GATE PHARMACEUTICALS, A DIVISION)
OF TEVA PHARMACEUTICALS, USA,)
24 INC.; SMITHKLINE BEECHAM)
CORPORATION; ABANA)
25 PHARMACEUTICALS, INC.; RICHWOOD)
PHARMACEUTICAL COMPANY, INC.;)
26 ION LABORATORIES, INC.; MEDEVA)
PHARMACEUTICALS, INC.; EON)
27 PHARMACEUTICALS; AND)

DOES 1 THROUGH 500,)

28 _____)
Defendants.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL BACKGROUND	2
III. A MEDICAL SCREENING CLASS SHOULD BE CERTIFIED	5
A. Recent Orders Certifying Medical Screening Classes For Illinois, New Jersey, Pennsylvania, Texas, Washington and West Virginia Residents Strongly Support Certification Of Screening Claims On Behalf of California Residents.	7
B. The Requirements for Class Certification of the Equitable/Injunctive Relief Claims Have Been Met.	8
C. Plaintiffs Satisfy The Class Certification Prerequisites Of Ascertainability And Numerosity, Commonality, Typicality And Adequacy Of Representation.	12
1. The Proposed Class Is Ascertainable, And Is So Numerous That Joinder Is Impracticable.	13
2. There Are Many Common Issues of Law and Fact.	14
3. The Proposed Class Representatives' Claims For Medical Monitoring Are Typical Of Those Of The Class.	18
4. The Proposed Class Representatives Will Adequately Represent The Class.	19
IV. PLAINTIFFS ARE ENTITLED TO PREFERENTIAL TRIAL SETTING	19
V. CONCLUSION	20

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Abuan v. General Electric Co.
(9th Cir. 1993) 3 F.3d 329
cert. denied, (1994) 510 U.S. 1116 16

Ahearn v. Fibreboard Corp.
(E.D. Tex. 1995) 162 F.2d 505 12

Ayers v. Township of Jackson,
(1987) 106 N.J. 557, 525 A.2d 287 10, 11

Baker et. al. v. Wyeth-Ayerst Laboratories Division of American Home Products Corporation
et.al.
(Washington Co., October 26, 1998) Case No. CIV 97-1192) 8

Barnes v. American Tobacco Co.,
(3d Cir. Pa. Nov. 12, 1998) 161 F.3d 127,
1998 U.S. App. LEXIS 28624 17, 18

Bell v. American Title Ins. Co.
(1991) 226 Cal. App. 3d 1589, 277 Cal. Rptr. 583
review denied, (Apr. 18, 1991) 1991 Cal. LEXIS 2002 8, 9, 12, 14

Birch v. American Home Prods. Corp.
Civ. (W.Va. Cir. Ct. Feb. 11, 1999)
Action No. 97-V-204 (1-11) 7

Bourgeois v. A.P. Green Industries, Inc.
(La. 1998) 715 So.2d 1194 (Sept. 4, 1998) reh'g denied 9, 10, 18

Burns v. Jaquays Mining Corp.,
(App. 1987) 156 Ariz. 375, 752 P.2d 28 10

Cook v. Rockwell Int'l Corp.
(D. Colo. 1993) 151 F.R.D. 378 12, 16, 18

Day v. NLO
(S.D. Ohio 1994) 851 F. Supp. 869 9, 12-14, 16, 18

Dunk v. Ford Motor Co.
(1996) 48 Cal. App. 4th 1794, 56 Cal. Rptr. 2d 483 8

Earthman v. American Home Products, Inc.
Case No. 97-10-03790-CV, Montgomery Co., Tx. 1998 7

Fanucchi v. Coberly-West Co.
(1957) 151 Cal. App. 2d 72 14

General Tel. Co. v. Falcon
(1982) 457 U.S. 147, 157 n.13 18

German v. Federal Home Loan Mortg. Corp.
(1995) 885 F. Supp. 537 12, 13

1	<u>Hansen v. Mountain Fuel Supply Co.</u>	
	(Utah 1993) 858 P.2d 970	5, 10
2	<u>In re Copley Pharmaceutical, Inc.</u>	
3	(D. Wy. 1995) 161 F.R.D. 456	16
4	<u>In re Telectronics Pacing Systems, Inc.</u>	
	(S.D. Ohio 1997) 172 F.R.D. 271	11, 18
5	<u>In re: Pennsylvania Diet Drugs Litigation,</u>	
6	(March 12, 1999) Master Docket No. 9709-3162)	7
7	<u>Karen Rhyne, et al. v. American Home Products Corp, et al.</u>	
	(Ill. Cir., Cook Co., Chanc. Div.) No. 98 CH 04099	7
8	<u>La Sala v. American Sav. & Loan Ass'n</u>	
9	(1971) 5 Cal.3d 864, 97 Cal.Rptr. 849	19
10	<u>McGhee v. Bank of America</u>	
	(1976) 60 Cal. App. 3d 442	19
11	<u>Miranda v. Shell Oil</u>	
	(1993) 26 Cal. Rptr. 2d 623	15
12	<u>Miranda v. Shell Oil Co.</u>	
13	(1993) 17 Cal. App. 4th 1651, 15 Cal. Rptr. 2d 569	14
14	<u>O'Connor v. Boeing North American, Inc.</u>	
15	(C.D. Cal. 1998) No. CV 97-1554 (RCx)	
	1998 U.S. Dist. LEXIS 15433 and 15976	15, 16, 18
16	<u>Potter v. Firestone Tire & Rubber Co.</u>	
	(1993) 6 Cal. 4th 965	14, 15, 18
17	<u>Redland Soccer Club v. Department of the Army</u>	
18	(1997) 548 Pa. 178, 696 A.2d 137	5, 11, 17
19	<u>StopYouth Addiction, Inc. v. Lucky Stores, Inc.</u>	
	(1998) 17 Cal. 4th 553	6
20	<u>Vadino et. al. v. American Home Products Corporation et. al.,</u>	
21	No. MID-L-425-98, Middlesex Co., N.J. 1998	7
22	<u>Vasquez v. Superior Court</u>	
	(1971) 4 Cal.3d 800, 94 Cal. Rptr. 796	12
23	<u>Wehner v. Syntex Corp.</u>	
	(N.D. Cal. 1987) 117 F.R.D. 641	18, 19
24	<u>Yslava v. Hughes Aircraft Co.</u>	
25	(D. Ariz. 1993) 845 F. Supp. 705	12, 14, 17
26		
27	<u>FEDERAL STATUTES</u>	
28	Federal Equity Rule 38	12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure
 Rule 23(a) 13

Federal Rules of Civil Procedure
 Rule 23 18

Federal Rules of Civil Procedure
 Rule 23(b) 7-9, 12, 14-16, 20

STATE STATUTES

Code Civ. Proc.
 § 36(e) 15, 16

§ 382 6, 9, 10, 11

§ 1062.3 15, 16

TREATISES

3B J. Moore & J. Kennedy
Moore's Federal Practice ¶ 23.31[3], at 236-37 (2d ed. 1990) 12

4 B.E. Witkin
California Procedure, Pleading § 202, at 238 (3d ed. 1985) 14

ARTICLES

American College of Cardiology ("ACC")
 "Statement of the American College of Cardiology on
 Recommendations for Patients Who Have Used
 Anorectic Drugs," October 18, 1997 3

