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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 COUNTY OF LOS ANGELES

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12 COORDINATION PROCEEDING) JUDICIAL COUNCIL
SPECIAL TITLE (RULE 1550)(b)) COORDINATION PROCEEDING
13 DIET DRUG LITIGATION) 4032

14 _____)
In Re:) HONORABLE JUDGE DANIEL
15) S. PRATT
DEPARTMENT "D"

16 DIET DRUG CASES)
REPLY OF HEALTH CARE
17 PROVIDER/DIET CENTER
DEFENDANTS TO
18 THIS DOCUMENT PERTAINS TO THE)
MASTER CASE) PLAINTIFFS' OPPOSITION
TO DEFENDANTS' DEMURRER
AND MOTION TO STRIKE

19)
20) DATE: October 30, 1998
TIME: 10:00 A. M.
DEPT.: SE "D"
21)
22) Trial Date: None

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25 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

26 The HEALTHCARE PROVIDER/DIET CENTER DEFENDANTS respond as
27 follows to plaintiffs' combined opposition to defendants' demurrer
28 and motion to strike:

1 **I. INTRODUCTION**

2 Plaintiffs admit that one subset of the defendants identified as
3 DIET CENTERS is composed of "physician operated weight loss groups"
4 (Opp., p.5, l.22). Notwithstanding that admission, they argue that
5 the demurrer of the HEALTH CARE PROVIDER/DIET CENTER DEFENDANTS
6 should be overruled, apparently because the allegations against the
7 DIET CENTER DEFENDANTS may apply to the other subsets of defendants
8 included within the term DIET CENTERS.

9 This demurrer is not brought on behalf of any category of
10 defendants other than physicians who allegedly prescribed Fen-Phen
11 for their patients. Specifically, none of these demurring defendants
12 are "non-medical entities whose business is to help people lose
13 weight." (Opp., p.5, l. 21.) Since this demurrer is brought only on
14 behalf of the HEALTHCARE PROVIDER subset of DIET CENTER DEFENDANTS,
15 plaintiffs' opposition does not establish any legal basis on which
16 the demurrer might be overruled. The claim that the master complaint
17 may not be uncertain as to non-medical DIET CENTERS does not lead to
18 the conclusion that it is certain as to the HEALTH CARE PROVIDERS
19 included within that category.

20 **II. PLAINTIFFS ARE BOUND BY THE INCONSISTENT FACTUAL ALLEGATIONS**
21 **MOST PREJUDICIAL TO THEM**

22 Although plaintiffs are permitted to allege inconsistent legal
23 theories, they may not allege inconsistent facts. The master
24 complaint is riddled with inconsistent factual allegations as set
25 forth in defendants' demurrer. It is well established that
26 plaintiffs are bound by the facts least favorable to them. In Manti
27 v. Gunari, (1970) 5 Cal.App.3d 442, the court of appeal held:

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1 "While inconsistent theories of recovery are
2 permitted (citation), a pleader cannot blow hot
3 and cold as to the facts positively stated.
4 (citations) To verify inconsistent facts
5 alleged in a complaint indicates perjury in the
6 matter. But the rule also applies to unverified
7 pleadings. The code requirement is to state the
8 facts, not theories In reference to
9 the antagonistic allegations in the single cause
10 of action the court is required to take as true
11 the averments in the complaint

12 which bear most strongly against the pleader, when sustained by the
13 allegations of the complaint as specifically admitted in the answer
14 (citation)." (Id., 5 Cal.App.3d at 449, 450.)

15 **A. Plaintiffs are bound by the following allegations:**

16 1. The *Physicians' Desk Reference* publishes warnings
17 issued by drug manufacturers (master complaint, paragraph 57);

18 2. The *Physicians' Desk Reference* contained allegedly
19 inaccurate information concerning the number of PPH in the time
20 period of 1989 through 1997 (master complaint, paragraph 57);

21 3. Internal manufacturer memos in 1995 and 1996 discussed
22 the need to update the warning in the *Physicians' Desk Reference*
23 (master complaint, paragraph 58);

24 4. The PHARMACEUTICAL DEFENDANTS became aware as early as
25 March 1996 of "a striking and significant relationship between these
26 drugs and defects of the valves of the heart" (master complaint,
27 paragraph 60);

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1 5. The product warnings about PPH in effect at relevant
2 times were inadequate to alert prescribing physicians about the known
3 pulmonary, cardiac and neurological risks of these drugs (master
4 complaint, paragraph 69);

5 6. Plaintiffs' physicians would not have prescribed these
6 drugs if they had been aware of the true facts concerning the dangers
7 of the products (master complaint, paragraph 110);

8 7. Information concerning product risks was concealed
9 from plaintiffs' physicians (master complaint, paragraphs 57, 60, 68,
10 69, 70, 71, 72, 78, 106, 109, 110, 113, 114, 121 and 131); and

11 8. Information concerning product risks was concealed from
12 plaintiffs' physicians by the pharmaceutical defendants (master
13 complaint, paragraphs 57 and 60).

14 **B. The Foregoing Allegations Preclude Any Theory Of Liability**
15 **Against The HEALTHCARE PROVIDER/DIET CENTER DEFENDANTS**

16 Plaintiffs specifically and repeatedly allege that critical
17 information was concealed from their physicians. They allege that
18 the physicians would not have prescribed Fen-Phen if that information
19 had not been concealed from them. In some cases, plaintiffs
20 specifically allege that information was concealed by the
21 PHARMACEUTICAL DEFENDANTS. In others, that allegation is implied.

