

1 Patricia Carmichael, Esq. Bar Number: 146649  
2 **TUVERSON & HILLYARD**  
3 4675 MacArthur Center, Suite 650  
4 Newport Beach, California 92660  
5 Tel: (949) 752-7855 Fax: (949) 752-5437

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8 Liaison Counsel for HEALTH CARE PROVIDER/  
9 DIET CENTER Defendants

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF LOS ANGELES**

**IN RE DIET DRUG LITIGATION**

**THIS DOCUMENT PERTAINS TO THE  
MASTER CASE**

JUDICIAL COUNSEL COORDINATION  
PROCEEDING NO.  
**JCCP 4032**

MASTER COMPLAINT FILED JUNE 16,  
1998

NOTICE OF DEMURRER AND  
DEMURRER TO MASTER COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES

(Filed with Request for Judicial Notice  
and Motion to Strike)

DATE:  
TIME:  
DEPT: SE "D"

TRIAL DATE: none

TO ALL PLAINTIFFS AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that the demurrer of the HEALTH CARE PROVIDER/DIET CENTER Defendants to plaintiffs' master complaint will be heard at a date and time to be set by the Superior Court.

The demurrer is made on the grounds that the Master Complaint is uncertain and fails to state facts sufficient to constitute a cause of action against the HEALTH CARE PROVIDER/DIET CENTER Defendants as appears more fully in the attached Demurrer.

1 The demurrer is based on this Notice, the attached Demurrer, Memorandum of Points and  
2 Authorities, and on the documents of which judicial notice is requested in the Request for  
3 Judicial Notice which is served herewith as well as upon such other and further evidence  
4 and argument as may be submitted before the hearing of this matter.

5 DATED: August 14, 1998

TUVERSON & HILLYARD

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By: \_\_\_\_\_  
PATRICIA CARMICHAEL  
Liaison Counsel on Behalf of the  
HEALTH CARE PROVIDER/DIET  
CENTER Defendants Steering Committee

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**DEMURRER**

The HEALTH CARE PROVIDER/DIET CENTER Defendants demur to the Master Complaint as follows:

**GENERAL ALLEGATIONS**

1. Paragraphs 13, 17, and 38 of the general allegations are uncertain in that the meaning of the term "DIET CENTER" is uncertain. [California Code of Civil Procedure section 430.10 (f)].

**SECOND CAUSE OF ACTION**

2. The Second Cause of Action fails to state facts sufficient to constitute a cause of action against the HEALTH CARE PROVIDER/DIET CENTER Defendants. [California Code of Civil Procedure section 430.10(e)].

**SIXTH CAUSE OF ACTION**

3. The Sixth Cause of Action is uncertain in that it cannot be ascertained therefrom how or in what manner any plaintiff was injured by any conduct of the HEALTH CARE PROVIDER/DIET CENTER Defendants. [California Code of Civil Procedure section 430.10(f)].

4. The Sixth Cause of Action is uncertain in that it cannot be ascertained therefrom how the HEALTH CARE PROVIDER/DIET CENTER Defendants "willfully deceived" any plaintiff by concealing true facts concerning the pharmaceutical products as alleged in paragraph 106 in light of the allegations of paragraph 70. [California Code of Civil Procedure section 430.10(f)].

5. The Sixth Cause of Action is uncertain in that it cannot be ascertained therefrom how or in what manner the HEALTH CARE PROVIDER/DIET CENTER Defendants "willfully deceived" themselves as to the risks and consequences of the diet drugs as alleged in paragraph 109. [California Code of Civil Procedure section 430.10(f)].

6. The Sixth Cause of Action is uncertain in its use of the word "defendants" in paragraphs 106, 108, 109, and 110, in that it appears that the word defendants in those paragraphs is referring to the pharmaceutical defendants and not to any HEALTH CARE

1 PROVIDER/DIET CENTER Defendants. [California Code of Civil Procedure section  
2 430.10(f)].

3 7. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of  
4 action against the HEALTH CARE PROVIDER/DIET CENTER Defendants. [California  
5 Code of Civil Procedure section 430.10(e)].

6 **SEVENTH CAUSE OF ACTION**

7 8. The Seventh Cause of Action is uncertain in that it cannot be ascertained  
8 therefrom how or in what manner the HEALTH CARE PROVIDER/DIET CENTER  
9 Defendants "willfully deceived" themselves as alleged in paragraph 113. [California Code  
10 of Civil Procedure section 430.10(f)].

11 9. The Seventh Cause of Action is uncertain in that it cannot be ascertained  
12 therefrom how or in what manner the HEALTH CARE PROVIDER/DIET CENTER  
13 Defendants made representations with the intention of inducing their own reliance as  
14 alleged in paragraph 114. [California Code of Civil Procedure section 430.10(f)].

15 10. The Seventh Cause of Action fails to state facts sufficient to constitute a cause  
16 of action against the HEALTH CARE PROVIDER/DIET CENTER Defendants. [California  
17 Code of Civil Procedure section 430.10(e)].

