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Submitted on Behalf of the Plaintiffs' Executive Committee
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11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF LOS ANGELES

13
14 IN RE DIET DRUGS LITIGATION)

JUDICIAL COUNSEL COORDINATION
PROCEEDING NO. JCCP 4032

15)
16)
17 THIS DOCUMENT PERTAINS TO)
THE MASTER CASE)
18)

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
HEALTH CARE PROVIDER/DIET
CENTER DEFENDANTS' DEMURRER
TO MASTER COMPLAINT AND
MOTION TO STRIKE

19)
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22)
DATE : October 30, 1998
TIME : 10:00 a.m.
DEPT : SE "D"
JUDGE: Daniel Pratt
DATE ACTION FILED: June 16, 1998
TRIAL DATE : None

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1 COME NOW PLAINTIFFS in Opposition to HEALTH CARE PROVIDER/DIET
2 CENTER Defendants' Demurrer to Plaintiffs' Master Complaint and Motion to Strike.

3 This Opposition is based on the following grounds:

4 1. Plaintiff has adequately defined the term "Diet Center" in the Master
5 Complaint;

6 2. The Second Cause of Action against the Diet Center Defendants
7 sufficiently states a cause of action because it sounds in negligence not strict liability;

8 3. The Sixth through Ninth Causes of Action are not uncertain and
9 sufficiently state a cause of action against the Diet Center Defendants because the
10 Master Complaint, when read as a whole, refers to and alleges acts by the Diet Center
11 Defendants that support Causes of Action for Deceit by Concealment, Negligent
12 Misrepresentation, and Violations of Business and Professions Code §§ 17200 and
13 17500;

14 4. The Eighth and Ninth Causes of Action state sufficient facts to support a
15 claim for injunctive relief because injunctive relief insures that fenfluramine and
16 dexfenfluramine remain withdrawn from the marketplace;

17 5. The Eighth and Ninth Causes of Action state sufficient facts to support a
18 claim for restitution since restitution is available whether or not injunctive relief is
19 granted;

20 6. The Eleventh Cause of Action for Medical Negligence is sufficiently
21 certain to constitute a cause of action against Defendant Health Care Providers.

22 7. The Motion to Strike is baseless and must be denied.

23 This Opposition is further based upon the attached Memorandum of Points and
24 Authorities, the pleadings, papers, and files in this matter, and upon such other oral
25 and documentary evidence as may be presented at the hearing of the subject Motion
26 and this Opposition thereto.

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3 DATED: October 2, 1998

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Respectfully submitted,

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GANCEDO & NIEVES LLP

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By: _____
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ROBINSON, PHILLIPS & CALCAGNIE
Plaintiffs' Liaison Counsel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The complaint at issue in the Demurrer and Motion to Strike brought by the
4 Health Care Provider/Diet Center Defendants is plaintiffs' Master Complaint. The
5 Master Complaint was drafted for use by all Fen-Phen plaintiffs in California against all
6 Fen-Phen defendants in California. By its very nature the complaint must be pleaded
7 broadly and generally because every plaintiff and every defendant, including the
8 Health Care Provider/Diet Center defendants, has slightly different facts.

9 The essence of defendants' Demurrer and Motion to Strike is twofold: they argue
10 that Diet Centers and Health Care Providers are essentially one and the same and
11 therefore no products liability action can be maintained against them. Secondly, they
12 argue that the Master Complaint is defective because it alleges the impossibility of the
13 Diet Center defendants concealing information from themselves and/or misleading
14 themselves. For the reasons set forth below, defendants' Demurrer and Motion to
15 Strike are not well taken and plaintiffs may proceed on all causes of action.

16 In the event the court determines that any of the allegations in the Complaint are
17 uncertain, or fail to properly state a cause of action, plaintiffs request leave to amend
18 the Master Complaint to cure any perceived defects.