American Heart Association ("AHA") Media Advisory
 "American Heart Association Supports Interim Guidelines for
 Managing Patients Who Have Taken Appetite Suppressants,"
 November 13, 1997 3

Center for Drug Evaluation and Research.
 "Questions and Answers Concerning the Department of Health and Human Services (DHHS)
 Interim Recommendations for Patients Who Have Taken Either Fenfluramine or Dexfenfluramine" 3

Centers for Disease Control and Prevention ("CDC")
 "Cardiac Valvulopathy Associated with Exposure to Fenfluramine or Dexfenfluramine:
 U.S. Department of Health and Human Services Interim Public Health Recommendations,
 November 1997,"
Morbidity and Mortality Weekly Report, vol. 46, no. 45 (Nov. 14, 1997) 2

New England Journal of Medicine
 "A Population-Based Study of Appetite-Suppressant Drugs And the Risk of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cardiac-Valve Regurgitation," by Hershel Jick, M.D., et. al.
(1998) Vol. 339 4

New England Journal of Medicine
"An Assessment of Heart-Valve Abnormalities in Obese
Patients Taking Dexfenfluramine, Sustained-Release
Dexfenfluramine, or Placebo," Neil J. Weissman, M.D. et. al.
(1998) Vol. 339 4

New England Journal of Medicine
"The Prevalence of Cardia Valvular Insufficiency Assessed
by Transthoracic Echocardiography in Obese Patients
Treated With Appetite-Suppressant Drugs,
Mehmood A. Khan, et. al. (1998) Vol. 339 4

United States Department of Health and Human Services
"Interim Recommendations Issued for Patients Exposed to Fenfluramine and
Dexfenfluramine," released November 13, 1997 2

1 **I. INTRODUCTION**

2 This country's leading public health organizations have urged all individuals who have
3 the diet drugs Pondimin[®] (fenfluramine) and/or Redux[®] (dexfenfluramine) to seek immediate medical
4 evaluations, including, in most cases, echocardiograms, to detect possible heart valve damage caused
5 these drugs. In order to safeguard the health of the thousands of California residents who have taken
6 products, which both contain the same active ingredient,^{1/} Plaintiffs seek a court decree ordering
7 defendants American Home Products Corporation ("AHP") and the California Diet Center Defendants
8 establish a court-supervised medical screening fund and program. Plaintiffs assert that AHP and the
9 California Diet Center Defendants should pay the quantifiable costs of periodic medical examinations
10 necessary to detect the onset of heart and lung disease, because it is through their wrongful actions that
11 plaintiffs have been made susceptible to such disease. The limited issue raised by the present motion is
12 whether plaintiffs may seek to establish, on behalf of a class of California residents who ingested
13 fenfluramine and/or dexfenfluramine, the liability of AHP and the California Diet Center Defendants for
14 costs of this medical screening, or whether each individual must bring a separate action in order to obtain
15 this relief.

16 This action asserts claims against the Fenfluramine and Dexfenfluramine Defendants,^{3/}
17 Phentermine Defendants^{4/} and the California Diet Center Defendants (collectively referred to herein as
18 "defendants") arising from their manufacturing, marketing, selling and/or distributing the drugs fenflur
19 dexfenfluramine, and phentermine in California. At this time, Plaintiffs are seeking only the establishment
20 a court-supervised medical screening program funded by AHP and the California Diet Center Defendants.

21 ^{1/} The same active isomer, dexfenfluramine, is in both Redux and Pondimin.

22 ^{2/}The "California Diet Center Defendants" refers to Manhattan Weight Control, Weight Release and
23 Wellness Center, Results Plus Medical Group, Joseph Ravenna, Jr., M.D., Wellness Group Medical Center
24 and LA Weight Clinic.

25 ^{3/}The "Fenfluramine and Dexfenfluramine Defendants" refers to American Home Products Corporation,
26 Wyeth-Ayerst Laboratories Company, Interneuron Pharmaceuticals, A.H. Robins Company, Inc., and Les
27 Laboratoires Servier. At the present time, all actions against Interneuron have been stayed by order of the
28 Court in In re Diet Drugs Product Liability Litigation, MDL No. 1203.

^{4/}The "Phentermine Defendants" refers to Gate Pharmaceuticals (a division of Teva Pharmaceuticals,
USA), Smithkline Beecham Corporation, Abana Pharmaceuticals, Richwood Pharmaceutical Company, Ion
Laboratories, Medeva Pharmaceuticals, and Eon Pharmaceuticals.

1 on behalf of a class of all California residents who ingested these drugs. Thus, Plaintiffs ask the Court
2 certify this action as a class action for class-wide adjudication of Plaintiffs' medical screening claims a
3 AHP and the California Diet Center Defendants. More specifically, Plaintiffs ask the court to certify (1)
4 plaintiff class of California residents who have taken fenfluramine or dexfenfluramine, and (2) a plaint
5 sub-class of California residents who have taken fenfluramine or dexfenfluramine, marketed and sold
6 the California Diet Center Defendants. Plaintiffs also ask the Court to set an expedited trial schedule f
7 those claims.

8 **II. FACTUAL BACKGROUND**

9 Since the early 1980's, defendants aggressively marketed phentermine, fenfluramine and
10 dexfenfluramine as safe and effective methods for weight loss. Fenfluramine and dexfenfluramine we
11 widely used for weight loss and control until they were withdrawn from the market in mid-September
12 1997, at the federal government's request, due to the association of these drugs with serious and unusu
13 cardiac and valve disorders. Shortly after dexfenfluramine and fenfluramine were withdrawn from the
14 market, the United States Department of Health and Human Services ("DHHS") took the highly unusu
15 step of recommending that all individuals who had ever taken these drugs for any length of time seek
16 complete physical evaluations to detect signs of heart or lung disease. A copy of the DHHS, CDC and
17 related recommendations are attached as Exhibits A-E to the accompanying Declaration of William B.
18 Hirsch in Support of Plaintiffs' Motion ("Hirsch Decl."). The public health recommendations were
19 endorsed by leading government and private public health organizations, a consensus reflected in
20 documents released in November 1997, including: United States Department of Health and Human
21 Services, "Interim Recommendations Issued for Patients Exposed to Fenfluramine and Dexfenfluramin
22 released November 13, 1997, and Centers for Disease Control and Prevention ("CDC"), "Cardiac
23 Valvulopathy Associated with Exposure to Fenfluramine or Dexfenfluramine: U.S. Department of Hea
24 and Human Services Interim Public Health Recommendations, November 1997," Morbidity and Morta
25 Weekly Report, vol. 46, no. 45 (Nov. 14, 1997).

26 The DHHS release recommends the following measures for fenfluramine/dexfenfluramin
27 users:
28

1 Anyone who has taken fenfluramine or dexfenfluramine for any period of
2 time, either alone or with another drug or drugs, should see their doctor for
3 a medical history and physical examination to determine whether there are
4 signs or symptoms of heart or lung disease.

5 Anyone who has taken these drugs for any period of time, either alone or
6 with another drug or drugs, who has signs or symptoms of heart or lung
7 disease, such as a new heart murmur or shortness of breath, should have
8 an echocardiogram performed.