18 **EIGHTH CAUSE OF ACTION**

19 11. The Eighth Cause of Action is uncertain in that it cannot be ascertained  
20 therefrom how or in what manner the HEALTH CARE PROVIDER/DIET CENTER  
21 Defendants deceived themselves as alleged in paragraph 122(a). [California Code of  
22 Civil Procedure section 430.10 (f)].

23 12. The Eighth Cause of Action is uncertain in that it cannot be ascertained  
24 therefrom how or in what manner the HEALTH CARE PROVIDER/DIET CENTER  
25 Defendants engaged in advertising programs designed to create the belief in themselves  
26 that use of the diet drugs was safe as alleged in paragraph 122( b). [California Code of  
27 Civil Procedure section 430.10 (f)].

28 ///





1 24. The Eleventh Cause of Action fails to state facts sufficient to constitute a cause of  
2 action against the HEALTH CARE PROVIDER/DIET CENTER Defendants. [California  
3 Code of Civil Procedure, section 430.10(e)].

4 DATED: August 14, 1998

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The Demurrer of the HEALTH CARE PROVIDER/DIET CENTER Defendants to the  
4 Second, Sixth, Seventh, Eighth and Ninth Causes of Action of the Master Complaint should  
5 be sustained without leave to amend. The Second Cause of Action fails to state facts  
6 sufficient to constitute a cause of action against the HEALTH CARE PROVIDER/DIET  
7 CENTER Defendants because they were not in the business of selling Phentermine and  
8 Fenfluramine. A products liability cause of action cannot be alleged against a prescriber  
9 of medications.

10 The Sixth, Seventh, Eighth, and Ninth Causes of Action suffer from common  
11 defects. Each of those causes of action alleges that the DIET CENTER defendants  
12 concealed information from themselves or otherwise mislead themselves. The conduct  
13 alleged is not sufficient to constitute a cause of action against the HEALTH CARE  
14 PROVIDER/DIET CENTER Defendants. Because of the explicit allegations in the  
15 Complaint concerning the supposed concealment activities of the pharmaceutical  
16 defendants, the HEALTH CARE PROVIDER/DIET CENTER Defendants respectfully  
17 submit that plaintiffs cannot allege any cause of action against them for deceit, negligent  
18 misrepresentation, unfair business practices or false advertising.

19 **1. THE TERM "DIET CENTERS" IS UNCERTAIN**

20 One of the fundamental vices of the Master Complaint is its use of the term "DIET  
21 CENTERS" to describe one class of defendants. The purpose of that term appears to be  
22 the avoidance of MICRA as to physicians doing business under fictitious business names.  
23 DIET CENTERS are ambiguously defined as "business entities" [paragraphs 17 and 38]  
24 who "prescribed" diet drugs (paragraphs 13 and 17)].

25 Only persons holding specified health care provider licenses may prescribe  
26 medication. California Business and Professions Code, section 2051 authorizes holders  
27 of physicians and surgeons certificates to use drugs in the treatment of physical and  
28 mental conditions. California Business and Professions Code Section 2052 makes it a

1 misdemeanor to prescribe drugs for any ailment without a valid license. Plaintiff's Master  
2 Complaint alleges that the prescription of diet drugs by the DIET CENTERS was negligent,  
3 not a crime, thereby implicitly admitting the HEALTH CARE PROVIDER status of the DIET  
4 CENTERS.

5 The documents attached to Defendants' Request for Judicial Notice pertain to a  
6 "business entity" which is a fictitious business name for a physician's medical practice.  
7 Defendants' purpose in requesting judicial notice of those documents is to provide a  
8 concrete illustration of the uncertainty of Plaintiff's use of the term "DIET CENTERS." By  
9 identifying that medical practice as a "business entity", Plaintiff is attempting to avoid  
10 application of MICRA to its conduct.

11 In its broadest usage, the term "DIET CENTER" could include such diverse entities  
12 as Weight Watchers, Jenny Craig, health and fitness centers, hypnotherapists, as well as  
13 medical doctors specializing in the treatment of obesity. The HEALTH CARE  
14 PROVIDER/DIET CENTER Defendants respectfully submit that Plaintiffs must be required  
15 to identify the DIET CENTER defendants as health care providers in order to eliminate the  
16 uncertainty of the Master Complaint's use of that term.

17 **2. PLAINTIFFS' SECOND CAUSE OF ACTION FAILS TO**  
18 **STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF**  
19 **ACTION AGAINST DIET CENTER DEFENDANTS AS SUCH**  
20 **HEALTH CARE PROVIDERS WERE NOT "IN THE**  
21 **BUSINESS OF SELLING" FEN-PHEN.**

22 The threshold question which must be answered before imposing products liability  
23 is whether the defendants are primarily engaged in the business of manufacturing and  
24 selling a product or primarily engaged in the provision of services. (Carmichael v. Reitz  
25 (1971) 17 Cal.App.3d 958.) Providers of services are not subject to products liability. (Ibid.)  
26 The law further is clear in California that a health care provider is not a supplier of a  
27 product but a provider of medical services and is not, therefore, subject to products  
28 liability. (See Hector v. Cedars-Sinai Medical Center (1986) 180 Cal.App.3d 493.)

