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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 MOTION AND MOTION TO
STRIKE PORTIONS OF THE MASTER
COMPLAINT [CALIFORNIA CODE OF
CIVIL PROCEDURE SECTIONS 435
AND 425.13]; MEMORANDUM OF
POINTS AND AUTHORITIES

(Filed with Request for Judicial Notice
and Demurrer)

DATE:
TIME:
DEPT: SE "D"

TRIAL DATE: none

TO ALL PLAINTIFFS AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that the motion of the health care provider and diet center defendants to strike portions of plaintiffs' master complaint will be heard at a date and time to be set by the Superior Court.

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1 The motion to strike is made on the grounds that portions of the Master Complaint
2 are sham and that the Master Complaint seeks punitive damages against health care
3 providers in violation of California Code of Civil Procedure section 425.13. The motion is
4 based on this Notice of Motion, the attached Motion to Strike, and Memorandum of Points
5 and Authorities, Declaration and exhibits and on the documents of which judicial notice is
6 requested in the Request for Judicial Notice which is served herewith as well as upon such
7 other and further evidence and argument which may be submitted before the hearing of
8 this matter.

9 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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MOTION TO STRIKE

The HEALTH CARE PROVIDER/DIET CENTER Defendants hereby move to strike the following portions of plaintiffs' Master Complaint:

1. The Eighth Cause of Action [paragraphs 119 through 127 of the Master Complaint];
2. The Ninth Cause of Action [paragraphs 128 through 136 of the Master Complaint]; and,
3. Paragraphs 4 and 9 of the Prayer
4. Paragraphs 151 of the Master Complaint.

DATED: August 14, 1998

TUVERSON & HILLYARD

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

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs' Master Complaint seeks punitive damages against health care providers in violation of California Code of Civil Procedure section 425.13. In the eighth and ninth causes of action, it seeks an injunction against conduct which, by the allegations of the complaint, has already ended. The eighth and ninth causes of action are therefore sham and should be stricken.

1. THE MASTER COMPLAINT SEEKS PUNITIVE DAMAGES AGAINST HEALTH CARE PROVIDERS IN VIOLATION OF CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.13

In paragraph 81 of the prefatory Factual Allegations, plaintiffs allege that defendants' conduct was "despicable." In Paragraph 151 they allege malice, fraud, oppression in inadequate conclusory language. In paragraph 4 of the prayer, plaintiffs seek punitive damages. The prayer does not specify which damages are sought as to which causes of action. For purposes of this motion, the HEALTH CARE PROVIDERS/DIET CENTER defendants assume that plaintiffs may be seeking punitive damages against them as to the sixth cause of action [Deceit by Concealment], the eighth cause of action [Violation of Business and Professions Code section 17200], and the ninth cause of action [Violation of Business and Professions Code section 17500]. Since plaintiffs have not complied with Code of Civil Procedure section 425.13, paragraph 4 of the prayer should be stricken.

The uncertainty of plaintiffs' Master Complaint's use of the term "Diet Center" is addressed in the Demurrer filed by the HEALTH CARE PROVIDER/DIET CENTER Defendants. The vice of that uncertainty is especially evident as to the issue of punitive damages. Plaintiffs allege that the defendant Diet Centers are "business entities" which prescribed diet drugs to plaintiffs [paragraphs 13, 17 and 38]. Under California law, only

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1 persons holding specified health care provider licenses may prescribe medications.
2 [See, for example, California Business and Professions Code, sections 2051 and 2052]

3 Since only health care providers can prescribe medications, paragraphs 13 and 17
4 of the Master Complaint establish that the Diet Centers are health care providers and
5 plaintiffs cannot seek punitive damages against them except in compliance with Code of
6 Civil Procedure section 425.13.

7 **2. PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER**
8 **BUSINESS AND PROFESSIONS CODE SECTIONS 17200**
9 **AND 17500**

10 The Master Complaint is not clear as to the causes of action (or defendants) as to
11 which plaintiffs seek punitive damages. The HEALTH CARE PROVIDER/DIET CENTER
12 Defendants, submit the following authority establishing that such damages are not
13 permitted under Business and Professions Code sections 17200 and 17500.

14 **A. Business and Professions Code Section 17200**

15 Business and Professions Code sections 17200, et seq. define and prohibit unfair
16 competition. Remedies for violation of the statute are set forth in sections 17203 and
17 17206. The primary remedy provided by section 17203 is injunctive. In addition, in
18 actions brought on behalf of the people of the State of California, section 17206 provides
19 for imposition of a civil penalty. Neither statute permits a private citizen to recover any
20 kind of damages, whether special, general or punitive. As the Supreme Court noted in
21 Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254, 10 Cal. Rptr. 2d 538: ". . .
22 damages are not available under section 17203." (2 Cal. 4th at 1266)

23 Since Business and Professions Code sections 17200, et seq. do not provide for
24 damages in favor of private citizens, plaintiffs can not claim punitive damages under those
25 sections in this action.