9 An echocardiogram should be strongly considered for any patient who has
10 taken these drugs, either alone or with another drug or drugs — regardless
11 of whether they have signs or symptoms of the heart or lung diseases —
12 BEFORE having any invasive procedure for which the American Heart
13 Association recommends antibiotic prophylactic treatment to prevent the
14 development of bacterial endocarditis. This will provide an accurate
15 determination of whether or not the person needs the antibiotic treatment.

16 (Hirsch Decl., Ex. A, at 1; Ex. B, Ex. C.) These recommendations were developed through cooperatio
17 among the CDC, the United States Food and Drug Administration, and the National Institutes of Health
18 consultation with the American Heart Association, the American College of Cardiology, and the Amer
19 Dental Association. (Hirsch Decl., Ex. B, at 4.) The American College of Cardiology and American
20 Heart Association also issued parallel recommendations in view of the potentially serious public health
21 implications of fenfluramine and dexfenfluramine exposure. (Hirsch Decl. Exhs. D-E). Patients with
22 history of exposure to these drugs are advised to undergo a careful cardiovascular physical examinatio
23 which should be followed by an echocardiogram in patients with cardiac murmurs, or symptoms or ot
24 concerns.

25 The unanimous medical screening guidelines were developed following evidence of the
26 association of serious cardiac and pulmonary disorders with the use of fenfluramine and dexfenflurami
27 On or about July 8, 1997, the Mayo Clinic, located in Rochester, Minnesota, released an emergency
28 report linking the use of fenfluramine and dexfenfluramine to unusual, potentially life-threatening valv
morphology and regurgitation in 24 women. According to the report, cardiovascular testing procedure
principally the electrocardiogram and echocardiogram, revealed that each of the 24 patients had one or
more heart valves that were abnormally thickened and that blood was regurgitating, or leaking backwa
through the valves, making the heart work harder to pump throughout the body. The Mayo Clinic's stu
concludes that fenfluramine and dexfenfluramine users need to be informed about the risks of pulmona

1 hypertension and valvular heart disease, particularly because these conditions are extremely rare in
2 individuals under the age of 50 in the general population.

3 The September 10, 1998 edition, Volume 339, Number 11, of the *New England Journal*
4 *of Medicine* recently published a series of studies which further establish the extraordinary connection,
5 which plaintiffs intend to prove at trial, between valvular heart damage and fenfluramine/dexfenfluramine
6 exposure. (New England Journal of Medicine (1998) Vol. 339, pp. 713-718. "The Prevalence of
7 Cardiac Valvular Insufficiency Assessed by Transthoracic Echocardiography in Obese Patients Treated
8 With Appetite-Suppressant Drugs," by Mehmood A. Khan et. al.) The Khan study design included
9 rigorous scientific and epidemiologic methods and concluded that patients who took fenfluramine and
10 dexfenfluramine alone, or in combination with other products, had a significantly higher prevalence of
11 cardiac valvular insufficiency than did a matched group of control subjects. (Id.) The Khan report
12 indicates that while only 1.3 percent of the control subjects met the FDA's case definition for cardiac-
13 abnormalities, an extraordinary 22.7 percent of the drug exposed patient group met the case definition
14 cardiac-valve abnormalities. (Id.; see also, New England Journal of Medicine (1998) Vol. 339, pp.719-
15 724, "A Population-Based Study of Appetite-Suppressant Drugs And the Risk of Cardiac-Valve
16 Regurgitation," by Hershel Jick, M.D., et. al. (concluding that diet drug induced valvular heart injury is
17 particularly likely to involve injury to the aortic valve); New England Journal of Medicine (1998) Vol.
18 pp. 725-732, "An Assessment of Heart-Valve Abnormalities in Obese Patients Taking Dexfenfluramine
19 Sustained-Release Dexfenfluramine, or Placebo," by Neil J. Weissman, M.D. et. al. (acknowledging an
20 increase in the prevalence of aortic and mitral regurgitation in patients treated with dexfenfluramine).

21 This factual background has given rise to hundreds of individual damages suits, as well
22 multiple state and federal class actions seeking defendant-funded court-supervised medical screening (or
23 referred to as "medical monitoring"). The common basis of such medical screening suits is the simple
24 principle that the fenfluramine/dexfenfluramine manufacturers should pay for the medical screening
25 procedures necessitated by use of their products, to prevent or mitigate future harm and to enable those
26 already injured to have the benefit of early diagnosis and treatment. The sheer number of persons
27 exposed, the categorical and all-inclusive nature of the above-described health agency directives, and t
28

1 need for an organized, systematic and consistent judicial and administrative approach underscores the
2 superiority of addressing medical screening claims on a class basis.

3 **III. A MEDICAL SCREENING CLASS SHOULD BE CERTIFIED**

4 AHP and the California Diet Center Defendants have refused to pay for the medical
5 examinations and echocardiograms made necessary by their products. (See Hirsch Decl., ¶ 6.) It is lik
6 that many fenfluramine/dexfenfluramine users will find it difficult, if not impossible, to pay for these
7 procedures.^{5/} Plaintiffs seek an order certifying a mandatory (i.e., non-opt-out) class of California
8 fenfluramine/dexfenfluramine users to adjudicate Plaintiffs' claims that defendants should pay for the
9 medical testing of the Class.

10 The proposed plaintiff class and subclass ("Class") are defined as follows:

11 Plaintiff class consisting of all persons who reside in California who have
12 taken fenfluramine, sold as Pondimin, and/or dexfenfluramine, sold as
13 Redux, alone or in combination with phentermine, designed, manufactured,
supplied, distributed, sold and/or placed in the stream of interstate
commerce by American Home Products Corporation.

14 Plaintiff subclass consisting of all persons who reside in California who
15 have taken fenfluramine, sold as Pondimin, and/or dexfenfluramine, sold as
16 Redux, alone or in combination with phentermine, designed, manufactured,
supplied, distributed, sold and/or placed in the stream of interstate
17 commerce by the California Diet Centers named as defendants in this
action.

18 Specifically excluded from the Class and Subclass are all persons who
19 have filed independent claims for personal injury arising from the ingestion
20 of fenfluramine and/or dexfenfluramine. Also specifically excluded from
21 the class are the Defendants, any entity in which Defendants have a
controlling interest, and the officers, directors, affiliates, legal
representatives, heirs, successors, subsidiaries, and/or assigns of any such
individual or entity, as well as the presiding judge and the judge's
immediate family members and dependents.

22 As discussed below, medical screening classes have been certified by numerous courts,
23 including California courts, because such claims are extraordinarily well suited for class treatment.
24 Moreover, as discussed in Section III B, below, courts in Illinois, New Jersey, Pennsylvania, Texas,
25

26 ^{5/}"In many cases a person will not be able to afford such [medical screening] tests, and refusing to allow
27 medical monitoring damages would in effect deny him or her access to potentially life-saving treatment." (1997)
28 Redland Soccer Club v. Department of the Army 548 Pa. 178, 696 A.2d 137, 145 (quoting Hansen v.
Mountain Fuel Supply Co. (Utah 1993) 858 P.2d 970, 976-77.

1 Washington and West Virginia have already certified medical screening claims against AHP on behalf
2 residents of their states who ingested Pondimin and/or Redux.