1 "The health care provider ... stands subject to no such  
2 [products] liability." (1 McDonald, California Medical  
3 Malpractice Law and Practice, §4.16, p. 231.) "Instead, the  
4 answerability for damages of such a practitioner or institution  
5 will pivot on whether the conduct in respect to the selection,  
6 use or placement of the instrument or product conformed to or  
7 deviated from the applicable standard of care. (Inouye v. Black  
8 (1965) 238 Cal.App.2d 31, 33; Putensen v. Clay Adams, Inc.  
9 (1970) 12 Cal.App.3d 1062, 1084.) In short, products liability  
10 is not applied to health care providers. (Silverhart v. Mt. Zion  
11 Hospital (1971) 20 Cal.App.3d 1022, 1028; Hector v.  
12 Cedars—Sinai Medical Center (1986) 180 Cal.App.3d 493,  
13 507—508; Carmichael v. Reitz (1971) 17 Cal.App.3d 958,  
14 979.)" (1 McDonald, supra, at p. 231.)

15 As the court in Carmichael explained: "Of ... meaningful  
16 significance is the recognition that the essence of the  
17 transaction between the retail seller and the consumer relates  
18 to the article sold. The seller is in the business of supplying  
19 the product to the consumer. It is that, and that alone, for  
20 which he is paid. A dentist or a physician offers, and is paid  
21 for, his professional services and skill. That is the essence of  
22 the relationship between him and his patient. ... The  
23 physician's services depend upon his skill and judgment  
24 derived from his specialized training, knowledge, experience  
25 and skill. The physician prescribes the medicine in the course  
26 of therapy only as a chemical aid or instrument to achieve a  
27 cure."

28 (Carmichael v. Reitz, supra, 17 Cal.App.3d at 978—979.)

1           Accordingly, the court in Silverhart v. Mt. Zion Hospital (1971), 20 Cal.App.3d 1022,  
2 held that the doctrine of products liability could not be applied to a hospital that had  
3 furnished a defective surgical needle to an operating surgeon, as a hospital is not engaged  
4 in the business of selling the products or equipment it uses in providing medical services  
5 to its patients. (Id. at 1027.) Again, the court emphasized that the essence of the  
6 relationship between a hospital and its patients relates to the professional services it  
7 provides. (Ibid.)

8           Similarly, in Hector v. Cedars—Sinai Medical Center, *supra*, Plaintiff argued that the  
9 hospital should be considered a seller of a product rather than a provider of services  
10 because the hospital did not rely on its own skill and judgment in selecting the pacemaker  
11 in question. (Hector v. Cedars-Sinai Medical Center, *supra*, 180 Cal.App.3d at 505.) The  
12 court in Hector rejected Plaintiff’s argument, holding that the pacemaker had been  
13 provided to the patient as a necessary part of the patient’s medical treatment and that  
14 providing the pacemaker was integrally related to the hospital’s primary function of  
15 providing medical services. (Id. at 506.) The court concluded that the hospital was  
16 therefore not engaged in the business of selling pacemakers and could not be held liable  
17 under a products liability theory. (Id. at 507—508.)

18           Plaintiff’s Second Cause of Action against the Pharmaceutical Company  
19 Defendants and HEALTH CARE PROVIDER/DIET CENTER Defendants appears to be  
20 founded on the presumption that said defendants were suppliers of Fen-Phen. In fact, the  
21 allegations against the Pharmaceutical Company Defendants and HEALTH CARE  
22 PROVIDER/DIET CENTER Defendants are identical and concern generally the  
23 manufacture, design and sale of Fen—Phen.

24           As Plaintiffs’ complaint concedes repeatedly, however, at all times mentioned in  
25 Plaintiff complaint the drug combination commonly known as Fen—Phen was available  
26 only by prescription. In fact, Plaintiff’s complaint in paragraph 17 alleges that the HEALTH  
27 CARE PROVIDER/DIET CENTER Defendants prescribed and/or provided Fen—Phen to  
28 Plaintiff. Accordingly, as in Carmichael, approving the anorectic medication used during

1 the course of the Plaintiff's medical treatment required the specialized training, knowledge,  
2 expertise and skill of the HEALTH CARE PROVIDER/DIET CENTER Defendants and their  
3 employees. For both the HEALTH CARE PROVIDER/DIET CENTER Defendants and the  
4 patients, the purpose of the relationship was the care and treatment of the patients'  
5 medical problem of obesity, and the providing of a prescription or medication was merely  
6 incidental to the provision of medical services.

