

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELLEN G. LEVINE, RUTH FALLENBAUM,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

AMERICAN PSYCHOLOGICAL
ASSOCIATION, INC. and AMERICAN
PSYCHOLOGICAL ASSOCIATION
PRACTICE ORGANIZATION,

Defendants, jointly and severally.

**CONSOLIDATED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

Hon. John Bates

Lead Civil Action No. 1:10-CV-01780

ERIC S. ENGUM, on behalf of himself and all
others similarly situated,

Plaintiffs,

v.

AMERICAN PSYCHOLOGICAL
ASSOCIATION, INC. and AMERICAN
PSYCHOLOGICAL ASSOCIATION
PRACTICE ORGANIZATION,

Defendants, jointly and severally.

Civil Action No. 1:10-CV-01898
(consolidated with 1:10-CV-01780)

Plaintiffs Ellen G. Levine, Ruth Fallenbaum and Eric S. Engum (collectively “Plaintiffs”), through their undersigned attorneys, on behalf of themselves and all others similarly situated, complain against Defendants American Psychological Association, Inc. (“APA”) and American Psychological Association Practice Organization (“APAPO”) (collectively “Defendants”) as follows:

INTRODUCTION

1. This is a class action lawsuit brought on behalf of current and former APA members who have paid special or practice assessment fees as part of their annual dues, which were misrepresented as being a mandatory part of those dues.

2. The APA, a Washington, D.C. based non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code, is the world's largest association of licensed psychologists with hundreds of thousands of members throughout the country.

3. The APAPO is a separate organization operated by the same leadership as APA from the same address in Washington, D.C. The APAPO conducts professional advocacy and lobbying on behalf of members.

4. Since at least 2002, the APA has falsely represented to its members that a 'mandatory' practice or special assessment over and above the annual dues was required for membership in the APA. In fact, that assessment (which currently amounts to approximately \$140.00 per member per year) is completely voluntary, and solely required for membership in the APA's 501(c)(6) organization, the APAPO.

5. The APAPO is organized under section 501(c)(6) of the Internal Revenue Code, ostensibly as an organization that is separate from APA, for purposes of conducting lobbying and advocacy activities, which activities would not be lawful for the different type of 501(c)(3) non-profit organization such as APA.

6. Recognizing that many of its members would not want to voluntarily pay to fund this lobbying and advocacy organization, APA deliberately sought to maximize lobbying funds outside of the proper lawful function of a 501(c)(3) entity. The APA misrepresented to its members that as part of annual membership renewal there was a "mandatory" assessment, which it then allocated to the APAPO.

7. The “mandatory” assessment amounts collected from Plaintiffs and the class total approximately \$6,000,000 per year.

JURISDICTION AND VENUE

8. This Court has original jurisdiction over this class action pursuant to 28 U.S.C. § 1332(d). Plaintiffs and members of the class have suffered aggregate damages exceeding \$5,000,000, exclusive of interest and costs, and is a class action in which any member of the class of plaintiffs is a citizen of a state different from any defendant.

9. Venue is proper in this District under 28 U.S.C. § 1391(a)(1), because Defendants are citizens of and are located in this District and significant events giving rise to this case took place in this District.

PARTIES

10. Plaintiff Ellen G. Levine is a resident of California who during the relevant time period paid special or practice assessment fees as part of her annual APA dues.

11. Plaintiff Ruth Fallenbaum is a resident of California who during the relevant time period paid special or practice assessment fees as part of her annual APA dues.

12. Plaintiff Eric S. Engum is a resident of Tennessee who during the relevant time period paid special or practice assessment fees as part of his annual APA dues.

13. The APA and the APAPO are related Washington, D.C. nonprofit corporations with their principal places of business in Washington, D.C. They conduct business throughout the United States, including in this District. The APA and APAPO share the same board of directors, the same physical address, the same server hosting company, the same membership list, and the same accounting and billing systems. The governance responsibilities for both the APA and the APAPO are conducted by the Committee for the Advancement of Professional

Practice (“CAPP”). CAPP has responsibility to exercise general governance supervision in the management of the 501(c)(6) companion organization.

14. At all times herein mentioned, each of the Defendants was the agent, servant, representative, officer, director, partner or employee of the other. At all times, each of the Defendants was acting within the scope and course of his/her/its authority as such agent, servant, representative, officer, director, partner or employee, and with the permission and consent of each Defendant. Additionally, at all times herein mentioned, Defendants were members of, and engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope of, and in pursuance of, the joint venture, partnership and common enterprise.