3 An examination of the elements of medical screening relief in the context of this action
4 reveals issues which are, by definition, common issues and which invite class-wide determinations. The
5 categorical, all-inclusive medical screening recommendations unanimously embraced by leading
6 governmental and private health organizations' for persons exposed to Pondimin and/or Redux
7 demonstrates the cohesiveness of the medical screening class and the predominance of the legal and
8 factual issues raised by the medical screening claim. Individual factors or characteristics of the class
9 members — age, gender, lifestyle, motivation, etc. — are irrelevant to the fundamental issues in this case.
10 The medical monitoring directives do not depend on these variables; rather, they create a simple,
11 functional, objective and all-inclusive class: all persons who took either or both drugs need medical
12 screening and all symptomatic persons need echocardiograms. AHP and the California Diet Center
13 Defendants will either be found responsible for paying the costs of the medical examinations and
14 procedures, or they will not.^{6/} This is an issue which should be decided once, on a classwide basis.

15 **A. Recent Orders Certifying Medical Screening Classes For Illinois, New Jersey,**
16 **Pennsylvania, Texas, Washington and West Virginia Residents Strongly Support**
17 **Certification Of Screening Claims On Behalf of California Residents.**

18 On March 12, 1999, the Honorable Stephen E. Levin, of the First Judicial District of
19 Pennsylvania, certified a medical monitoring class on behalf of asymptomatic Redux/Pondimin exposed
20 Pennsylvania residents. (In re: Pennsylvania Diet Drugs Litigation, (March 12, 1999) Master Docket No.
21 9709-3162). The Honorable Maria Coredemus of New Jersey Superior Court, in a detailed opinion that
22 cites similar class certification orders from Washington and Texas, certified a 23(b)(2) class action for
23 equitable monitoring claims on behalf of exposed Redux/Pondimin New Jersey residents. (Vadino et al. v.
24 American Home Products Corporation et. al., (Middlesex Co., N.J. January 1, 1998) Case No. MID-L-98-0001).

25
26 ^{6/}Plaintiffs seek class certification against AHP under all theories alleged in their complaint, except for
27 their unfair business practices claims which plaintiffs intend to pursue as private attorney generals against all
28 defendants. (Plaintiffs' First and Second Claims for Relief under Business and Professions Code sections 17200
et. seq. and sections 17500 et. seq.; see also StopYouth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.
4th 553 (granting broad standing to citizens to pursue unfair business practices claims as private attorney
generals)).

1 425-98). In West Virginia, a state circuit court recently recognized that the state common law supports
2 a cause of action for medical monitoring and certified a class of approximately 40,000 diet drug exposures
3 West Virginia residents, pursuant to a state procedural rule identical to Rule 23(b)(2). (Birch v. American
4 Home Prods. Corp. Civ. (W.Va. Cir. Ct. Feb. 11, 1999) Action No. 97-V-204 (1-11)). The
5 Honorable Judge Fred Edwards of Texas certified a Texas-wide equitable medical monitoring class
6 action, pursuant to that state's equivalent of Fed.R.Civ.P. 23(b)(2). (Earthman v. American Home
7 Products, Inc., (Montgomery Co., Tx. October 1998) Case No. 97-10-03790-CV). On October 16,
8 1998, Spokane County, Washington Superior Court Judge, the Honorable Richard J. Schroeder, certified
9 a 23(b)(2) class action for adjudication of Respondents' claim for medical monitoring relief on behalf of
10 Washington residents, under the Washington Products Liability Act. (Fred St. John v. American Home
11 Products (Spokane Co. October 16, 1998) Case No. 97-2-06368-4). On January 26, 1999 Cook
12 County, Illinois Circuit Court Judge Ellis E. Reid certified a class defined as: "All Illinois residents who
13 have purchased and taken either fenfluramine (Pondimin) or dexfenfluramine (Redux) in Illinois and who
14 have undergone or will undergo by (opt-out date) the medical screening procedures recommended by the
15 United States Department of Health and Human Services and the Illinois Department of Public Health
16 (Karen Rhyne, et al. v. American Home Products Corp, et al. (Ill. Cir., Cook Co., Chanc. Div.) No. 98
17 CH 04099).^{7/}

18 The representative plaintiffs in all six states relied, like the plaintiffs in this action, upon
19 governmental screening recommendations and emphasized the fact that absent class certification,
20 thousands of affected individuals would otherwise be effectively denied a remedy for costs incurred in
21 obtaining screening and/or needlessly placed at risk of serious injury or death.

22
23
24
25
26
27 ^{7/}Arkansas is the only state where a court has considered and declined to permit class certification of
28 medical monitoring claims on behalf of residents exposed to Redux and/or Pondimin. (Baker et. al. v. Wyeth-
Ayerst Laboratories Division of American Home Products Corporation et.al. (Washington Co., October 26,
1998) Case No. CIV 97-1192).

1
2 **B. The Requirements for Class Certification of the Equitable/Injunctive Relief Claims Have Been Met.**

3 Section 382 of the Code of Civil Procedure authorizes class actions in California courts
4 In a recent decision, which affirmed the certification of a nationwide consumer class, Dunk v. Ford Motor
5 Co. (1996) 48 Cal. App. 4th 1794, 56 Cal. Rptr. 2d 483, the court of appeal summarized the standard
6 for determining the propriety of class certification as follows:

7 Code of Civil Procedure Section 382 provides: "[W]hen the question is
8 one of common or general interest, of many persons, or when the parties
9 are numerous, and it is impracticable to bring them all before the court,
10 one or more may sue or defend for the benefit of all." "Although the statute
11 appears to speak in the alternative, . . . two requirements must be met in
12 order to sustain any class action: (1) there must be an ascertainable class
13 [citations]; and (2) there must be a well-defined community of interest in
14 the questions of law and fact involved affecting the parties to be
15 represented [Citations]." "Community of interest . . . embodies three
16 factors: (1) predominant common questions of law or fact; (2) class
17 representatives with claims or defenses typical of the class; and (3) class
18 representatives who can adequately represent the class."

19 (Id. at 1806 (interpolations and ellipses in Dunk; citations omitted)).

20 The definitive case confirming the California courts' equitable authority to certify
21 mandatory classes under section 382 in cases seeking injunctive and declaratory relief is Bell v. American
22 Title Ins. Co. (1991) 226 Cal. App. 3d 1589, 277 Cal. Rptr. 583, review denied, (Apr. 18, 1991)
23 1991 Cal. LEXIS 2002. In Bell, the court held that mandatory class treatment is appropriate under the
24 circumstances described in Federal Rules of Civil Procedure 23(b)(1) and (b)(2). Thus, mandatory class
25 treatment is appropriate when: (1) allowing separate actions to proceed in different courts by individuals
26 Class members against a defendant would put it at risk of being put into a "conflicted" position, where
27 different results in the separate actions would impair a defendant's ability to act in a uniform manner; and
28 (2) Defendants have acted, or refused to act, in a consistent manner toward the Class, thereby making
appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole
(Id. at 1604-05.)