7 Based on Plaintiffs' own pleading, HEALTH CARE PROVIDER/DIET CENTER  
8 Defendants are therefore clearly providers of medical services. Accordingly, any liability  
9 of HEALTH CARE PROVIDER/DIET CENTER Defendants for damages must pivot on  
10 whether defendants' selection, use or placement of Fen—Phen conformed to or deviated  
11 from the applicable standard of care. Plaintiff's Second Cause of Action for general  
12 negligence arising out of products liability is thus clearly inapplicable to these defendants  
13 as products liability standards cannot be applied to a HEALTH CARE PROVIDER. This  
14 court should therefore sustain said defendants' demurrer to Plaintiff's second cause of  
15 action without leave to amend.

16 **3. THE SIXTH CAUSE OF ACTION FAILS TO STATE FACTS**  
17 **SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR DECEIT**  
18 **BY CONCEALMENT AS TO THE HEALTH CARE PROVIDER/DIET**  
19 **CENTER DEFENDANTS.**

20 **A. The only actionable conduct alleged in the Sixth Cause of**  
21 **Action is on the part of the pharmaceutical defendants.**

22 The general factual allegations appearing between paragraphs 39 and 81 clearly  
23 allege a pattern of conduct by the Pharmaceutical Company Defendants. That pattern of  
24 conduct allegedly included a failure to provide accurate information in the Physicians' Desk  
25 Reference (PDR) [paragraph 57]. Those paragraphs also allege that the pharmaceutical  
26 defendants concealed information from physicians concerning the alleged risks of the diet  
27 drugs. [E.g. paragraph 60, 71, 72, 76, and 78].

28 ///

1 Despite plaintiffs' repeated allegations of concealment of information from physicians,  
2 plaintiffs seek to hold the HEALTH CARE PROVIDER/DIET CENTER Defendants liable  
3 for deceit in the Sixth Cause of Action. Reading the Complaint as a whole, the allegations  
4 of the Sixth Cause of Action are fatally defective as to the HEALTH CARE  
5 PROVIDER/DIET CENTER Defendants.

6 Paragraph 106 of the Sixth Cause of Action alleges:

7 "Defendants, and each of them, from the time that the  
8 aforementioned products were first manufactured, marketed  
9 and distributed, and up to the present, willfully deceived  
10 plaintiff by concealing from the plaintiff, plaintiff's **physicians**  
11 and the general public, the true facts concerning said  
12 pharmaceutical products, which the defendants, as  
13 **manufacturers markers [sic] and distributors of the**  
14 **products**, had a duty to disclose." (Emphasis added.)

15 Although the Sixth Cause of Action may state a cause of action against the  
16 pharmaceutical defendants, it does not allege any conduct on the part of the HEALTH  
17 CARE PROVIDER/DIET CENTER Defendants. To the contrary, the Sixth Cause of Action  
18 affirmatively alleges that the HEALTH CARE PROVIDER/DIET CENTER Defendants were  
19 themselves the victim of concealment by the pharmaceutical defendants.

20 **B. The allegations of failure to warn do not apply to**  
21 **the HEALTH CARE PROVIDER/DIET CENTER**  
22 **Defendants.**

23 The allegations set forth in paragraphs 107 and 108 of the Master Complaint pertain  
24 to the package insert information supplied by the drug manufacturers, and which are  
25 published in the Physicians Desk Reference (PDR). These allegations are irrelevant to  
26 the HEALTH CARE PROVIDER/DIET CENTER Defendants. Plaintiff specifically alleges  
27 that the PDR publishes warnings "issued by drug manufacturers" (Master Complaint,  
28 Paragraph 107), and that the "manufacturers" were informed of certain facts, but failed to

1 warn the public. (Master Complaint, Paragraph 107.) There is no allegation the HEALTH  
2 CARE PROVIDER/DIET CENTER Defendants published information in the PDR.

3 Similarly, the allegation that the HEALTH CARE PROVIDER/DIET CENTER  
4 Defendants had possession of Adverse Drug Effects or withheld said information from the  
5 FDA, as set forth in paragraph 108 of the Master Complaint is fatally inconsistent with the  
6 allegations of the pharmaceutical defendants' concealment of the same information from  
7 physicians.

8 **4. THE SIXTH CAUSE OF ACTION IS UNCERTAIN.**

9 The Sixth Cause of Action, as pled, is uncertain in that it is inconsistent with the  
10 Master Complaint as a whole. The term "defendants" is defined in paragraph 4 of the  
11 Master Complaint as "all 'Pharmaceutical Company' Defendants . . . all 'Diet Center'  
12 Defendants and all 'Physician Defendant's" . . . The Sixth Cause of Action, however,  
13 states that "defendants" concealed the true facts concerning the diet drugs at issue from  
14 "the Plaintiff, Plaintiff's physicians and the general public." (Master Complaint, Paragraph  
15 106.) As pleaded, the Master Complaint alleges that HEALTH CARE PROVIDER/DIET  
16 CENTER Defendants concealed information from themselves.