19 **II. A DEMURRER IS INTENDED TO TEST THE LEGAL SUFFICIENCY OF**
20 **THE PLEADING, NOT TO WEIGH THE EVIDENCE AND MAKE FACTUAL FINDINGS.**

21 "It is not the ordinary function of a demurrer to test the truth of the plaintiff's
22 allegations or the accuracy with which he describes the defendant's conduct. A
23 demurrer tests only the legal sufficiency of the pleading." Committee on Children's
24 Television, Inc. v. General Foods Corp. (1983) 35 C.3d 197, 213. "The sole issue
25 raised by a general demurrer is whether the facts pleaded state a valid cause of
26 action." Weil & Brown, Civil Procedure Before Trial (Rutter Group 1998) ¶7.44, citing
27 Del E. Webb Corp. v. Structural Materials Co. (1981) 125 C.A.3d 593, 604. For
28 purposes of testing the sufficiency of the cause of action, the demurrer admits the truth

1 of all material facts. Serrano v. Priest (1971) 5 C.3d 584, 591. “A demurrer should not
2 be sustained without leave to amend if the complaint states a cause of action under any
3 theory or if there is a reasonable possibility the defect can be cured by amendment.
4 Seidler v. Municipal Court for Beverly Hills Judicial District of Los Angeles County
5 (1993) 12 C.A.4th 1229 citing Minsky v. City of Los Angeles (1974) 11 C.3d 113, 118;
6 Kite v. Campbell (1983) 142 C.A.3d 883, 896; and, Young v. Haines (1986) 41 C.3d
7 883, 896.

8 **III. THE TERM “DIET CENTERS” IS CERTAIN AND UNAMBIGUOUS.**

9 Defendants argue that the Diet Centers are defined in the Master Complaint as
10 “business entities who prescribed diet drugs.” (Demurrer, p.8, In. 23-24). Because
11 only Health Care Providers may prescribe drugs, the argument goes, then Diet Centers
12 are Health Care Providers. Therefore, the Master Complaint must be required to
13 identify Diet Centers as Health Care Providers to make the term “Diet Centers” more
14 certain.

15 Defendants’ argument lacks merit because it misstates how Diet Centers are
16 defined in the Master Complaint. Diet Centers, as defined in the Master Complaint, are
17 not limited to “business entities who prescribed diet drugs” as defendants claim.
18 Instead, in paragraph 17 of the Master Complaint (page 5, lines 6-7), the Diet Center
19 defendants are defined as “business entities which prescribed and/or provided
20 fenfluramine, phentermine and/or dexfenfluramine to plaintiff.” In paragraph 13 (p. 4,
21 In. 20-22) the Diet Center defendants are further defined as entities “engaged in the
22 business of prescribing, formulating, distributing, supplying and selling fenfluramine,
23 phentermine and dexfenfluramine.” Diet Centers include weight management facilities,
24 weight control groups and other non-medical entities whose business is to help people
25 lose weight. Diet Centers also include physician operated medical weight loss groups.
26 The term is much broader than defendants contend, and must necessarily be broad to
27 include all the various types of Diet Centers in California which were involved in the
28 distribution of Fen-Phen. Diet Centers are therefore not Health Care Providers as the

1 term "Diet Center" is defined in the Master Complaint, and the term needs no further
2 definition.

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4 **IV. PLAINTIFFS' SECOND CAUSE OF ACTION FOR NEGLIGENCE**
5 **STATES SUFFICIENT FACTS TO CONSTITUTE A CAUSE OF ACTION.**

6 Defendants' attack on the second cause of action for negligence misses the
7 mark entirely. Defendants' argue that since Diet Centers are a provider of services and
8 are not engaged in the business of manufacturing and selling a product then they are
9 not subject to products liability. In this argument they rely on Carmichael v. Reitz
10 (1971) 17 C.A.3d 958, Hector v. Cedars-Sinai Medical Center (1986) 180 C.A.3d 493,
11 and Silverhart v. Mt. Zion Hospital (1971) 20 C.A.3d 1022. In Carmichael the court
12 held that a doctor was not strictly liable for providing the drug Enovid to a patient.
13 Hector and Silverhart hold that a hospital is not strictly liable for providing a pacemaker
14 and a defective surgical needle, respectively.