Both of the conditions identified in Bell as supporting mandatory class certification are
present in this case. Allowing separate actions by California diet drug users for medical screening relief
could lead to the inefficient and inequitable result that medical screening for some plaintiffs may be

1 covered, while the costs for screening of other similarly situated plaintiffs would not be covered. AHP
2 the California Diet Center Defendants may be faced with differing standards of conduct with respect to
3 their liability for medical screening based on inconsistent results issued by different courts. The case for
4 certification under 23(b)(2) is equally strong. AHP and the California Diet Center Defendants have
5 supplied dangerously defective, hazardous drugs to each member of the plaintiff class and/or subclass,
6 have refused to pay for the medical screening which has been recommended by all of the leading public
7 health agencies in this country. It should be decided once, on a classwide basis, whether AHP and the
8 California Diet Center Defendants will be required to establish a court-supervised medical screening fund
9 for the benefit of all class members. As discussed below, courts deciding whether to certify medical
10 monitoring or medical screening classes typically direct their inquiry toward defendants' conduct. (See
11 e.g., Day v. NLO (S.D. Ohio 1994) 851 F. Supp. 869, 884.)

12 Moreover, the type of relief sought here, i.e., the establishment of a court-supervised
13 medical screening trust fund for the benefit of all members of the class, is inherently a class remedy
14 because it is in the nature of injunctive and equitable relief on behalf of a readily identifiable class. This
15 is illustrated by a recent Louisiana Supreme Court decision recognizing the viability under Louisiana law of a
16 putative medical monitoring class action seeking a court-supervised medical monitoring trust fund to pay
17 for costs associated with exposure to asbestos. (Bourgeois v. A.P. Green Industries, Inc. (La. 1998) 71
18 So.2d 355 (Sept. 4, 1998) reh'g denied.) In keeping with the vast majority of jurisdictions, the Bourgeois
19 Court held that a claim for such medical screening relief arose without regard for whether the claimant
20 suffered any physical injury. (Id.) Following a rigorous review of medical monitoring decisions by other
21 states, the Louisiana Supreme Court specifically held that asymptomatic plaintiffs who had been exposed
22 to defendants' asbestos could maintain a medical monitoring claim for a judicially administered trust fund to
23 pay expenses associated with periodic medical examinations to monitor the effects of asbestos exposure.
24 (Id.) The judicially administered fund approach to medical monitoring claims has been endorsed by
25 several courts in the precise context of class certification of medical monitoring issues, since such a fund is
26 inherently a class remedy. The Bourgeois court specifically distinguished a court-administered medical
27 monitoring fund from a lump sum damages award. A trust fund covers only medical screening costs
28 actually incurred by plaintiffs, while a lump sum award is a monetary award that a plaintiff can spend

1 or she sees fit. (Bourgeois, 715 So.2d at 357.) Here, plaintiffs seek a court-supervised fund, the
2 preferred means of furthering the health and safety goals of a medical screening, since such a mechanism
3 ensures that the fund is put to its intended purpose.

4 The California Supreme Court has expressed its preference for the use of a court
5 supervised medical screening fund, "we hold that the cost of medical monitoring is a compensable item
6 damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future
7 monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended
8 monitoring is reasonable." (Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1007). Where
9 the established elements entitle persons to medical monitoring relief, class certification is the best manner
10 to resolve the claim whose very nature is equitable and global. For example, in Redland Soccer Club v.
11 Department of the Army (1997) 548 Pa. 178, 696 A.2d 137, the Pennsylvania Supreme Court
12 recognized that the right to medical monitoring is (or should be) an equitable cause of action to obtain
13 necessary monitoring services through a court-supervised trust fund for all affected persons, rather than
14 a legal claim for compensatory damages:

15 A claim for a medical monitoring trust fund is significantly different from a claim for a lump
16 sum award of damages. A trust fund compensates the plaintiff for only the monitoring
17 costs actually incurred. In contrast, a lump sum award of damages is exactly that, a
18 monetary award that the plaintiff can spend as he or she sees fit. Various courts have
19 advocated the trust fund approach instead of the lump sum approach. Hansen v.
Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993); Ayers v. Township of Jackson,
106 N.J. 557, 525 A.2d 287 (1987); Burns v. Jaquays Mining Corp., 156 Ariz. 375, 752
P.2d 28 (App.1987). The Supreme Court of New Jersey explained the advantages of the
trust fund approach as follows:

20 In our view, the use of a court-supervised fund to administer medical-
21 surveillance payments in mass exposure cases...is a highly appropriate
22 exercise of the Court's equitable power.... Such a mechanism offers
23 significant advantages of a lump-sum verdict.... [A] fund would serve to
24 limit the liability of defendants to the amount of expenses actually incurred.
25 A lump-sum verdict attempts to estimate future expenses, but cannot
26 predict the amounts that actually will be expended for medical purposes.
27 Although conventional damage awards do not restrict plaintiffs in the use
28 of money paid as compensatory damages, mass-exposure toxic-tort cases
involve public interests not present in conventional tort litigation. The
public health interest is served by a fund mechanism that encourages
regular medical monitoring for victims of toxic exposure....

Although there may be administrative and procedural questions in the
establishment and operation of such a fund, we encourage its use by trial
courts in managing mass-exposure cases.... [M]edical-surveillance
damages will be paid only to compensate for medical examinations and

1 tests actually administered and will encourage plaintiffs to safeguard their
2 health by not allowing them the option of spending the money for other
purposes.

3 Ayers, 525 A.2d at 314 (footnote omitted). We too, believe that a
4 medical monitoring trust fund is a more appropriate remedy than lump sum
damages in mass exposure toxic tort cases.

5 Redland, 696 A.2d at 142-43, n. 6.

6 In another recent analogous decision, In re Telectronics Pacing Systems, Inc., (S.D. Ohio
7 1997) 172 F.R.D. 271, which involved defective cardiac pacemaker lead wires implanted in many
8 thousands of heart patients, a federal court certified class claims for medical monitoring on behalf of
9 members residing in all 50 states and the District of Columbia. The court found that medical monitoring
10 claims are ideally suited for unitary adjudication before a single judge:

11 The medical monitoring claim here is an ideal candidate for class
12 certification pursuant to Rule 23(b)(1)(A) because separate adjudications
13 would impair TPLC's ability to pursue a single uniform medical monitoring
program.

14 (172 F.R.D. at 284.)

15 While some courts have held that certification of a personal injury class is inappropriate
16 on the ground that individual issues predominate over common ones, plaintiffs in this action do not seek
17 class treatment of their personal injury or damages claims, only of their claims for medical screening.
18 Moreover, whether common issues predominate is not an issue in certification of mandatory classes under
19 Fed. R. Civ. P. 23(b)(2) or California law.[§] For these reasons and those stated below, Plaintiffs'

20
21 [§]Plaintiffs cite federal Rule 23 and federal decisions applying it, because California courts look to the
22 Rule and such decisions for authoritative guidance in class action matters. See Vasquez v. Superior Court
23 (1971) 4 Cal.3d 800, 821, 94 Cal. Rptr. 796. As a general matter, mandatory certification under
Rule 23(b)(2) for equitable or injunctive relief is preferable, even if certification under Rule 23(b)(3) for
damages claims would also be appropriate.

24 "[i]f an action can be maintained as a class action under (b)(1) and/or (b)(2),
25 and also under (b)(3), the court should order that the suit be maintained under
26 (b)(1) and/or (b)(2) . . . so that the judgment will have res judicata effect as
to all the class (since no member has the right to opt out in a (b)(1) or (b)(2)
suit), thereby furthering policy underlying (b)(1) and (b)(2) class suits."