22 The above allegations conclusively negate any theory of
23 liability against the HEALTHCARE PROVIDER DEFENDANTS, including those
24 alleged to be a subset of the DIET CENTER DEFENDANTS.

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26 **III. PLAINTIFF'S SECOND CAUSE OF ACTION IS IMPROPER AS NEGLIGENCE IN**
27 **THE PROVISION OF MEDICAL SERVICES IS GOVERNED SOLELY BY**
28 **MALPRACTICE STANDARDS**

1 As plaintiffs apparently concede in their opposition, the law is
2 clear in California that a health care provider is not a supplier of
3 a product but rather a provider of medical services and accordingly
4 is not subject to strict products liability. (See Hector v. Cedars-
5 Sinai Medical Center (1986) 180 Cal.App.3d 493.) Accordingly,
6 "[l]iability for prescribed or dispensed drugs . . . will turn on
7 malpractice rather than strict product liability concepts."
8 (McDonald, 1 California Medical Malpractice Law and Practice, §4.16,
9 p. 231.)

10 "In a malpractice action the activity lies in the realm of
11 medical treatment and is governed by malpractice standards."
12 (Putensen v. Clay Adams, Inc. (1970) 12 Cal.App.3d 1062, 1084.) The
13 duty of a provider of medical services is therefore to exercise in
14 diagnosis and treatment that reasonable degree of skill, knowledge
15 and care ordinarily possessed and exercised by members of the medical
16 profession under similar circumstances in the locality. (Bardessono
17 v. Michels (1970) 3 Cal.3d 780, 788.)

18 In their opposing papers, the plaintiffs ask the court to assume
19 that defendants are providers of medical services and go on to
20 acknowledge that defendants are therefore not subject to strict
21 products liability. Plaintiffs' error, however, comes in their
22 assumption that a provider of medical services can somehow be held
23 liable for the provision of those services without applying either
24 strict liability or malpractice standards.

25 / / /

26 In support of that contention, plaintiffs cite the case of San
27 Diego Hospital Association, et al. v. Superior Court of San Diego
28 County (1994) 30 Cal.App.4th 8, for the proposition that there is a

1 separate negligent products liability standard applicable to the
2 provision of medical services. In that case, a doctor injured while
3 performing surgery sued claiming the injuries were caused by the
4 hospital's failure to maintain a KTP laser. (Ibid.) In issuing a
5 writ of mandate directing the superior court to sustain the defendant
6 hospital's demurrer without leave to amend, the court of appeal
7 simply held strict products liability did not apply to the hospital's
8 conduct. (Id. at 17.) Not only was the hospital not a provider of
9 medical services to the physician plaintiff, however, there further
10 was no issue before the court as to the hospital's liability under
11 any standard other than strict products liability. (Ibid.)

12 As plaintiffs fail to dispute that DIET CENTER DEFENDANTS are
13 providers of medical services, the determination as to whether said
14 defendants were negligent in the provision of medical services is
15 clearly governed by malpractice standards. California law does not
16 recognize a separate general, non-malpractice negligence cause of
17 action against health care providers arising out of the provisions of
18 medical services. Rather, the determination of whether a health care
19 provider was negligent in providing medical services is governed
20 solely by whether that provider exercised in diagnosis and treatment
21 that reasonable degree of skill, knowledge and care ordinarily
22 possessed and exercised by members of the medical profession under
23 similar circumstances in the locality.

24 Plaintiffs' attempt to circumvent the governing standard for
25 medical malpractice is thus completely inappropriate. This court
26 should therefore sustain defendant's demurrer to plaintiffs' second
27 cause of action without leave to amend.

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1 **IV. THIS COURT SHOULD STRIKE PLAINTIFF'S PUNITIVE DAMAGES**
2 **ALLEGATIONS**

3 Plaintiffs apparently contend that the motion to strike punitive
4 damages should be denied because it is not necessary. Defendants
5 will be happy to enter into a written stipulation with Plaintiffs
6 that no punitive damages are sought against any HEALTHCARE PROVIDER
7 DEFENDANTS, including those alleged to be a subset of the DIET CENTER
8 DEFENDANTS. Defendants note that paragraph 81 of the Master
9 Complaint is a claim for punitive damages and is included by
10 reference in every cause of action. Therefore, absent a stipulation
11 by plaintiffs, a judicial determination of the motion to strike the
12 punitive damages is necessary.

13 **V. THIS COURT SHOULD STRIKE PLAINTIFF'S BUSINESS AND PROFESSIONS**
14 **CODE CLAIMS**

15 Plaintiffs' analysis of the state of the law with regard to the
16 availability of injunctive and restitutionary relief is correct.
17 However, these claims suffer from the same defect as all the other
18 causes of action alleged against DIET CENTER DEFENDANTS. The
19 allegations listed in Section 1(A) conclusively negate any claim
20 under Business and Professions Code §§17200 or 17500.

21 **VI. CONCLUSION**

22 The HEALTHCARE PROVIDER/DIET CENTER DEFENDANTS respectfully
23 submit that their demurrer should be sustained without leave to amend
24 because plaintiffs cannot cure the defects in the Master Complaint
25 without pleading even more inconsistent factual allegations.

26 DATED: October 23, 1998 TUVERTSON & HILLYARD

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BY: _____
Patricia Carmichael

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Liaison Counsel on behalf
of the HEATHCARE PROVIDER/
DIET CENTER DEFENDANTS
Steering Committee

PC/REB/bh/97179/REPLY.OPP