

1 Thomas M. Moore (Bar No. 116059)
2 Mario Horwitz (Bar No. 110965)
3 Haight, Brown & Bonesteel, L.L.P.
4 1620 26th Street, Suite 4000 North
5 Santa Monica, California 90404-4013
6 Telephone: (310) 449-6000

7 Charles F. Preuss (Bar No. 45783)
8 Michael J. Stortz (Bar No. 139386)
9 Jonathan M. Rolbin (Bar No. 160462)
10 PREUSS, WALKER & SHANAGHER, L.L.P.
11 225 Bush Street, 15th Floor
12 San Francisco, California 94104-4207
13 Telephone: (415) 397-1730

14 Attorneys for Defendant,
15 SMITHKLINE BEECHAM CORPORATION, AND
16 LIAISON COUNSEL ON BEHALF OF THE
17 PHENTERMINE DEFENDANTS
18

19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

DIET DRUG LITIGATION)
Judicial Council Coordination Proceeding
No. 4032

THIS DOCUMENT RELATES TO ALL)
ACTIONS.)
Date: January 22, 1999
Time: 9:00 a.m.
Dept: SE"D"
Judge: Hon. Daniel Solis Pratt

OPPOSITION OF THE PHENTERMINE
DEFENDANTS TO PLAINTIFFS'
MOTION TO AMEND THE MASTER
COMPLAINT TO ADD "MARKET
SHARE" ALLEGATIONS [Filed
Concurrently With Defendants' Request To
Take Judicial Notice]

TO ALL COUNSEL AND TO THEIR ATTORNEYS OF RECORD:

COME NOW, those parties collectively designated as the "phentermine defendants"
in these coordinated proceedings, and submit the following opposition to

1 plaintiffs' Motion To Amend To Add Market Share Allegations.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: January 15, 1999

HAIGHT, BROWN & BONESTEEL, L.L.P.

By: _____

Thomas M. Moore
Mario Horwitz
Attorneys for Defendant,
SMITHKLINE BEECHAM
CORPORATION, AND LIAISON
COUNSEL ON BEHALF OF THE
PHENTERMINE DEFENDANTS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I.**

4 **INTRODUCTION AND SUMMARY OF ARGUMENT**

5 The collective plaintiffs in this coordinated proceeding have moved the Court for an
6 order allowing them to immediately amend the so-called “Master Complaint” in order to
7 add allegations to that pleading which would purportedly support a theory of “market
8 share” liability, as articulated by the California Supreme Court in Sindell v. Abbott
9 Laboratories (1980) 26 Cal.3d 588.

10 Mindful of the general liberality with which the trial court is to assess a request to
11 amend, the phentermine defendants nevertheless oppose plaintiffs’ motion on the following
12 grounds:

- 13 • Plaintiffs’ motion is premature. The most essential prerequisite for the
14 application of the “market share” doctrine is a significant and litigation-wide
15 inability of plaintiffs, through no fault of their own, to identify the
16 manufacturers of a product, made from an identical formula, which is alleged to
17 have caused a singular risk. At the present stage of this litigation, there is at best
18 insufficient information to allow the Court to determine the justification for the
19 doctrine in these cases.
- 20 • Even assuming, *arguendo*, that there is a theoretical basis for “market share”
21 liability, it would be improper, inappropriate, and counterproductive for the
22 Court to use the “Master Complaint” as the vehicle for the imposition of such
23 liability. Utilization of the doctrine, if it applies at all, should be effectuated on
24 a case-specific basis, with the requirement that individual plaintiffs maintain the
25 burden of proving that identification is an impossibility.

1 **II.**

2 **A “MARKET SHARE” AMENDMENT IS PREMATURE**

3 It is undisputed that “as a general rule, the imposition of liability depends upon a
4 showing *by plaintiff* that his or her injuries were caused by the act of the defendant or by
5 an instrumentality under the defendant’s control.” Sindell v. Abbott Laboratories, *supra* at
6 597 (emphasis added). If a plaintiff has no evidence linking a particular injury-causing
7 product to a specific defendant, an essential element of the cause of action is lacking, and
8 judgment must be entered against the plaintiff who has the burden of proof on the issue.
9 See, e.g., Garcia v. Joseph Vince Co. (1978) 84 Cal.App.3d 868; Miller v. Schlitz Brewing
10 Co. (1956) 142 Cal.App.2d 109.