15 For purposes of the second cause of action it is irrelevant whether the diet
16 centers are characterized as engaged in the business of manufacturing and selling a
17 product or as a provider of medical services. Assuming for purposes of addressing
18 defendants' attack on this cause of action that Diet Centers are providers of medical
19 services, all of the cases cited by defendants stand for the proposition that a provider of
20 services is not strictly liable for a defective product. Plaintiffs are not alleging,
21 however, that the Diet Center defendants are strictly liable. The second cause of
22 action is not a strict liability cause of action. The cause of action sounds in negligence,
23 and a provider of services is still responsible for the consequences of any negligent
24 acts they may have committed. San Diego Hospital Association et al., v. The Superior
25 Court of San Diego County (1994) 30 C.A.4th 8, 17.

26 Paragraph 87 and 88 of the Master Complaint (p. 21, Ins. 6-14) properly plead a
27 negligence cause of action against the Diet Center Defendants. In those paragraphs it
28 is alleged that the Diet Center Defendants breached their duty to properly market, sell,

1 and prescribe Fen-Phen and failed to adequately warn of the risks and dangers of the
2 products. These allegations are pled against the Pharmaceutical company defendants
3 and Diet Center defendants generally, and against the Diet Center defendants
4 specifically. The second cause of action is clearly sufficient to withstand the instant
5 demurrer.

6 **V. THE SIXTH THROUGH NINTH CAUSES OF ACTION ARE NOT**
7 **UNCERTAIN AND SUFFICIENTLY STATE A CAUSE OF ACTION AGAINST THE**
8 **DIET CENTER DEFENDANTS**

9 **A. THE MASTER COMPLAINT ALLEGES AND REFERS TO ACTS**
10 **BY THE DIET CENTER DEFENDANTS WHICH ESTABLISH A SUFFICIENT BASIS**
11 **FOR THE SIXTH THROUGH NINTH CAUSES OF ACTION.**

12 Defendants read the Master Complaint too narrowly. In the Master Complaint
13 there are numerous references to acts by the Diet Centers which form the basis for
14 causes of action for Deceit by Concealment, Negligent Misrepresentation, and
15 Violations of Business and Professions Code §17200 and §17500. Specifically, Diet
16 Centers are alleged to have, among other things:

- 17 • Widely advertised and marketed Fen-Phen as safe and effective weight
18 control medications. (¶40, p.10, Ins. 16-18)
- 19 • Actively encouraged the combination use of the drugs, though not
20 approved by the FDA, because it would increase sales of each individual
21 drug (¶46, p.11, Ins 19-22)
- 22 • Failed to disclose known material risks to consumers. (¶49, p. 12, Ins. 2-
23 7)
- 24 • Aggressively marketed and sold these products by falsely misleading
25 potential users about the dangers(¶50, p.12, Ins. 8-11)
- 26 • Downplayed and understated the health hazards and risks associated
27 with the drugs, and deceived potential users through promotional
28 literature. (¶53, p.12, In.25 - p. 13, In. 5) and,

- 1 • Falsely misrepresented the adverse health effects in materials they
2 produced (¶54, In. 6-10)

3 It is clear from the above that the Master Complaint, when read as a whole,
4 contains sufficient allegations to support causes of action for deceit, misrepresentation
5 and unfair business practices against both the Pharmaceutical Company defendants
6 and the Diet Center Defendants. While the Diet Center Defendants and the
7 Pharmaceutical Defendants share some of the same deceptions, misrepresentations
8 and unfair business practices with regard to Fen-Phen, there are also differences which
9 will be borne out through discovery. At this early pleading stage, though, before any
10 discovery has commenced to flush out the particular deceptions and fraud by the
11 various defendants, the causes of action for Deceit by Concealment, Negligent
12 Misrepresentation, and Unfair Business Practices certainly contain sufficient
13 allegations against the Diet Center Defendants to support these causes of action. This
14 is particularly true in light of the recent Supreme Court decision in Stop Youth
15 Addiction, Inc., v. Lucky Stores, (1998) 17 C.4th 553 which affirmed the broad reach of
16 unfair business practices claims. Defendants demurrer, therefore, is without merit and
17 plaintiffs should be allowed to proceed on these causes of action.