FACTUAL ALLEGATIONS

15. The APA is the world’s largest organization representing psychologists—both clinical, teaching and research psychologists (and many other types too numerous to mention here). Recognizing that it was illegal for a 501(c)(3) organization like the APA to engage in lobbying and lobbying fundraising (beyond certain relatively small limits), APA leadership created a 501(c)(6) lobbying entity in 2001 known as APAPO. However, APA has been assessing clinicians—those psychologists who actually practice clinical psychology and do psychotherapy—a special fee with their annual APA dues, which is represented to those clinicians on their billing statements as a mandatory practice assessment, and which is then allocated by APA leadership to the APAPO. In this manner, the APA simply skirted the rules applicable to tax-exempt non-profit entities.

16. The special or practice assessment fee came pre-printed on annual membership dues statement which deceptively created the impression that the fee was actually required as part of annual APA dues. Moreover, the dues statement instructions disseminated to members

stated that any members who provide “ANY” health related services “MUST PAY” the Practice Assessment.

17. The APA’s website in 2002 stated that members “... must pay the Special Assessment ...” This wording found on the APA’s website continued for a period of years.

18. In 2004, the APA announced that it was changing its practice of exempting new practitioners from paying the practice assessment. Beginning in 2005, “all APA members who are licensed psychologists will be billed the assessment, regardless of their length of APA membership, albeit at a reduced fee for newly licensed psychologists.” M. Greer, *Monitor*, “Practitioners’ annual assessment is changing with the times”, September 2004, Vol. 35, No. 8, at 22.

19. Through 2010, the APA’s website never made any indication that the practice assessment was voluntary, and never used any language stating or even suggesting that APA members were not required to pay the assessment. Instead, the website repeatedly stated that all practicing APA members were billed the practice assessment and were expected to pay that assessment. And when APA members tried to pay their dues online, the APA website did not allow them to pay the APA dues without also paying the APAPO assessment.

20. In April of 2010, the APAPO’s “Practice Central” website (www.apapracticecentral.org) published a statement entitled, “The Practice Assessment: What You Need To Know.” That statement purports to provide “Answers to common member questions about the annual payment supporting the work of the APA Practice Organization.” That statement does not indicate or suggest in any way that the payment of the practice assessment is voluntary. To the contrary, the statement makes clear that all APA members who practice are expected to pay the assessment: “In addition to APA dues, members who are licensed practitioners pay the annual ‘Practice Assessment’ that supports the Work of the APA

Practice Organization (APAPO).” The final question on the statement is “Why Isn’t The Practice Assessment Part of My APA Dues?” Instead of making clear that the assessment is not part of the APA dues because it is voluntary, the statement explains that the assessment is broken out from the APA dues for tax reasons: “As noted earlier, the Practice Assessment monies support the work of the APA Practice Organization, a legally separate entity with a different IRS status than APA. As a result, Practice Assessment payments are not part of your APA membership dues, although they are billed on your APA dues statement.”

21. The APAPO practice assessment is not trivial. It amounts to over 50% of the amount of the APA dues. In 2009, for example, this assessment was \$137 per person, while the total annual APA dues themselves were \$238.

22. Until discovered and announced by some APA members in a list-serve discussion in 2010, it was unknown by the membership, and not reasonably capable of being known due to fraudulent concealment by Defendants, that the purportedly mandatory APAPO special or practice assessment fee was purely voluntary.

23. The APA board has now *admitted* to the deceptive nature of the special or practice assessment fee. A newsletter issued by a division of the APA, stated:

The manner in which the APA, APAPO, and Division dues have been combined on past due statements does not make clear that the mandatory practice assessment payment is required for APAPO membership but not for APA membership. The 2011 dues statement instructions will be modified to clarify this point.

May 5, 2010 Memo from APA/APAPO Board of Directors to Members of the APAPO, “The APAPO Practice Assessment.”

24. Days later, on May 8, 2010, one of the nine members of CAPP, Glenn Ally, Psy.D., made a statement on an official APA list-serve purporting to justify the imposition of a mandatory practice assessment for a lobbying arm of the APA. According to Dr. Ally, the APA

decided to make the assessment mandatory because the APA members would not make sufficient voluntary contributions to fund the APAPO's activities:

I'm assuming you know the statistics that psychologist are at the bottom (AT THE BOTTOM) of the list of professions regarding voluntary contributions, even political advocacy contributions. What you are suggesting here is to make the primary and largest advocacy arm of our organization dependent on the voluntary contributions of the cheapest profession around. . . Again, I don't mean to be offensive, but try running your practice on voluntary contributions and see if your family gets everything they want and deserve to have. The PO is a business and they are in the business of advocating for practice. WE have decided we need this, and we decided long ago that we were not getting enough advocacy when we had to depend on the larger "APA." We wanted our own practice advocacy for a variety of reasons. That "business" has to depend on a relatively stable revenue source. Would the lobbyist for your state organization represent you if you told him/her that you were going to pay him/her differently each year based on "voluntary donations?"