11 Although personal injury litigation involving prescription drugs and medical devices
12 is by now commonplace, the Supreme Court of California has abrogated the general rule
13 on identification in these cases only once, with respect to a single product,
14 diethylstilbestrol (DES). In Sindell v. Abbott Laboratories, *supra*, (1980) 26 Cal.3d 588,
15 the Supreme Court issued an opinion establishing the so-called “market share” doctrine in
16 the context of answering the following narrow question:

17 “*[M]ay a plaintiff injured as the result of a drug administered*
18 *to her mother during pregnancy, who knows the type of drug*
19 *involved but cannot identify the manufacturer of the precise*
20 *product, hold viable for her injuries a maker of a drug*
21 *produced from an identical formula?”*

22 26 Cal.3d at 593 (emphasis added).

23 The instant Motion requests leave to immediately amend the “Master Complaint” to
24 add the Sindell doctrine in diet drug cases. The plaintiffs contend that the only facts which
25 are a prerequisite to the application of that doctrine are that (1) the product (phentermine)
26 is “fungible,” (2) the product is, in one or more cases, “untraceable” to a specific
27 manufacturer or manufacturers; and (3) the complaint joins a “substantial share” of the

1 phentermine “marketplace.” Having purportedly drafted such allegations into the proposed
2 amended master pleading, the plaintiffs submit that it would be an abuse of discretion for
3 this Court not to grant the pending Motion.

4 Plaintiffs fail to recognize the most essential prerequisite to the imposition of
5 “market share” liability, to-wit, that the inability of plaintiffs to identify phentermine
6 manufacturers, through no fault of their own, is so pervasive throughout the diet drug
7 litigation that the situation compels, for reasons of public policy, an abrogation of the usual
8 and well-defined burden of proof in products liability cases.

9 The Court need only look to the facts and circumstances underlying the Sindell
10 opinion to understand the vast differences between the obstacles to identification in cases
11 involving DES and those confronting plaintiffs in the diet drug litigation. It was those
12 specific circumstances that caused the Supreme Court in Sindell to apply the “market
13 share” doctrine for the first and only time in the context of litigation involving prescription
14 drugs. The Supreme Court noted:

15 “Here. . .the circumstances appear to render identification of
16 the manufacturer of the drug ingested by plaintiff’s mother
17 impossible by either plaintiff or defendants, and it cannot
18 reasonably be said that one is in a better position than the
19 other to make the identification. *Because many years elapsed*
20 *between the time the drug was taken and the manifestation of*
21 *plaintiff’s injuries, she, and many other daughters of mothers*
22 *who took DES, are unable to make such identification.”*

23 26 Cal.App.3d at 600 (emphasis added).

24 In Sindell, the majority opinion was largely predicated upon the policy analysis
25 articulated by the author of a law review article commenting upon the specific evidentiary
26 hurdles faced by so-called “DES daughters.” As both the author and the Supreme Court
27

1 observed, the problem of identification in DES cases was both substantial and litigation-
2 wide. The author concluded:

3 “[T]he unique legal problem in the DES cases concerns the
4 crucial issue of cause-in-fact. Because of the time lapse from
5 the intake of DES to the manifestation of injury, and the
6 further interval before recognition of DES as the probably
7 causative agent, a *majority of plaintiffs cannot identify the*
8 *manufacturer of the drug ingested by their mothers.*”

9 Comment, “DES and a Proposed Theory of Enterprise Liability.” 46 Fordham Law Review
10 (1978) 936, 972 (emphasis added).

11 In product liability cases where obstacles to identification are neither significant nor
12 litigation-wide, the courts in California have rejected application of the “market share”
13 doctrine as a threshold matter. As an example, Judge (now Justice) John E. Benson,
14 presiding over coordinated asbestos litigation, rejected application of Sindell to cases
15 where, despite having exercised “reasonable diligence,” some plaintiffs were unable to
16 identify either all or the majority of asbestos suppliers. Justice Benson observed:

17 “Asbestos litigation does not meet the criteria for market
18 share liability imposed by the Sindell decision. Initially, and
19 perhaps most importantly, asbestos litigation does not involve
20 an inability of the plaintiffs to identify the
21 manufacturers/suppliers of the asbestos products alleged
22 responsible for their injuries. . . . This is in sharp contrast to
23 the situation which prevails in DES litigation where the
24 “. . .majority of plaintiffs cannot identify the manufacturer of
25 the drug ingested by their mothers.” [Citations.] *It was to the*
26 *magnitude of the identification problem existing throughout*
27 *DES litigation that the Sindell majority responded. It is very*

1 *unlikely that traditional tort concepts would have been*
2 *rejected by the Sindell majority had the DES problem of*
3 *identification been a matter of a few isolated cases. The*
4 *scope and magnitude of the problem of identification as it*
5 *exists in the DES litigation simply does not exist in asbestos*
6 *litigation."*

7 In Re: Complex Asbestos Litigation, 828-684, General Order No. 21, at p. 2 (emphasis
8 added). See, defendants' Request to Take Judicial Notice, Exhibit "A."