18 **B. THERE IS NO SELF-DECEPTION IN THE MASTER COMPLAINT**
19 **AS DEFENDANTS CONTEND BECAUSE THE DIET CENTERS AND HEALTH CARE**
20 **PROVIDERS ARE SEPARATE AND DISTINCT DEFENDANTS.**

21 The sixth through ninth causes of action for Deceit by Concealment, Negligent
22 Misrepresentation, and Violations of Business and Professions Code §17200 and
23 §17500 are specifically pled against the Pharmaceutical Company defendants and the
24 Diet Center defendants, only. These causes of action are not pled against the Health
25 Care Provider defendants. Yet, defendants in their demurrer repeatedly and
26 mistakenly refer to and combine “Health Care Provider/Diet Center Defendants” as the
27 subject of these causes of action. In so doing, they make the specious argument that
28 the “health care provider/diet center defendants” concealed information from

1 themselves and made false representations to themselves as plaintiffs' physicians.

2 The Diet Center defendants and the Health Care Provider defendants are not
3 one and the same. Causes of action in the Master Complaint are pled against each of
4 them separately. Causes of Actions against Diet Centers include Negligence (2nd
5 Cause of Action), Deceit by Concealment (6th Cause of Action)), Negligent
6 Misrepresentation (7th Cause of Action), Violation of B&P §§17200 and 17500 (8th and
7 9th Causes of Action) and Loss of Consortium (10th Cause of Action). By contrast, only
8 Loss of Consortium and Medical Negligence (11th Cause of Action) are pled against the
9 Health Care Provider Defendants.

10 Moreover, as explained above, the Master Complaint plainly states that the Diet
11 Center defendants did more than just prescribe diet drugs. Diet Centers also provided,
12 marketed, distributed, advertised and sold diet drugs. In doing so, the Diet Center
13 defendants falsely misled the public about the drugs' dangers by promoting the drugs
14 as safe and effective (Master Complaint, ¶¶ 40, 50), encouraged the use of the drugs in
15 combination with knowledge that such practice was not approved by the FDA (M.C.
16 ¶46), underplayed the health hazards and risk associated with the drugs (M.C. ¶53),
17 and falsely misrepresented the adverse health effects in materials they produced (M.C.
18 ¶54). Consequently, there is no immovable nexus between Diet Centers and
19 physicians as defendants would have the court believe. True, the diet drugs were
20 required to be prescribed and a Diet Center would need the services of a prescribing
21 physician to prescribe the drugs, but that does not make the Diet Center Defendants
22 and the Health Care Provider Defendants interchangeable.

23 Because the Health Care Provider Defendants are separate and distinct from
24 Diet Center Defendants, the fact that Diet Centers may have concealed information and
25 misrepresented information to physicians and other members of the public does not
26 lead to the conclusion, as defendants contend, that the Diet Center defendants
27 concealed information from themselves and misrepresented facts to themselves.
28 Indeed, as the Master Complaint is pled, there is no self-deception.

1 **VI. THE EIGHTH AND NINTH CAUSES OF ACTION SUFFICIENTLY**
2 **STATES FACTS TO SUPPORT CLAIMS FOR INJUNCTIVE RELIEF AND**
3 **RESTITUTION.**

4 **A. INJUNCTIVE RELIEF**

5 The drug manufacturers voluntarily withdrew fenfluramine and dexfenfluramine
6 from the market in September 1997. As the withdrawal was voluntary, there is nothing
7 to prevent the drug manufacturers from restoring the drugs to the marketplace at any
8 time. Injunctive relief is sought to ensure that the drug manufacturer's voluntary
9 withdrawal remains in effect, and to prevent these harmful drugs from returning to the
10 marketplace in the future. Consequently, plaintiffs' prayer for injunctive relief must
11 remain a viable prayer for relief.