May 8, 2010 Post by Glenn Ally, List for APA members interested in discussing practice related issues, "Re: [PRACTICE] ... and it gets nastier still. (Long)."

25. After making these admissions, Defendants changed the dues statement in an apparent effort to be less deceptive. Originally, the dues statement described the Practice Assessment in one column. In the next column, entitled "Action Required," the statement directed the members to "Pay \$137 Practice Assessment." On the 2011 statement, the APA removed the "Action Required" column. They also removed the words "MUST PAY" from the instructions, which now state (for the first time) that non-payment of the practice assessment does not affect membership in APA.

26. The APA, however, initially did not change the portion of the 2011 dues statement instructions entitled "Five Year Dues Step-Down" that describes how senior APA members may become eligible for a reduction in annual APA dues. That portion of the 2011 statement originally contained the same language as earlier statements that "payment of the Practice Assessment *is required* during the Step-Down process until full Life Status is achieved." (emphasis added). But after receiving complaints from its membership regarding this false and

deceptive language, the APA revised the 2011 dues statement to explain that: “The Step-Down reduction in payment applies to APA dues. It does not apply to payment of the Practice Assessment, which is required for membership in APAPO.”

27. Despite these changes, the APA continues to indicate that all of its members must pay the practice assessment—while at the same time claiming they are “voluntary.” For instance, APA Executive Director for Public and Member Communications, Rhea K. Farberman, stated that “all APA members who are licensed to provide health care services are billed the practice assessment.” And she confirmed that, “[i]n general, licensed providers are expected to pay the assessment.” In the same communication, Ms. Farberman admitted that despite the fact that the Practice Assessment is billed to every APA member and payment was expected of every member, it was not in fact mandatory: “Non-payment of the practice assessment will not affect your APA membership status.” January 11, 2011 Letter from Rhea Farberman, “Your refund request.”

28. In response to recent complaints that members cannot pay their APA dues online without also paying the practice assessment, the APA did not change its website to allow for a member to pay only their APA dues. Instead, the APA’s Practice Directorate issued a statement telling the member that they could opt-out of paying the practice assessment “by calling the Membership Service Center.” Timothy Tumlin, Ph.D. and John M. Grohol, Psy.D., *APA’s Practice Assessment Fee: Part II*, Clinical Science, Society for the Science of Clinical Psychology, APA Division 12, Winter Issue.

29. The websites of the APA and APA Practice Central continue to falsely state in numerous places that practicing members of the APA must pay the practice assessment.

TOLLING

30. Plaintiffs and members of the proposed Class did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of Defendants' conduct. Because Defendants' conduct was hidden by them, Plaintiffs and proposed Class members were unaware of it. The acts of Defendants alleged herein were wrongfully concealed and carried out in a manner that precluded detection. A reasonable person under the circumstances would not have been alerted to investigate Defendants' conduct. As a result of Defendants' fraudulent concealment, the running of any statute of limitations has been tolled with respect to Plaintiffs and the Class members' claims.

CLASS ACTION ALLEGATIONS

31. Plaintiffs bring this suit as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and Class (the "Class") composed of and defined as follows:

All persons in the United States who paid a "special" or "practice" assessment fee as part of their APA annual dues after 2000.

32. Plaintiffs also bring this suit as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and the following Subclasses:

- a. All persons in California who paid a "special" or "practice" assessment fee as part of their APA annual dues after 2000; and
- b. All persons in Tennessee who paid a "special" or "practice" assessment fee as part of their APA annual dues after 2000.

33. Subject to additional information obtained through further investigation and discovery, the foregoing definitions of the Class and Subclasses may be expanded or narrowed by amendment or amended complaint. Specifically excluded from the Class are any affiliate, parent, or subsidiary of Defendants; any entity in which Defendants have a controlling interest;

any officer, director, or employee of Defendants; any successor or assign of Defendants; and any Judge to whom this case is assigned as well as his or her immediate family.