27 Bell, 226 Cal. App. 3d at 1608 (quoting 3B J. Moore & J. Kennedy, Moore's Federal Practice (2d ed. 1990)
28 ¶ 23.31[3], at 236-37.

(continued...)

1 proposed medical screening class should be certified on a mandatory basis.

2
3 **C. Plaintiffs Satisfy The Class Certification Prerequisites Of Ascertainability And**
4 **Numerosity, Commonality, Typicality And Adequacy Of Representation.**

5 Courts throughout the country have recognized that the issues implicated by medical
6 screening claims are particularly well-suited for class action treatment, even where the underlying pers
7 injury claims may not be. (See, e.g., German v. Federal Home Loan Mortg. Corp. (1995) 885 F. Supp.
8 537; Ahearn v. Fibreboard Corp. (E.D. Tex. 1995) 162 F.2d 505; Day v. NLO (S.D. Ohio 1994)
9 851 F. Supp. 869; Cook v. Rockwell Int'l Corp. (D. Colo. 1993) 151 F.R.D. 378; Yslava v. Hughes
10 Aircraft Co. (D. Ariz. 1993) 845 F. Supp. 705.) California courts have followed the national trend in
11 certifying medical screening classes like the class proposed in this action. In Alviso Community
12 Organization v. Maciel, et al. (Santa Clara County Sup. Ct. 1994) Case No. 723808, for example, the
13 court certified classes for personal injury, property devaluation, and medical monitoring, in a mass tort
14 case arising from exposure to allegedly excessive levels of asbestos, as a result of defendants' business
15 activities on unpaved, asbestos-contaminated truckyards and industrial yards of Alviso, a small commu
16 of 2,200 people in the northeast section of San Jose, California. (Exh. I to Hirsch Decl.) Class
17 certification is particularly appropriate in the medical screening context, because the remedy sought is
18 the nature of injunctive relief (i.e., establishment of a court-supervised fund) rather than an award of
19 monetary damages, and because the implicated issues primarily relate to the impact of a defendant's
20 actions on the class as a whole. As the court in Day explained:

21 [S]hould the jury find liability, it will also be appropriate for that jury to
22 render a classwide verdict on the question of whether medical evaluation is
23 appropriate for all class members. A finding of liability makes it
24 reasonable for the tort victim to seek a diagnostic evaluation to determine
25 the extent of his or her injuries, if any, and to devise a course of treatment,
26 if required. The extent and duration of diagnostic monitoring is a matter
27 for medical professionals under the supervision of the court to decide.
28 Viewed in this light, class adjudication of the right to medical monitoring is
preferable.

26 _____
27 ^{8/}(...continued)

27 Federal Rule 23(b)(2) is the federal codification of the equity class action. Its predecessor, Federal
28 Equity Rule 38, uses language virtually identical to section 382 of the California Code of Civil Procedure,
exemplifying the common equity heritage of the California and federal rules.

1 (851 F. Supp. at 884.)

2 **1. The Proposed Class Is Ascertainable, And Is So Numerous That Joinder**
3 **Is Impracticable.**

4 For a class to be certified, section 382 of the Code of Civil Procedure and federal Rule
5 23(a)(1) require that joinder of all members must be impracticable. "Impracticability means difficulty
6 inconvenience of joinder; the rule does not require impossibility of joinder." (German 885 F. Supp. at
7 (certifying medical monitoring claims of toxic tort class of under 1000)). Here, the proposed class includes
8 thousands of claimants who were exposed to fenfluramine and dexfenfluramine and who now require
9 medical examinations and diagnostic testing. Although the precise number of Class members cannot be
10 determined at this time, it is estimated that 1.4-2.7 million people in the United States have taken
11 fenfluramine or dexfenfluramine. (See Hirsch Decl., Ex. B.) A substantial percentage of the country's
12 population lives in California. The composition of the class is readily ascertainable, since people who
13 fenfluramine or dexfenfluramine would normally be aware that they took the drugs, which were sold by
14 prescription. Thus, the proposed Class satisfies the numerosity and ascertainability requirements.

15 **2. There Are Many Common Issues of Law and Fact.**

16 The common legal and factual issues relevant to AHP's liability for medical monitoring
17 have been recognized by many courts as warranting class treatment of medical monitoring claims. To
18 establish the requisite commonality, plaintiffs need not show that all factual and legal issues in the litigation
19 are common, but only that common questions exist. (See Yslava 845 F. Supp. at 712.) Class certification
20 does not require simultaneous or identical injuries. (See Fanucchi v. Coberly-West Co. (1957) 151 Cal.
21 App. 2d 72, 80-82; see also 4 B.E. Witkin, California Procedure (3d ed. 1985) Pleading § 202, at 238.)
22 In deciding whether common questions of law and fact exist to meet the commonality requirement, the
23 court directs its inquiry primarily toward defendant's conduct. (See Day, 851 F. Supp. at 884.)
24 Regardless of whether some individual issues exist (as they will in any litigation), a mandatory class
25 certified under Rule 23(b)(2) does not require a finding that common issues predominate, so long as
26 common issues exist and injunctive relief is sought. (See Bell, 226 Cal. App. 3d at 1604-05.)

27 Medical monitoring claims are particularly well-suited for class treatment, both in terms of
28 the elements to be proven and the relief sought, as indicated by the seminal California Supreme Court

1 decision in Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965. Potter involved the dumping
2 numerous toxic substances which had combined with each other, leached into the ground and
3 contaminated groundwater ingested by persons residing in various proximities to Crazy Horse, a class
4 sanitary landfill where the hazardous material was illegally deposited. (Id. At 801.) In its seminal medical
5 monitoring analysis, the California Supreme Court held that medical monitoring was an appropriate relief
6 for the Potter plaintiffs who had been exposed to the hazardous substances and whose claims presented
7 common issues arising from: 1) the various extents of each plaintiffs' exposure, 2) the various toxicity
8 subject chemicals, 3) the seriousness of potentially resulting illnesses, 4) the relative risk of such illnesses
9 and 5) the likelihood that early detection and treatment would be beneficial. (Id. at 1009). Potter adopted
10 as "persuasive" the medical monitoring analysis and factors articulated in Miranda v. Shell Oil Co., 17
11 App. 4th 1651, 1657-58, 15 Cal. Rptr. 2d 569 (1993), which focus on common issues such as
12 defendants' conduct and the toxicity of the chemicals at issue. (Miranda v. Shell Oil (1993) 17 Cal. App.
13 4th 1651, 1655-61 (the California Supreme Court ordered the medical monitoring portion of the Miranda
14 opinion published, Miranda v. Shell Oil (1993) 26 Cal. Rptr. 2d 623.) The same public policy goals
15 articulated in Potter and Miranda apply in this action where only the class-wide pursuit of medical
16 screening relief could protect the health and safety of exposed persons, deter AHP from irresponsible
17 marketing of dangerously defective drugs and prevent or mitigate serious future illness and thus reduce
18 overall costs to AHP (Potter at 1007; Miranda at 1660).