17 Additionally, the Sixth Cause of Action is alleged against the "Pharmaceutical  
18 Company Defendants and HEALTH CARE PROVIDER/DIET CENTER Defendants Only",  
19 but utilizes the term "defendants" as a generic term. For example, in paragraph 109 of the  
20 Master Complaint, Plaintiff alleges that "defendants . . . conducted a sales and marketing  
21 campaign to promise [sic] the sale of the aforementioned drug products ...". It is uncertain  
22 whether Plaintiffs intend to allege that the HEALTH CARE PROVIDER/DIET CENTER  
23 Defendants and/or the Pharmaceutical Company Defendants were involved with this "sales  
24 and marketing campaign".

25 As the Sixth Cause of Action is uncertain in that it is inconsistent with the Master  
26 Complaint as a whole, and does not allow the HEALTH CARE PROVIDER/DIET CENTER  
27 Defendants to determine the specific factual allegations asserted against them, the  
28 Demurrer to this Cause of Action should be sustained. If Plaintiff is allowed to amend,

1 separate causes of action for fraudulent deceit should be to be pleaded against the  
2 Pharmaceutical Company Defendants, and the HEALTH CARE PROVIDER/DIET CENTER  
3 Defendants.

4 **5. THE SEVENTH CAUSE OF ACTION FAILS TO STATE FACTS**  
5 **SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR NEGLIGENT**  
6 **MISREPRESENTATION AGAINST THE HEALTH CARE PROVIDER/DIET**  
7 **CENTER DEFENDANTS.**

8 The tort of “negligent misrepresentation” is a form of the tort of fraud and deceit. In  
9 Walters v. Marler, (1978) 83 Cal.App.3d 1, 17, the Court of Appeal set forth the following  
10 elements of negligent misrepresentation as follows:

11 "The elements of a cause of action for negligent misrepresentation are:

- 12 '1. The defendant must have made a  
13 misrepresentation as to a past or existing  
14 material fact;
- 15 '2. The representation must have been untrue;
- 16 '3. Regardless of his actual belief the defendant must have made the  
17 representation without any reasonable ground for believing it to be  
18 true;
- 19 '4. The representation must have been made with the intent to induce  
20 Plaintiff to rely upon it;
- 21 '5. The Plaintiff must have been unaware of the falsity of the  
22 representation; he must have acted in reliance upon the truth of the  
23 representation and he must have been justified in relying upon the  
24 representation;
- 25 '6. And, finally, as a result of his reliance upon the truth of the  
26 representation, the Plaintiff must have sustained damage."

27 ///

28 ///

1 As with the Sixth Cause of Action, the Seventh Cause of Action alleges that the  
2 HEALTH CARE PROVIDER/DIET CENTER Defendants made false representations to  
3 themselves as the plaintiffs' physicians. [Paragraph 113 and 114.] Essentially, the Sixth  
4 and Seventh Causes of Action both allege self deception on the part of the HEALTH CARE  
5 PROVIDER/DIET CENTER Defendants. Defendants are unaware of the existence of such  
6 a tort.

7 In order to state a cause of action for negligent misrepresentation against the  
8 HEALTH CARE PROVIDER/DIET CENTER Defendants, plaintiffs must allege that those  
9 defendants made representations without any reasonable grounds to believe them to be  
10 true. However, plaintiffs have expressly alleged in paragraphs 113 and 114, and in many  
11 other places in the Master Complaint, that the plaintiffs' physicians were themselves the  
12 victims of misrepresentations by the pharmaceutical defendants. If the pharmaceutical  
13 defendants in fact concealed information and misrepresented information in their  
14 communications to physicians, as alleged, the physicians had a "reasonable ground" for  
15 believing the information they communicated to be true.

16 **6. THE SEVENTH CAUSE OF ACTION IS UNCERTAIN.**

17 The Sixth and Seventh Causes of Action do not allege any wrongful conduct by the  
18 HEALTH CARE PROVIDER/DIET CENTER Defendants. Rather, the only conduct alleged  
19 in those causes of action is on the part of the pharmaceutical defendants and each of  
20 those causes of action affirmatively alleges that the plaintiffs' physicians were misled by  
21 the pharmaceutical defendants. Therefore, the Seventh Cause of Action, like the Sixth,  
22 does not state facts sufficient to constitute a cause of action against the HEALTH CARE  
23 PROVIDER/DIET CENTER Defendants.

24 The Seventh Cause of Action is also uncertain. It is impossible for the HEALTH  
25 CARE PROVIDER/DIET CENTER Defendants to determine how they misrepresented  
26 information to themselves and how such a misrepresentation can form the bases of a  
27 cause of action against them.