9 Before this Court grants plaintiffs' motion to amend the master pleading in order
10 that it may allege a "market share" theory, the following question must be answered: does
11 the problem of an absolute inability of plaintiffs to identify phentermine manufacturers in
12 this litigation exist, and if so, is it sufficiently pervasive as to justify the wholesale
13 abrogation of the usual burden of proof on the issue?

14 At the very least, this Court has insufficient information with which to conclude that
15 "market share" is even theoretically applicable in the diet drug context. Specifically, the
16 Court has incomplete or insufficient information with regard to the following questions:

- 17 • How many of the diet drug cases currently on file actually involve phentermine,
18 either alone, or in combination with fenfluramine or dexfenfluramine? This
19 question is particularly relevant in that there have been a number of cases in
20 which all phentermine defendants have been dismissed because the plaintiff only
21 ingested drugs manufactured by co-defendant AMERICAN HOME
22 PRODUCTS.
- 23 • In how many of the cases where a plaintiff allegedly took a phentermine product
24 is the plaintiff currently unable to identify one or more phentermine
25 manufacturers?

- 1 • In cases where phentermine was ingested, in how many of those lawsuits are one
- 2 or more named phentermine defendants reasonably excluded from identification
- 3 by virtue of such facts as the dates of ingestion, dosage, or other matters?
- 4 • In those cases where phentermine was ingested, what steps have plaintiffs taken,
- 5 if any, to ascertain the identity of the manufacturers?
- 6 • Is there any case where a plaintiff has fully exhausted every possible means of
- 7 identification, without being able to identify the phentermine manufacturer?
- 8 • How many cases involve the absolute inability of plaintiffs to identify
- 9 phentermine manufacturers despite every reasonable effort?

10 The indisputable fact is that the Court has no clear-cut answers to any of the above
11 questions. What we do know is that there has been little, if any, substantive discovery
12 undertaken by plaintiffs to date designed to facilitate identification. We also know that,
13 even by the estimates of the plaintiffs’ attorneys themselves, identification is not
14 anticipated to be a problem in the vast majority of cases. Indeed, despite the lack of
15 litigation-wide discovery, the estimates of plaintiffs’ attorneys with regard to their ability to
16 affirmatively identify phentermine manufacturers seems to run between 50% and 90%.
17 Certain plaintiffs’ attorneys have candidly admitted that the number of cases without full
18 phentermine identification are likely to represent a “handful” of the Court’s entire caseload,
19 once discovery is completed.¹

20
21 ¹ By way of example, plaintiffs’ liaison counsel, Mark P. Robinson, Jr., indicated in
22 his Declaration dated November 6, 1998, that even without discovery from either phentermine
23 manufacturers or diet centers, his office was able to identify proper phentermine defendants
24 in approximately 70% of their cases. See, Declaration of Mark P. Robinson, Jr., attached to
25 Plaintiffs’ Request for Judicial Notice in Support of Notice to Amend Complaint as Exhibit 1, Page
26 2. More telling is the position of the Plaintiffs’ Executive Committee contained in their opposition
27 to the phentermine defendants Petition for General Order No. 6, wherein they argued that
28 “. . .discovery will narrow the possible providers of phentermine for any given case substantially.
Indeed, it is expected that such efforts *will result in a phentermine manufacturer being identified
in most cases.*” See, Defendants’ Request to Take Judicial Notice Exhibit “B,” Page 6.

Further, plaintiffs are just now receiving responses to their discovery to prescribing
physician defendants, which responses have proven to be dispositive in some cases. For example,
Dr. Skversky regularly prescribed only certain phentermine products. Thus, manufacturers and
distributors of *other* phentermine should be dismissed from those cases.

1 agreed to by all of the party categories, was to streamline the pleadings process, promote
2 consistency, and to ultimately convenience the parties and the Court. At the same time,
3 there was a recognition that certain plaintiffs might have case-specific issues which require
4 allegations or causes of action adjunct to the Master Complaint. As a result, plaintiffs who
5 “adopt” the Master Complaint are allowed to indicate in their “adoption forms” not only
6 those causes of action in the master pleading applicable to their case, but also that there are
7 additional theories of recovery unique to their factual circumstances.