19 This court's determination of the plaintiffs' eligibility for medical monitoring relief is a
20 determination uniquely amenable to classwide proof, particularly in the circumstances of this action.
21 Indeed, unlike Potter, this action does not implicate any complicated hazardous chemical and exposure
22 analysis, but instead involves exposure to a single, defective substance and resulting medical screening
23 recommendations unanimously recognized by the leading private and public health organizations to protect
24 health and avoid serious injury and death. Plaintiffs seek establishment of a Court-supervised medical
25 screening fund, not payment of damages to individual plaintiffs or the class. Determination of plaintiff
26 entitlement to medical screening will require litigation of many issues relating to the factors set forth in
27 Potter, each of which is a common issue. Litigating these questions will require the trier of fact to decide
28 such common issues as the dangers posed by use of fenfluramine and dexfenfluramine, the toxic and/or

1 defective properties of the drugs, the illnesses for which exposed users are at risk, and the availability;
2 efficacy of diagnostic tools such as the echocardiogram. The extent of exposure is not at issue, since t
3 government public health directives are addressed to all individuals "who have taken fenfluramine and
4 dexfenfluramine for any length of time." (See Hirsch Decl., Exhs. A-E).

5 Most recently, in O'Connor v. Boeing North American, Inc. (C.D. Cal. 1998)
6 No. CV 97-1554 (RCx), 1998 U.S. Dist. LEXIS 15433 and 15976, United States District Court Judge
7 Audrey B. Collins certified a mandatory Rule 23(b)(2) medical monitoring class. The class consisted o
8 those who had resided or worked in geographical proximity to four separate Boeing test areas in Simi
9 Valley and San Fernando Valley, California at any time over a 50 year period, and were allegedly
10 exposed to a variety of "radioactive and hazardous substances" in the air, soil and ground water. The c
11 was certified to proceed with claims for medical screening for five different disease categories, includi
12 advanced cancer, autoimmune disease, and birth defects. Id. In O'Connor, class members were allege
13 exposed to at least ten hazardous substances at issue through one or a combination of three indirect
14 exposure modes: substances were "released into the environment and into the air, soil and ground wa
15 O'Connor, [*5-*8]. The O'Connor court's ability to define an ascertainable class was complicated by
16 disputes related to the class definition, such as the existence and sources of contamination, and the pre
17 boundaries of the Contamination Area. Indeed, over one-third of the O'Connor decision is consumed t
18 an analysis of conflicting evidence on these points.

19 By contrast, it is uncontested here that there is an ascertainable population of California
20 residents who took Pondimin or Redux and thereby were unquestionably exposed to the chemical at is
21 fenfluramine/dexfenfluramine. Again, this case involves a single mode of exposure (ingestion), a sing
22 substance, and a single disease category (heart valvular disease) for which the class is at risk. Moreov
23 the class in this action would be defined by the fact of its members' exposure to one or both of these dr
24 Similarly, because each class member's exposure is by ingestion, pursuant to prescription and with the
25 contemporaneous knowledge of the class member and her physician, facts such as the duration of
26 exposure, the level (dosage) of exposure, and the date of first exposure (if any of these ever become
27 relevant) may likewise, and unlike O'Connor, be determined with precision for each class member.

28 Many other courts, both in California and across the nation, have also recognized the

1 benefits of class treatment of such common issues, and accordingly have certified medical screening of
2 monitoring classes in toxic tort cases. (See e.g., In re Copley Pharmaceutical, Inc., (D. Wy. 1995) 161
3 F.R.D. 456 (nationwide medical monitoring class certified by a multi-district litigation court under Fed.
4 Civ. P. 23(b)(3)); Day v. NLO (S.D. Ohio 1994) 851 F. Supp. 869 (medical monitoring class certified
5 under Fed. R. Civ. P. 23(b)(2) under traditional tort principals without proof of bodily injury, finding that
6 use of court's injunctive powers to oversee and direct medical surveillance of the class is a superior
7 method of adjudication); Abuan v. General Electric Co. (9th Cir. 1993) 3 F.3d 329, cert. denied (1994)
8 510 U.S. 1116 (class of individuals exposed to PCBs certified with respect to medical monitoring claim);
9 Cook v. Rockwell International Corp. (D. Colo. 1993) 151 F.R.D. 378; Yslava v. Hughes Aircraft Co.
10 (D. Ariz. 1993) 845 F. Supp. 705 ("core issues of liability and exposure are common to all class
11 members. Commonality among the members exists notwithstanding certain factual variations."))

12 A recent ruling from the United States Third Circuit in Barnes v. American Tobacco Co.
13 (3rd Cir. Pa. Nov. 12, 1998) 161 F.3d 127, 1998 U.S. App. LEXIS 28624, affirming the district court's
14 decertification of a proposed class of cigarette smokers, offers additional powerful insights into the
15 availability and propriety of adjudicating medical monitoring claims in this action on a class wide basis.
16 The Barnes decision reaffirms the propriety of class certification of medical monitoring claims under
17 Pennsylvania law (which itself derives partly from California's Potter decision) for narrowly defined groups
18 of persons whose claims are justified by the need to undergo specific medical screening programs distinct
19 from normal screening recommendations, which are essential for the early detection and prevention of
20 latent disease and recommended for all class members regardless of individual circumstances:

21 First, medical monitoring promotes 'early diagnosis and treatment of
22 disease resulting from exposure to toxic substances caused by a
23 tortfeasor's negligence.' Second, 'allowing recovery for such expenses
24 avoids the potential injustice of forcing an economically disadvantaged
25 person to pay for expensive diagnostic examinations necessitated by
26 another's negligence,' and 'affords toxic-tort victims, for whom other sorts
27 of recovery may prove difficult, immediate compensation for medical
28 monitoring needed as a result of exposure.' Third, medical monitoring
'furtheres the deterrent function of the tort system by compelling those who
expose other to toxic substances to minimize risks and costs of exposure.'
Finally, such recovery is 'in harmony with 'the important public health
interest in fostering access to medical testing for individuals whose
exposure to toxic chemicals creates an enhanced risk of disease.' 696
A.2d at 145.

1 Barnes, 1998 U.S. App. LEXIS 28624 at 12, quoting Redland Soccer Club v. Department of the Army
2 (1997) 548 Pa. 178, 696 A.2d 137.

3 Here, the proposed class of persons seeks access to a specific medical screening regime
4 that has been uniformly recommended by public health authorities for every person who has been exposed
5 to fenfluramine and dexfenfluramine, regardless of dose, duration or any other individual circumstance.
6 This is a critical distinction from Barnes where the district court decertified the class due to concerns about
7 the individual addiction status of each of the class members and concerns about exposures to different
8 products which changed over time. Barnes, 1998 U.S. App. LEXIS 28624 at 7-8 ("Whether an
9 individual is addicted is a highly individualistic inquiry . . . Defendants manufactured hundreds of different
10 types of cigarettes over the years and have even made changes within each brand. . . "). Neither
11 addiction nor individual risk variations is at issue in connection with plaintiffs' medical monitoring
12 certification motion. Here, the relevant drugs have been removed from the market; failure to warn of
13 risks has resulted in special medical monitoring recommendations for everyone exposed, regardless of
14 duration, lifestyle or other circumstances.

15 Following the logic of cases such as Day, O'Connor, Bourgeois and Telectronics, and
16 pursuant to the California Supreme Court's decision in Potter, this Court should focus on the issues
17 common to all medical screening class members: AHP's misconduct and liability for the marketing and
18 distribution of dangerously defective products, determination of the toxicity of the ingested drugs, the
19 increased risk of resulting illness, and the likelihood that early detection and treatment of such illness
20 would be beneficial to class members. Certification of the medical screening class is the fairest and most
21 efficient method of resolving these issues.