28 **///**

1           **7. THE EIGHTH AND NINTH CAUSES OF ACTION FAIL TO**  
2           **STATE FACTS SUFFICIENT TO CONSTITUTE CAUSES OF**  
3           **ACTION AGAINST THE HEALTH CARE PROVIDER/DIET**  
4           **CENTER DEFENDANTS.**

5           **A. The Facts Alleged do not Justify Injunctive Relief.**

6           Plaintiff's Eighth and Ninth Causes of Action seek an injunction requiring defendants  
7 to "cease such unfair business practices in the future" [paragraphs 127 and 135].  
8 Paragraph 66 alleges that the manufacturers of fenfluramine and dexfenfluramine withdrew  
9 their products from the market in September, 1997. Once those products were withdrawn,  
10 it was not possible for any physician to prescribe Fen-phen for a patient. Similarly, none  
11 of the other claimed unfair business practices can continue since the fenfluramine products  
12 are not available. Since there is no ongoing course of conduct—indeed, not even the  
13 *possibility* of further conduct of the sort alleged, there is nothing for this Court to join.

14           **B. Restitution is an Ancillary Remedy**

15           The only other remedy available to private Plaintiff under sections 17200 and 17500  
16 is restitution. In People v. Thomas Shelton Powers, M.D., Inc., (1992) 2 Cal.App.4th 330,  
17 3 Cal. Rptr.2d 34, the Court of Appeal held:

18                   ". . . as a general rule a trial court, ruling on an unfair trade  
19                   practice, has the power to order disgorgement and/or restitu-  
20                   tion as a form of relief ancillary to an injunction." (emphasis  
21                   added) [2 Cal.App.4th at 341].

22           The allegedly deceptive conduct ended with the withdrawal of fenfluramine and  
23 dexfenfluramine from the market in September, 1997. There is no ongoing course of  
24 conduct for this Court to enjoin. Since there can be no injunction as to which this court  
25 might grant *ancillary* relief, restitution is not available to Plaintiff in this action.

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1                   **C.     The Eighth and Ninth Causes of Action Cannot be Amended to**  
2                   **State Causes of Action as to the HEALTH CARE PROVIDER/DIET**  
3                   **CENTER Defendants.**

4                   Plaintiff's Eighth and Ninth Causes of Action do not allege violations of Business  
5 and Professions Code sections 17200 and 17500 by the HEALTH CARE PROVIDER/DIET  
6 CENTER Defendants. Further, given their explicit factual allegations, Plaintiff cannot  
7 amend the Master Complaint to allege such claims. In order to assess the deficiencies of  
8 the Eighth and Ninth Cause of Action, it is necessary to analyze the Plaintiff' prefatory  
9 Factual Allegations.

10                  In paragraphs 18 through 36, Plaintiff identifies the corporate pharmaceutical  
11 defendants who manufactured each of the diet drugs at issue in this litigation. In paragraph  
12 12, Plaintiff specifically alleges the role of the officers and directors of those  
13 pharmaceutical corporations in the drugs "production and promotion."

14                  The specific allegations as to the identity and conduct of the HEALTH CARE  
15 PROVIDER/DIET CENTER Defendants appear in paragraphs 13, 17 and 38. The DIET  
16 CENTERS are described as "business entities" which, among other things, prescribed the  
17 diet drugs at issue. Since only licensed physicians may prescribe medications, the  
18 allegations of paragraph 13 and 18 establish that the DIET CENTERS must be operated  
19 or staffed by doctors.

20                  In paragraphs 52, 53, 57, 60, 68, 69, 70, 71, 72, and 76, Plaintiff allege that the  
21 "defendants" concealed information from the public and from physicians, with the result  
22 that physicians wrote millions of prescriptions for the diet drugs. There is no specific  
23 allegation in the Master Complaint establishing that the HEALTH CARE PROVIDER/DIET  
24 CENTER Defendants had possession of the knowledge which "defendants" allegedly  
25 concealed from physicians. A reading of the above listed paragraphs and the allegations  
26 of the Eighth and Ninth Causes of Action establishes that Plaintiffs have pled specific facts  
27 concerning allegedly unfair business practices and/or false advertising, by the  
28 pharmaceutical defendants. However, they have not alleged any such wrongful conduct

1 by the HEALTH CARE PROVIDER/DIET CENTER Defendants and given their specific  
2 allegations of concealment of information from physicians, they can not.

3 In paragraph 122, Plaintiffs describe the alleged violations of Business and  
4 Professions Code Section 17200. Unless Section 17200 is designed to protect against  
5 self-deception, the allegations of paragraph 122 do not charge the HEALTH CARE  
6 PROVIDER/DIET CENTER Defendants with an unfair business practice [See, for example,  
7 the allegations of paragraphs 122(a) and (b): conduct violating section 17200 includes  
8 “representing to Plaintiff, Plaintiff’s physicians, and the general public that said  
9 pharmaceutical products were safe ...” and “engaging in advertising programs designed  
10 to create the image, impression and belief by consumers, physicians and Diet Centers”  
11 that the use of the diet drugs was safe.]