34. **Numerosity. (Fed. R. Civ. P. 23(a)(1)).** Members of the Class are so numerous that their individual joinder is impracticable. Defendants have thousands of members in the United States who have been wrongfully charged the “mandatory” fees at issue. The precise number of the class members is unknown to Plaintiffs. Class members are known by Defendants, however, and thus, may be notified of the pendency of this action by direct mail, email, and supplemented by published notice.

35. **Existence and Predominance of Common Questions of Law and Fact (Fed. R. Civ. P. 23(a)(2) & (b)(3)).** Common questions of law and fact exist as to all members of the Class that predominate over any questions affecting only individual Class Members. These common questions of law and fact include, but are not limited to:

- a. Whether Defendants omitted, misrepresented, concealed or manipulated material facts from Plaintiff and the Class regarding the special or practice assessment fee;
- b. The nature and extent of Defendants’ prior knowledge of the material facts relating to the manner of billing for and collection of special or practice assessment fees;
- c. Whether Plaintiffs and Class members are entitled to damages and/or restitution, plus costs, interest, and attorney fees;
- d. Whether Defendant’s conduct as described herein violates California Business and Professions Code Sections 17200 and 17500 et seq.; and
- e. Whether declaratory and/or injunctive relief should be granted requiring that Defendants cease their wrongful billing practices.

29. Defendants' defenses, to the extent that any such defenses apply, are applicable generally to Plaintiffs and the entire Class and are not distinguishable as to Class members.

30. **Typicality (Fed. R. Civ. P. 23(a)(3))**. Plaintiffs are members of the Class with claims which are typical of the claims of other Class Members. Like all Class Members, Plaintiffs have been injured by Defendants' common wrongful billing practice of misrepresenting voluntary fees as mandatory annual dues fees and collecting these fees through deceptive practices. Plaintiffs and all Class members were subjected to the same course of conduct.

31. **Adequacy of Representation (Fed. R. Civ. P. 23(a)(4))**. Plaintiffs will fairly and adequately represent and protect the interests of the Class. Their interests are coincident and not antagonistic to those of Class Members. Plaintiffs have retained Counsel that are highly experienced in the prosecution of complex class action litigation and have no conflicts in undertaking this litigation. Plaintiffs intend to prosecute this action vigorously.

32. **Class certification under Federal Rule of Civil Procedure 23(b)(1), (2), (3):**

(b)(3). Due to the uniformity of the injuries experienced by Class Members (wrongful assessment of monetary fees) and the predominance over individual issues of common issues of fact and law, a class action is superior to all other available means for the fair and efficient adjudication of the controversy;

(b)(1) Adjudication of individual claims would be prohibitively expensive for individual Class Members and for the court system as a whole. Individualized litigation would create the risk of inconsistent or varying adjudication that could establish incompatible standards of conduct for Defendants and would create the risk of adjudications that would, as a practical matter, be dispositive of the interests of Class Members not parties to the adjudications. By contrast, the class action

device provides the benefits of a single adjudication, economies of scale, and comprehensive supervision by a single court; and

(b)(2) Defendants have acted on grounds generally applicable to all members of the Class regarding final injunctive and declaratory relief barring future improper billing practices.

COUNT I
(Unjust Enrichment and Constructive Trust)

33. Plaintiffs reallege and hereby incorporate by reference all prior paragraphs as if they were fully set forth herein.

35. As a direct result of their conduct set forth in this Consolidated Complaint, Defendants voluntarily accepted and retained the benefits of millions of dollars in total payments from Plaintiffs and the Class that they would not have otherwise have had. As such Defendants have been unjustly enriched.

36. Defendants caused Plaintiffs and the Class to pay additional monies that were not mandatory, despite Defendants' representations and/or misleading statements, and as a direct and proximate result of Defendants' illegal conduct, Plaintiffs and the Class paid and continue to pay special or practice assessment fees that are not mandatory as part of APA membership. Plaintiffs and the Class are entitled to a restoration of their monies.

37. Defendants voluntarily accepted and retained the benefit of Plaintiffs' and Class members' payments with knowledge and awareness that, as a result of their wrongdoing, Plaintiffs and the Class paid special or practice assessment fees they would not have otherwise paid.

38. Plaintiffs and the Class are entitled in equity to seek restitution and disgorgement from Defendants' wrongful profits, revenues or other financial benefits to the extent and in the amount to be proven at trial.

39. Plaintiffs seek the imposition of a constructive trust upon all unlawful or inequitable sums received by Defendants identified and traceable through payment of special or practice assessment fees paid by Plaintiffs and the Class.