8 This Court must determine whether the “market share” doctrine, irrespective of its
9 substantive validity, is most appropriately a matter to be contained in the generic Master
10 Complaint, or more properly appended to the pleadings of individual plaintiffs who
11 contend that they are unable to identify the manufacturer of the phentermine they ingested.

12 As a threshold matter, it cannot be disputed that the phentermine identification
13 “problem” is not a generic issue. Even under the most dire predictions of plaintiffs
14 inability to identify phentermine manufacturers, it is clear that a “market share” claim, if
15 viable as a matter of law, would not impact on the vast majority of diet drug cases filed in
16 California. Accordingly, even if this Court feels compelled to allow the amendment of
17 some pleading, that pleading should not be the Master Complaint. The function of and
18 motivations behind the Master Complaint should remain pristine, and limited to those
19 allegations which have universal, or near universal application.

20 A second, more important, reason exists for the Court to deny amendment of the
21 Master Complaint. This Court has recognized on numerous occasions that the diet drug
22 litigation cannot be expeditiously resolved without a substantial effort to identify
23 phentermine defendants where that it possible. There is ample evidence that identification
24 can be made in the vast majority of diet drug cases to the extent that plaintiffs make the
25 effort to diligently pursue available evidence. Indeed, this Court has taken the appropriate
26 step of focusing substantive discovery in these cases on the identification issue until
27 March 1, 1999. Because of the Court’s efforts in this regard, plaintiffs, for the first time

1 since the inception of the coordinated proceedings have been motivated to thoroughly
2 investigate the origins of the phentermine they allegedly ingested. This motivation is
3 predicated upon the Court's deadline to comply with the law as it currently exists in this
4 litigation, to-wit, that plaintiffs who have not identified phentermine defendants on or
5 before March 1, 1999, face dismissal of their action as to unidentified phentermine
6 defendants. Underlying that impetus to "go forth and identify" is the knowledge of
7 plaintiffs' attorneys that, at least for the present time, so-called "market share" liability
8 does not exist.

9 Allowing amendment of the Master Complaint to include "market share" allegations
10 would send precisely the wrong message to plaintiffs and their attorneys. While some
11 plaintiffs' counsel have diligently attempted to identify phentermine defendants throughout
12 the pendency of this litigation, others have not, or have only recently started to devote
13 resources to that endeavor. The Court should not send a message to plaintiffs, no matter
14 how tenuous, which suggests that unidentified phentermine defendants may nevertheless
15 be subject to liability on a "market share" theory, especially during the critical period
16 between now and March 1, 1999, when the identification process should be complete.

17 Of course, the phentermine defendants would have the opportunity to challenge the
18 "market share" allegations in an amended Master Complaint, by way of demurrer, motion
19 to strike, or other procedural vehicle. However, briefing and argument on that issue would
20 likely extend throughout what is supposed to be the identification discovery phase, not
21 including any appellate review.

22 The bottom line, to use a cinematic analogy is that: "if you build it, they will
23 come." We know from experience that when parties, allegations, or causes of action are
24 placed in the Master Complaint, they are adopted almost universally, even where that is
25 seemingly inappropriate. There is no reason to believe that this amendment would be any
26 different. It is highly likely that at least some plaintiffs' attorneys would be dissuaded
27 from implementing "exhaustive" means to identify phentermine manufacturers during the

1 identification phase, effectively shifting the burden on that issue to the defendants in fact,
2 if not in law.

3 While a ruling on plaintiff's motion to amend is committed solely to the sound
4 discretion of the trial court, and such motions are generally to be treated with liberality, it
5 is equally clear that amendments may be rejected where they result in prejudice to
6 opposing parties, including added costs of preparation, and increased burdens of discovery.
7 See, e.g., Magpali v. Farmers Group, Inc. (996)48 Cal.App.4th 471, 486-488. The "market
8 share" issue should not be generically injected into the diet drug litigation at this time. To
9 do so would unnecessarily prejudice the phentermine defendants by holding open an
10 avenue of recovery to plaintiffs in the absence of identification of phentermine
11 manufacturers.