12 **B. RESTITUTION**

13 Defendants mislead this Court in relying on People v. Thomas Shelton Powers,
14 M.D., Inc., (1992) 2 C.A.4th 330 for the proposition that restitution is not an available
15 remedy when injunctive relief is not available. The Supreme Court in ABC International
16 Traders, Inc. v. Matsushita Electric Corporation of America (1997) 14 C.4th 1247
17 addressed the Powers case and specifically stated that nothing in the Powers opinion
18 stands for that proposition. The Supreme Court states: "As an injunction had also been
19 sought and granted in that case, the appellate court described the order for
20 disgorgement or restitution as a 'form of relief ancillary to an injunction' (id. at p. 341),
21 but nothing in the [Powers] opinion states or suggests restitution under 17203 is
22 restricted to such a circumstance." ABC International, supra, at p. 1270. The Supreme
23 Court concludes that "section 17203 authorizes a trial court to order restitution of
24 money lost through acts of unfair competition, as defined in section 17200, whether or
25 not the court also enjoins future violations." ABC International, supra, at p. 1271.
26 Accordingly, restitution is an appropriate remedy with or without injunctive relief, and
27 defendants' demurrer on this point is groundless.

28 **VII. THE ELEVENTH CAUSE OF ACTION IS SUFFICIENTLY CERTAIN TO**

1 **CONSTITUTE A CAUSE OF ACTION FOR MEDICAL NEGLIGENCE.**

2 Defendants claim the eleventh cause of action for medical negligence is
3 uncertain because they contend plaintiffs take an inconsistent position in the cause of
4 action as compared to the allegations against the Pharmaceutical Defendants. It has
5 long been the law in California that plaintiffs may plead alternative or inconsistent
6 theories in a complaint. The Court in Rader Company, Inc. v. Stone, et al. (1986) 178
7 C.A.3d 10 succinctly states the rule as follows: “Where the exact nature of the facts is
8 in doubt, or where the exact legal nature of plaintiff’s right and defendant’s liability
9 depend on facts not well known to the plaintiff, the pleading may properly set forth
10 alternative theories in varied and inconsistent counts.” Rader, supra, at p. 29.

11 Moreover, the eleventh cause of action pleads enough facts to certainly show
12 that defendant Health Care Providers failed to meet the standard of care. In paragraph
13 144 of the eleventh cause of action plaintiffs allege that defendant Health Care
14 Providers “carelessly and negligently examined, informed, treated, diagnosed,
15 prognosed, prescribed medication to and otherwise treated and rendered medical
16 services and care to plaintiff.” In paragraph 146 it is alleged that defendant Health
17 Care Providers failed to fully disclose the hazards of the drugs misrepresented the
18 safety of the drugs. These allegations alone are certain and sufficient to constitute a
19 cause of action for medical negligence against defendant Health Care Providers.

20 **VIII. DEFENDANTS’ MOTION TO STRIKE IS WITHOUT MERIT AND MUST**
21 **BE DENIED.**

22 **A. CODE OF CIVIL PROCEDURE §425.13**

23 In their Motion to Strike defendants seek to strike plaintiffs’ claim for punitive
24 damages against the Health Care Provider defendants on the grounds that plaintiffs
25 have not complied with Code of Civil Procedure section 425.13. Contrary to
26 defendants’ assertions, plaintiffs have very carefully addressed this issue in paragraph
27 151 of the Master Complaint as follows:

28 “Plaintiff is unable to assert punitive and/or exemplary damages against

1 Health Care Providers in this Master Complaint. Based upon the
2 allegations set forth in this Master Complaint, Plaintiff will seek leave to
3 amend said claims in the future to allege punitive damages under C.C.P.
4 §415.13(a).”