12 Given the specific factual claims alleged against the pharmaceutical defendants,  
13 it is not possible for Plaintiffs to amend their Eighth and Ninth causes of Action to state  
14 claims against the HEALTH CARE PROVIDER/DIET CENTER Defendants without  
15 pleading facts directly opposite to those set forth in the Master Complaint. The claims in  
16 both causes of action are sham against the HEALTH CARE PROVIDER/DIET CENTER  
17 Defendants. The only knowledge or promotion of the drugs alleged is that of the  
18 pharmaceutical manufacturers and they are alleged to have intentionally concealed all  
19 adverse information from physicians and Diet Centers. The HEALTH CARE  
20 PROVIDER/DIET CENTER Defendants cannot be held liable for unfair competition or false  
21 advertising where they themselves are also alleged to have been victims of the  
22 pharmaceutical defendants’ concealment and misrepresentations.

23 **8. THE EIGHTH AND NINTH CAUSES OF ACTION ARE**  
24 **UNCERTAIN**

25 Paragraphs 122 and 131 describe identical conduct as violating both Business and  
26 Professions Code Sections 17200 and 17500. A review of those paragraphs demonstrates  
27 the uncertainty of the claims against the HEALTH CARE PROVIDER/DIET CENTER

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1 Defendants in the Eighth and Ninth Causes of Action. Those paragraphs allege unfair  
2 business practices and false advertising by:

3           “(a) Representing to Plaintiff, **Plaintiff’s physicians** and the  
4           general public that said pharmaceutical products were safe, fit  
5           and effective for human consumption, knowing that said  
6           representations were false, and concealing from the Plaintiff,  
7           Plaintiff’s physicians and the general public that said products  
8           had a serious propensity to cause injuries to users;

9           ’(b) Engaging in advertising programs designed to create  
10           the image, impression and belief by consumers, **physicians**  
11           **and diet centers** that the use of phentermine, fenfluramine  
12           and dexfenfluramine, both individually and in combination, was  
13           safe for human use, had fewer side effects and adverse  
14           reactions than other methods of weight loss, constituted a  
15           convenient, safe form of weight loss and would not interfere  
16           with daily life, even though the Defendants knew these to be  
17           false, and even though the Defendants had no reasonable  
18           grounds to believe them to be true;

19           ’(c) Purposely down playing and understating the health  
20           hazards and risks associated with phentermine, fenfluramine  
21           and dexfenfluramine;

22           ’(d) Issuing promotional literature deceiving potential users  
23           of phentermine, fenfluramine and dexfenfluramine by relaying  
24           positive information, including testimonials from satisfied  
25           users, and manipulating statistics to suggest widespread  
26           acceptability, while down playing the known adverse and  
27           serious health effects and concealing material relevant  
28           information regarding the safety of said products;

1 (e) Encouraging the combination of phentermine,  
2 fenfluramine and dexfenfluramine, even though the FDA had  
3 not approved the drugs for use in combination, and knowing  
4 that the combination drug regimen was specially hazardous,  
5 had not been systemically tested by appropriate clinical trials,  
6 and causes serious adverse health effects.” (emphasis added)

7 **A. Subparagraphs (a) and (b)**

8 Taken to their logical conclusion, subparagraphs (a) and (b) each allege that the  
9 HEALTH CARE PROVIDER/DIET CENTER Defendants misled themselves concerning the  
10 safety of the diet drugs. However, neither cause of action alleges any facts concerning  
11 this claimed self-deception. Defendants doubt that any such facts exist. Almost certainly,  
12 Plaintiffs intended these subparagraphs to allege misleading conduct by the  
13 pharmaceutical defendants, consistent with the allegations of paragraph 70 of the Master  
14 Complaint. The inclusion of HEALTH CARE PROVIDER/DIET CENTER Defendants in  
15 these causes of action, however, leads to the absurd allegation that the HEALTH CARE  
16 PROVIDERS fooled themselves about the safety of the Fen-Phen combination.

17 **B. Subparagraphs (c), (d) and (e)**

18 The allegations of these subparagraphs are irreconcilable with the following  
19 allegations of paragraph 70 of the Master Complaint:

20 “The Pharmaceutical Company Defendants had knowledge,  
21 prior to fenfluramine and dexfenfluramine being taking [sic] off  
22 the market, that the drugs, either individually, or in  
23 combination increased the risk of PPH in multiples much  
24 greater than disclosed, and also caused valve disease. The  
25 **manufacturers and distributors of phentermine,**  
26 **fenfluramine and dexfenfluramine, and each of them, did**  
27 **not adequately or appropriately disclose related drug**  
28 **information to physicians in the United States.** As a result,

1 physicians have been over-prescribing phentermine,  
2 fenfluramine, and dexfenfluramine to patients who have been  
3 greatly under informed regarding the risk of primary pulmonary  
4 hypertension, cardiac valve disease and neurotoxicity  
5 associated with the Defendants' diet pills." [emphasis added]

6 Subparagraphs (c), (d) and (e) may be adequately pleaded as to the pharmaceutical  
7 defendants, but they are fatally uncertain as to the HEALTH CARE PROVIDER/DIET  
8 CENTER Defendants. Paragraph 70 contains very specific allegations concerning the  
9 failure of the pharmaceutical defendants to disclose necessary risk information to  
10 physicians. The HEALTH CARE PROVIDER/DIET CENTER Defendants respectfully  
11 submit that Plaintiffs cannot amend the Eighth and Ninth Causes of Action to state causes  
12 of action against the HEALTH CARE PROVIDER/DIET CENTER Defendants without  
13 pleading inconsistent factual allegations.