12 IV.

13 PLAINTIFFS' MOTION TO AMEND SHOULD BE DENIED

14 WITHOUT PREJUDICE TO INDIVIDUAL PLAINTIFFS

15 BRINGING MOTIONS TO AMEND FOLLOWING

16 THE IDENTIFICATION DISCOVERY PHASE

17
18 The only equitable resolution of plaintiffs' motion to amend would be for the Court
19 to deny it, without prejudice to individual plaintiffs bringing case-specific motions to
20 amend their complaints following completion of the identification phase of discovery on
21 March 1, 1999. This solution would fairly achieve the objectives of both sides in the
22 following manner:

- 23 • Plaintiffs would maintain the burden of proof on the identification issue, at least
24 through March 1, 1999, so that they would be encouraged to use their "best
25 efforts" to identify phentermine defendants.

- 1 • Discovery focusing on the identification issue would be completed, resulting in
2 the identification of proper phentermine defendants in all cases where that is
3 practical.
- 4 • Following completion of the identification discovery phase, the Court will have
5 drastically improved data on the precise scope of the identification “problem.”
6 This information is necessary for the Court to determine, as a threshold matter,”
7 whether the Sindell doctrine should be even considered in the diet drug
8 litigation.

9 In conclusion, the phentermine defendants submit that the “market share” doctrine
10 could never be appropriately extended to the diet drug litigation since phentermine is
11 neither fungible nor untraceable. If and when those issues are considered by the Court, the
12 phentermine defendants are confident that imposition of the Sindell doctrine will be
13 rejected. The forum for resolution of those issues, however, need not, and should not, be
14 the Master Complaint, which is simply an artificial construct designed to convenience all
15 parties, but which is unrelated to the facts of any specific case.

16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V.
CONCLUSION

For all the above reasons, the phentermine defendants respectfully request the Court to deny plaintiffs' motion to amend the Master Complaint to include "market share" allegations, and for such further relief as the Court deems just and proper.

DATED: January 15, 1999

HIGHT, BROWN & BONESTEEL, L.L.P.

By: _____
Thomas M. Moore
Mario Horwitz
Attorneys for Defendant,
SMITHKLINE BEECHAM
CORPORATION, AND LIAISON
COUNSEL ON BEHALF OF THE
PHENTERMINE DEFENDANTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE BY HAND-DELIVERY

STATE OF)
) ss.:
)

COUNTY OF
Diet Drug Litigation
JCCP Case No. 4032

I am employed in the County of , State of . I am over the age of 18 and not a party to the within action. My business address is .

On January 15, 1999, I served the within:

OPPOSITION OF THE PHENTERMINE DEFENDANTS TO PLAINTIFFS' MOTION TO AMEND THE MASTER COMPLAINT TO ADD "MARKET SHARE" ALLEGATIONS [Filed Concurrently With Defendants' Request to Take Judicial Notice]

by placing a true copy thereof enclosed in sealed envelope(s) , as stated below.

Joseph L. Dunn, Esq.
Robinson, Calcagnie & Robinson
620 Newport Center Drive, Suite 700
Newport Beach, CA 92660
Ph. No.: (949) 720-1288

I delivered such envelope(s) by hand to the offices of addressee.

Executed on January 15, 1999, at , Santa Monica, California.

I declare under penalty of perjury under the laws of the State of that the foregoing is true and correct.

(Type or print name) (Signature)

1 **PROOF OF SERVICE BY MAIL**

2
3 STATE OF

)
) ss.:
)

4 COUNTY OF

5 *Diet Drug Litigation*
6 *JCCP Case No. 4032*

7 I am employed in the County of , State of . I am over the age of 18 and not a party to the
within action. My business address is .

8 On January 15, 1999, I served on interested parties in said action the within:

9 **OPPOSITION OF THE PHENTERMINE DEFENDANTS TO PLAINTIFFS' MOTION**
10 **TO AMEND THE MASTER COMPLAINT TO ADD "MARKET SHARE" ALLEGATIONS**
[Filed Concurrently With Defendants' Request to Take Judicial Notice]

11 by placing a true copy thereof in sealed envelope(s) addressed , as stated below, as stated
12 on the attached service list.

13 I am readily familiar with this firm's practice of collection and processing correspondence
for mailing. Under that practice it would be deposited with the U.S. postal service on that same
14 day in the ordinary course of business. I am aware that on motion of party served, service is
presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of
15 deposit for mailing in affidavit.

16 Executed on January 15, 1999, at Santa Monica, California.

17 I declare under penalty of perjury under the laws of the State of that the foregoing is true
and correct.

18 Robin Schell

19 _____
(Type or print name)

_____ (Signature)