COUNT II
(By Plaintiffs Levine and Fallenbaum Only for Violations Of California's Unfair Competition Law, Business and Professions Code §§ 17200, *et seq.*)

40. Plaintiffs Levine and Fallenbaum reallege and incorporate by reference all prior paragraphs as if they were fully set forth herein.

41. The practice by APA of representing an assessment dedicated to APAPO as being required for membership in APA when, in truth, APA membership renewal did not require payment of the APAPO practice assessment was an unfair business act or practice because the practice was unconscionable, immoral, deceptive, unfair, illegal, unethical, oppressive, and/or unscrupulous.

42. Moreover, whatever utility could be associated with Defendants' conduct is by the gravity of the consequences to Plaintiff and other Class members.

43. The practice by APA of representing an assessment dedicated to APAPO as being required for membership in APA when, in truth, APA membership renewal did not require payment of the APAPO practice assessment was an unlawful business act or practice because it was part of a subterfuge to defeat the restrictions on lobbying and lobbying fund raising for a 501(c)(3) organization like APA in violation of the Internal Revenue Code.

44. The practice by APA of representing an assessment dedicated to APAPO as being required for membership in APA, when, in truth, APA membership renewal did not require payment of the APAPO practice assessment was a fraudulent business act or practice because it was likely to deceive, and did in fact deceive, Plaintiffs and members of the Class.

45. Plaintiffs and the Class members have suffered injury in fact and have lost money

as a result of Defendant's unlawful, unfair, or fraudulent practices.

46. The above-described unfair and fraudulent business practices present a threat and likelihood of harm and deception to members of the Class in that Defendants has systematically perpetrated and continues to perpetrate the unfair and fraudulent conduct upon members of the public by engaging in the conduct described herein.

47. Pursuant to Business and Professions Code §§ 17200 and 17203, Plaintiffs, on behalf of themselves and the Class, seeks an order enjoining Defendants from continuing to engage in unlawful and fraudulent business practices. Plaintiffs also seek an order providing restitution and disgorgement of all profits relating to the subject vehicles, and injunctive and declaratory relief as may be appropriate.

COUNT III

(By Plaintiffs Levine and Fallenbaum Only for Violations of California's False Advertising Law, Business and Professions Code, §§ 17500, *et seq.*)

48. Plaintiffs Levine and Fallenbaum reallege and incorporate by reference all prior paragraphs as if they were fully set forth herein.

49. California Business and Professions Code § 17500 prohibits "unfair, deceptive, untrue or misleading advertising."

50. Defendants caused to be made or disseminated throughout California and the United States, advertising, publications, statements and/or other materials that were untrue or misleading, and which were known, or which by the exercise of reasonable care should have been known to Defendants, to be untrue and misleading to consumers and Plaintiff.

51. Defendant has violated section 17500 because the affirmative misrepresentations and omissions regarding the mandatory nature of the special or practice assessment fees were material and likely to deceive a reasonable consumer.

52. Plaintiffs and the Class have suffered an injury in fact, including the loss of money, as a result of Defendants' false advertising. In paying special or practice assessment fees during the relevant time period, Plaintiffs relied on the misrepresentations and/or omissions of Defendants regarding the mandatory nature of the fees. Defendants' material representations and/or omissions were false, as the special or practice assessment fees have been voluntary throughout the relevant time period. Had Plaintiffs known true facts concerning the voluntary nature of the assessment fees, they would not have paid them.

53. Plaintiffs request that this Court enter such orders or judgments as may be necessary to enjoin Defendants from continuing its false and misleading advertising and to restore to Plaintiffs and the Class all monies Defendants acquired by their false advertising, including restitution and/or disgorgement, and for such other relief set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

- A. An order certifying the Class and/or Subclasses and appointing Plaintiffs and their counsel to represent the Class;
- B. Monetary relief and/or equitable relief (including without limitation damages and/or restitution to Plaintiffs and the Class) payable into a common fund in an amount to be determined at trial;
- C. Statutory damages, including double and/or treble damages;
- D. Exemplary damages;
- E. Punitive damages;
- F. Interest;
- G. Attorneys' fees and costs of suit, including costs of notice, administration, and expert witness fees; and

H. Such other legal or equitable relief, including injunctive and/or declaratory relief, as the Court may deem appropriate.

JURY DEMAND

Plaintiffs demand trial by jury of all issues so triable.

Respectfully submitted,



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