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15 **9. THE ELEVENTH CAUSE OF ACTION IS UNCERTAIN**

16 The Eleventh Cause of Action suffers from the vices of the other causes of action  
17 addressed to the HEALTH CARE PROVIDER/DIET CENTER Defendants. In the Eleventh  
18 Cause of Action, the plaintiffs allege that the HEALTH CARE PROVIDERS "should have  
19 known" of the health hazards of the diet drugs at the time they prescribed them.  
20 [Paragraph 143.] Plaintiffs also allege that the HEALTH CARE PROVIDERS knew of the  
21 falsity of statements concerning the safety of the drugs and knew of serious hazards  
22 involved in their use. [Paragraph 147.] These allegations are irreconcilable with the  
23 allegations against the pharmaceutical company defendants.

24 Plaintiffs apparently seek to avoid the problems created by their inconsistent  
25 pleading by alleging in paragraph 141 that the HEALTH CARE PROVIDERS were the  
26 agents of the manufacturers. Although agency is frequently alleged in such a conclusory  
27 fashion, defendants respectfully submit that, given the specific allegations against the

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1 pharmaceutical company defendants in this action, plaintiffs must be required to allege a  
2 factual basis for the legal conclusion of agency.

3 Defendants believe that it is a matter of sufficiently common knowledge that the  
4 court may take judicial notice of it that physicians in private medical practices typically are  
5 not the agents of drug companies. Therefore, under Evidence Code section 451(f), the  
6 HEALTH CARE PROVIDER/DIET CENTER Defendants request that the court take judicial  
7 notice of that fact.

8 Even if the court is not willing to take judicial notice of that fact under Evidence  
9 Code section 451(f), the HEALTH CARE PROVIDER/DIET CENTER Defendants  
10 respectfully request the court to require plaintiffs to allege the facts underlying the claim  
11 of agency.

12 **10. COURT'S POWER**

13 California Code of Civil Procedure section 430.10 provides authority for the filing  
14 and sustaining of this demurrer.

15 **11. LEGAL STANDARD**

16 A demurrer is used to test the legal sufficiency of the complaint, and raises issues  
17 of law, not fact. (Beauchene v. Synanon Foundation, Inc., (1979) 88 Cal.App.3d 342, 344.)  
18 For this purpose, a demurrer assumes all material facts properly pleaded in the complaint  
19 are true. (Serrano v. Priest, (1971) 5 Cal.3d 585, 591, cert. denied, 432 U. S. 907.) A  
20 demurrer lies when Plaintiff's complaint fails to state facts sufficient to constitute a cause  
21 of action (C.C.P. Section 430.10(e)), or if the complaint is uncertain, ambiguous or  
22 unintelligible (C.C.P. Section 430.10(f)). A demurrer may be taken to the entire complaint  
23 or to any of the causes of action stated in the complaint. (C.C.P. Section 430.50(a).

24 When a demurrer is sustained, the Plaintiff must be allowed leave to amend only  
25 if there is a reasonable possibility that the defects can be cured by amendment. (Blank v.  
26 Kirwan, (1985) 39 Cal.3d 311, 319.) The burden is on Plaintiff of proving that a  
27 reasonable possibility exists. (Id.)

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**CONCLUSION**

The HEALTH CARE PROVIDER/DIET CENTER Defendants respectfully submit that the use of the term "DIET CENTERS" is uncertain and an improper effort to avoid application of MICRA to the conduct of HEALTH CARE PROVIDERS. The Second Cause of Action for negligence in the manufacture of a product fails to state facts sufficient to constitute a cause of action against HEALTH CARE PROVIDER/DIET CENTER Defendants which are providers of a medical service rather than a seller of a product. The Sixth and Seventh Causes of Action also must fail for uncertainty and lack of specificity. Further, the Eighth and Ninth causes of actions' allegation that information was concealed from the HEALTH CARE PROVIDER/DIET CENTER Defendants is factually irreconcilable with the claim that those same defendants somehow concealed information that was unknown to them. The Eleventh Cause of Action alleges the HEALTH CARE PROVIDER defendants should have known information allegedly concealed by the pharmaceutical defendants and therefore is uncertain and fails to state facts sufficient to constitute a cause of action against the HEALTH CARE PROVIDERS. For all these reasons, the HEALTH CARE PROVIDER/DIET CENTER Defendants request that the Court sustain this demurrer.

DATED: August 14, 1998

Respectfully submitted,

TUVERSON & HILLYARD

By: \_\_\_\_\_  
PATRICIA CARMICHAEL  
Liaison Counsel on Behalf of the  
HEALTH CARE PROVIDER/DIET  
CENTER Defendants Steering Committee