26 **B. Business and Professions Code Section 17500**

27 Business and Professions Code sections 17500, et seq. define and prohibit false
28 advertising. Sections 17535 and 17536 are the counterparts to sections 17203 and 17206.

1 They provide for injunctive and restitutionary remedies for private citizens and permit
2 imposition of civil penalties in actions brought in the name of the people of the State of
3 California. Neither section 17535 nor section 17536 permits recovery of any kind of
4 damages, including punitive; therefore, plaintiffs can not seek punitive damages under
5 those sections in this action.

6 **3. THE EIGHTH AND NINTH CAUSES OF ACTION ARE SHAM**

7 **A. There Is No Ongoing Course of Conduct as to Which an**
8 **Injunction May Issue**

9 Plaintiffs' eighth and ninth causes of action seek an injunction requiring defendants
10 to "cease such unfair business practices in the future" [paragraphs 127 and 135].
11 Paragraph 66 alleges that the manufacturers of fenfluramine and dexfenfluramine withdrew
12 their products from the market in September, 1997. Once those products were withdrawn,
13 it was not possible for any physician to prescribe Fen-phen for a patient. Similarly, none
14 of the other claimed unfair business practices can continue since the fenfluramine products
15 are not available. Therefore, no injunction is necessary or appropriate.

16 **B. Restitution Is an Ancillary Remedy**

17 The only other remedy available to private plaintiffs under sections 17200 and
18 17500 is restitution. In People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App.
19 4th 330, 3 Cal. Rptr. 2d 34, the Court of Appeal held:

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

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

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1 **C. The Master Complaint Establishes That the Eighth and Ninth**
2 **Causes of Action Are Sham as to the Diet Center Defendants**

3 Plaintiffs' eighth and ninth causes of action do not allege violations of Business and
4 Professions Code sections 17200 and 17500 by the Diet Center defendants. Further,
5 given their explicit factual allegations, plaintiffs can not amend the Master Complaint to
6 allege such claims. In order to assess the deficiencies of the eighth and ninth causes of
7 action, it is necessary to analyze the plaintiffs' prefatory Factual Allegations.

8 In paragraphs 18 through 36, plaintiffs identify the corporate pharmaceutical
9 defendants who manufactured each of the diet drugs at issue in this litigation. In
10 paragraph 12, plaintiffs specifically allege the role of the officers and directors of those
11 pharmaceutical corporations in the drugs' "production and promotion".

12 The specific allegations as to the identity and conduct of the Diet Center defendants
13 appear in paragraphs 13, 17 and 38. The Diet Centers are described as "business
14 entities" which, among other things, prescribed the diet drugs at issue. Since only licensed
15 physicians may prescribe medications, the allegations of paragraph 13 and 18 establish
16 that the Diet Centers must be operated or staffed by doctors.

17 In paragraphs 52, 53, 57, 60, 68, 69, 70, 71, 72, and 76, plaintiffs allege that the
18 "defendants" concealed information from the public and from physicians, with the result
19 that physicians wrote millions of prescriptions for the diet drugs. There is no specific
20 allegation in the Master Complaint establishing that the Diet Center defendants had
21 possession of the knowledge which "defendants" allegedly concealed from physicians.
22 A reading of the above-listed paragraphs and the allegations of the eighth and ninth
23 causes of action establishes that plaintiffs have pleaded specific facts concerning allegedly
24 unfair business practices and/or false advertising, by the pharmaceutical defendants.
25 However, they have not alleged any such wrongful conduct by the Diet Centers and given
26 their specific allegations of concealment of information from physicians, they can not.

27 In paragraph 122, plaintiffs describe the alleged violations of Business and
28 Professions Code section 17200. Unless section 17200 is designed to protect against

1 Code, those causes of action are sham as against the Diet Center defendants. For all
2 these reasons, the HEALTH CARE PROVIDER/DIET CENTER defendants request that
3 the Court grant this motion.

4 DATED: August 14, 1998

Respectfully submitted,
TUVERTSON & HILLYARD

7 By: _____
8 PATRICIA CARMICHAEL
9 Liaison Counsel on Behalf of the
10 HEALTH CARE PROVIDER/DIET
11 CENTER Defendants Steering Committee

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