22
23 **3. The Proposed Class Representatives' Claims For Medical Monitoring Are**
24 **Typical Of Those Of The Class.**

25 The typicality and commonality requirements of Rule 23 "tend to merge," and a finding
26 of commonality ordinarily will support a finding of typicality. (See General Tel. Co. v. Falcon (1982)
27 457 U.S. 147, 157 n.13.) The relative degree of the representative's damages or injury vis-a-vis other
28 class members does not impair typicality. These and other factual differences are acceptable so long as

1 the claims arise from the same events or course of conduct and are based on the same legal theory. (See
2 Cook, 151 F.R.D. at 385-86; Wehner v. Syntex Corp. (N.D. Cal. 1987) 117 F.R.D. 641, 644; Day,
3 851 F. Supp. at 884.)

4 Here, the proposed class representatives' claims are typical of those of the Class as a
5 whole with respect to the medical screening claim, because the representatives took dexfenfluramine or
6 fenfluramine, and share a common interest with the Class in being evaluated for possible heart or lung
7 disease associated with the drugs. The claims the representatives assert, and the injunctive relief they
8 in the form of Court-supervised medical screening, are typical of the Class' claims in all significant respects.
9 This is particularly true in light of the uniform, unqualified nature of the DHHS recommendations. All
10 persons who have ingested fenfluramine or dexfenfluramine, without regard to dosage or duration of
11 exposure or prior medical history, are urged to obtain a medical examination with particular attention to
12 cardiovascular health.

13
14 **4. The Proposed Class Representatives Will Adequately Represent The Class.**

15 The proposed class representatives Tiffith and Sharp satisfy the adequacy of
16 representation requirement if they have no interest antagonistic to those of the class they proposed to
17 represent, and if they are represented by experienced and competent counsel. (See McGhee v. Bank of
18 America (1976) 60 Cal. App. 3d 442, 450; Wehner, 117 F.R.D. at 644.) Here, as established by the
19 allegations of their common complaint and separate adoption forms, the claims of the class representatives
20 are aligned with, and representative of, the claims of all Class members.

21 To further the interests of the Class, Plaintiffs Tiffith and Sharp seek leave of court to
22 permit the joinder of an additional class representative plaintiff, Ms. Lydia Miller. Ms. Miller is a resident
23 of Sacramento, California, who ingested a combination of fenfluramine and phentermine, has no present
24 injury and who needs, but cannot afford an echocardiogram. Her joinder as a class representative plaintiff
25 would be beneficial to the class because Ms. Miller would be seeking class wide relief alone. Joinder of
26 additional class representative plaintiffs is liberally granted where joinder would be of benefit to the class.
27 (La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal.3d 864, 97 Cal.Rptr. 849.)

28 Proposed counsel for the Class are qualified, experienced, and generally able to conduct the litigation.

1 this litigation. (See Hirsch Decl., Ex. J.) Plaintiffs therefore satisfy the adequacy-of-representation
2 requirement.

3 **IV. PLAINTIFFS ARE ENTITLED TO PREFERENTIAL TRIAL SETTING**

4 Because of the extraordinary health risks posed by fenfluramine and dexfenfluramine, a
5 because the federal government has released emergency recommendations advising all
6 fenfluramine/dexfenfluramine users to have medical examinations to detect signs of heart or lung disease,
7 Plaintiffs are entitled to preferential trial setting and adjudication of their medical monitoring claims. (C.C.P.
8 e.g., Code Civ. Proc. §§ 36(e), 1062.3.) Therefore, to protect the life and health of Class members,
9 Plaintiffs seek an expedited schedule for the class trial of those claims. The major diagnostic procedures
10 medical examinations and echocardiograms, are readily available and recommended by the leading public
11 health organizations. Those Class members without health coverage or enough money will be forced to
12 forego examination at their peril, in the absence of funding by AHP.

13 **V. CONCLUSION**

14 All persons in the State of California who ingested fenfluramine and dexfenfluramine
15 urgently need a medical examination and testing. Certification of a California class of fenfluramine and
16 dexfenfluramine users for medical screening purposes will most effectively resolve many common issues of
17 law and fact relating to the liability of AHP and the California Diet Center Defendants for the costs of
18 medical screening to class members. Furthermore, the relief plaintiffs seek — the establishment of a
19 medical screening fund — is in the nature of injunctive relief, such that certification of a mandatory no
20 opt-out class under C.C.P. section 382 and federal Rule 23(b)(2)) is proper, as authorized in Bell v.
21 American Title 226 Cal. App. 3d 1589.

22 Thus, certification of the medical screening claims is the case management structure of
23 choice and necessity. Plaintiffs expect that a proposed class notice, upon approval, will be disseminated
24 English and Spanish by publication and through direct mailing to the many Class members who have
25 already contacted Plaintiffs' counsel and the defendants themselves. Furthermore, speedy adjudication
26 Plaintiffs' medical screening claims will ensure the availability of medical examinations for those Class
27
28

1 members who cannot otherwise afford or receive screening. For the foregoing reasons, Plaintiffs
2 respectfully request the entry of an order certifying the medical screening claims for class treatment.

3 Dated: April 29, 1999

Respectfully submitted,

4 LIEFF, CABRASER, HEIMANN
5 & BERNSTEIN, LLP

6
7 By: _____
8 William B. Hirsch

9 275 Battery Street, 30th Floor
10 San Francisco, California 94111-3339
11 Telephone: (415) 956-1000
12 Fax: (415) 956-1008

13 LAW OFFICES OF THOMAS J. BRANDI
14 44 Montgomery Street, Suite 1050
15 San Francisco, CA 94104
16 Telephone: (415) 989-1800
17 Fax Number: (415) 989-1801

COTCHETT, PITRE & SIMON
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Fax Number: (650) 697-0577

18 GANCEDO & NIEVES
19 119 E. Union St., Ste. G
20 Pasadena, CA 91103
21 Telephone: (626) 685-9800
22 Fax Number: (626) 685-9808

GREENE, BROILLET, TAYLOR,
WHEELER & PANISH, LLP
100 Wilshire Boulevard
Santa Monica, CA 90401
Telephone: (310) 576-1200
Fax Number: (310) 576-1220

23 LOPEZ, HODES, RESTAINO,
24 MILMAN, ET AL.
25 450 Newport Center Drive
26 Second Floor
27 Newport Beach, CA 92660
28 Telephone: (949) 640-8222
Fax Number: (949) 640-8294

PAUL & JANOFSKY
1401 Ocean Avenue, Suite 200
Santa Monica, CA 90401
Telephone: (310) 458-7900
Fax Number: (310) 458-6823

ROBINSON, CALCAGNIE & ROBINSON
28202 Cabot Road, Suite 200
Laguna Niguel, CA 92677
Telephone: (949) 347-8855
Fax Number: (949) 347-8774

SHERMAN DAN PETOYAN SALKOW &
WEBER
9454 Wilshire Boulevard, Suite 550
Beverly Hills, CA 90212
Telephone: (310) 275-5077
Fax Number: (310) 276-5871