5 As plainly expressed in Paragraph 151, plaintiffs assert punitive damages
6 against all defendants and acknowledge they cannot, without amending the Complaint,
7 assert punitive damages against the Health Care Provider defendants. The allegation
8 asserts that plaintiffs will amend their complaint to plead punitive and/or exemplary
9 damages against the Health Care Provider as required by Code of Civil Procedure
10 section 425.13. The allegation is properly pled, and Defendants request to strike this
11 paragraph is baseless.

12 Equally without basis is Defendants’ argument that Diet Centers are Health Care
13 Providers because they prescribe diet drugs to plaintiffs and therefore cannot have
14 punitive damages allegations alleged against them absent compliance with Code of
15 Civil Procedure §425.13. As explained above, because a Diet Center may utilize a
16 physician to prescribe diet medication does not lead to the conclusion that Diet Centers
17 are Health Care Providers. As alleged in the Master Complaint Diet Centers provided,
18 distributed, advertised, marketed, supplied and sold diet drugs in ways which constitute
19 sufficient basis for a claim for punitive and/or exemplary damages against them.

20 **B. PUNITIVE DAMAGE REMEDY UNDER BUSINESS AND**
21 **PROFESSIONS CODE SECTIONS 17200 AND 17500.**

22 The Eighth and Ninth Causes of Action for violation of Business and Professions
23 Code §17200 and §17500 request injunctive relief, restitution and disgorgement of ill
24 gotten gain from the unfair business practices (Master Complaint, ¶127, ¶135, ¶136).
25 Punitive damages are not claimed under those sections. Defendants argument is
26 therefore pointless and unnecessary.

27 **C. THE EIGHTH AND NINTH CAUSES OF ACTION ARE NOT**
28 **SHAM.**

1 In their Motion to Strike Defendants regurgitate verbatim the contentions in their
2 demurrer that 1) Injunction is not an available remedy, 2) Since injunction is not
3 available restitution is also not available, and 3) the Eighth and Ninth Causes of Action
4 do not allege violations of Business and Professions Code §17200 and §17500 by the
5 Diet Center defendants. Plaintiffs have fully addressed each of these contentions
6 above. In a nutshell, each of defendants' arguments is baseless for the following
7 reasons:

- 8 • injunctive relief is available because the withdrawal of the diet drugs from the
9 marketplace was voluntary and a prayer for injunctive relief provides a remedy in
10 the event defendants decide unilaterally to restore the diet drugs to the
11 marketplace.
- 12 • The Supreme Court in ABC International Traders, Inc. v. Matsushita Electric
13 Corporation of America (1997) 14 C.4th 1247 specifically allows restitution
14 regardless of whether injunctive relief is available.
- 15 • Since the Diet Center defendants are separate and distinct from the Health Care
16 Provider defendants there can be no self-deception as defendants contend. As
17 pled in the Master Complaint, the Diet Center defendants actively encouraged
18 the use of the drugs in combination with knowledge that such practice was not
19 approved by the FDA, aggressively marketed and sold the products by falsely
20 misleading the public about the drugs' dangers, underplayed the health hazards
21 and risk associated with the drugs, and falsely misrepresented the adverse
22 health effects in materials they produced. Such acts clearly form the basis of
23 proper unfair business practice causes of action.

24 **IX. CONCLUSION**

25 Courts disfavor sustaining demurrers without leave to amend unless it is clear
26 that no amendment could possibly state a cause of action. Moore v. Morhar (1976) 65
27 C.A.3d 896; Seidler v. Municipal Court for Beverly Hills Judicial District of Los Angeles
28 County (1993) 12 C.A.4th 1229. If the court determines that any of the allegations in

1 the Complaint are uncertain, or fail to properly state a cause of action, plaintiffs
2 respectfully request leave to amend the Master Complaint to cure any perceived
3 defects.

4 For the foregoing reasons, plaintiffs respectfully request that defendants'
5 demurrer and motion to strike be denied.

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7 DATED: October 2, 1998

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Respectfully submitted,

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GANCEDO & NIEVES LLP

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By: _____
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