

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
JCCP 004032**

<p>Date: Friday, October 30, 1998</p> <p>HONORABLE DANIEL SOLIS PRATT Judge</p> <p>Y. KRANTZ Deputy Sheriff</p>	<p>DEPT. SE D</p> <p>S. RAINWATER Deputy Clerk</p> <p>J. LIBERTY Court Reporter</p>	
10:00 am	<p>JCCP004032</p> <p>IN RE: DIET DRUG CASES</p>	<p>Plaintiff Counsel</p> <p>Defendant Counsel</p>

DEMURRER OF HEALTH CARE PROVIDERS TO MASTER COMPLAINT; MOTION TO STRIKE:

The Demurrer and Motion to Strike are called for hearing and argued by Barbara Reardon on behalf of moving parties and Tina Nieves on behalf of the opposing parties.

Defendants' demurrer is hereby **OVERRULED**. CCP §430.10(a).

Defendants' motion to strike portions of plaintiff's complaint is **DENIED**. CCP 436(a).

Defendants' request for judicial notice of the articles of incorporation of Manhattan Weight Control Medical Center Corp. is **GRANTED**. EC §452(c).

Defendants' request for judicial notice of the fact that physicians in private practice typically are not the agents of drug companies is **DENIED**. EC §452(g).

The Health Care Providers/Diet Centers have 30 days in which to file a master answer. CMO #3, p. 2:19.

I. DEMURRER Generally

There seems to be some confusion over classification of health care providers who operated diet centers. First, the term "diet centers" is sufficiently certain. The term must be broad so

as to include all of the intended defendants. Substituting "health care providers" would add little certainty.

Second, the standard to be applied in each case will be determined by the activity that is alleged to be wrongful, not by the label placed on the defendant. Activity that lies in the realm of medical treatment will be governed by malpractice standards. Putensen v. Clay Adams, Inc. (1970) 12 Cal.App.3d 1062, 1084. Activity not within this realm, even if conducted by a health care provider, will be governed by ordinary negligence standards. See Meier v. Ross General Hospital, 69 Cal.2d 420, 433-434.

Third, whether a diet center is also a health care provider for the purposes of the Medical Injury Compensation Reform Act (MICRA) will be determined by reference to CC §3333.2, not the pleadings. Therefore, plaintiffs will not by artful pleading avoid the limitation on liability imposed by MICRA.

2nd Cause of Action

The complaint states facts sufficient to constitute a cause of action for negligence against the diet centers. Again, it is not necessary to specifically exclude the health care provider subset of the diet center category because liability will be predicated on specific activity, not on the label placed on the defendant. See San Diego Hospital Asso. et al. v. The Superior Court of San Diego County (1994) 30 Cal.App.4th 8, 17.

6th, 7th, 8th, and 9th Causes of Action

The complaint, specifically ¶¶ 40, 46, 49, 50, 53 and 54, adequately alleges acts of concealment, misrepresentation and unfair business practices by the diet centers. See Stop Youth Addiction, Inc., v. Lucky Stores (1998) 17 Cal.4th 553.

Furthermore, the complaint is not uncertain. The diet centers and the health Care Providers are not the same. That the diet centers employed a physician to prescribe the diet drugs does not make the diet centers and the health care providers interchangeable. Therefore, alleging the diet centers concealed information from and made misrepresentations to physicians and other members of the public does not lead to the conclusion the diet centers deceived themselves.

8th, and 9th Causes of Action: Remedies

Injunction is available because withdrawal of the diet drugs from the market was voluntary. Restitution is available with or without an injunction. ABC International Traders, Inc. v. Matsushita Electric Corp. of America (1997) 14 Cal.4th 1247, 1270.

11th Cause of Action

The 11th cause of action alleges facts sufficient to constitute medical negligence.

Defendants argue the complaint makes inconsistent factual allegations, and that plaintiffs are bound by those allegations that are least favorable to them. Specifically, plaintiffs allege the pharmaceutical companies deceived plaintiff's physicians, who would not have prescribed the diet drugs if they had been aware of the true facts concerning the dangers of the

products. Complaint, ¶¶ 57, 60, and 110. Defendants argue these allegations are inconsistent with any physician liability.

First, it is not clear the specified allegations are inconsistent with physician liability. The issue here is not only whether the physician knew the risks associated with the drugs, but also whether he should have known. It may be that the prescribing physician should have known of the risks even though they were concealed by the pharmaceutical companies.

Second, even if the allegations are inconsistent, “[w]here the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff’s right and defendant’s liability depend on facts not well known to the plaintiff, the pleading may properly set forth alternative theories in varied and inconsistent counts.” Rader Co. v. Stone, et al. (1986) 178 Cal.App.3d 10, 29; see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §372, p. 473-474.

Third, ¶144 of the complaint alleges defendant health care providers “carelessly and negligently examined, informed, treated, diagnosed, prognosed, prescribed medication to and otherwise treated and rendered medical services and care to plaintiff.” This alone suffices to constitute a cause of action for medical negligence.

Based on the above analysis, the demurrer to the master complaint is overruled.

II. MOTION TO STRIKE

Though ¶4 of the prayer asserts punitive damages against all defendants, ¶151 makes it clear plaintiffs do not assert punitive damages against the health care providers absent a future amendment pursuant to CCP §425.13. Therefore, the complaint does not violate §425.13. (Plaintiffs do not seek punitive damages for violation of B&P ¶¶ 17200 and 17500.) Therefore, defendants’ motion to strike ¶¶ 4 and 9 of the prayer and ¶151 of the complaint is denied.

As discussed above, injunction and restitution are available in the eighth and ninth causes of action. Also as discussed above, since the health care providers are separate and distinct from the diet centers, there is no self deception alleged. Therefore, the 8th and 9th causes of action are not sham, and defendants’ motion to strike them is denied.

STATUS CONFERENCE

STAY AS TO DEFENDANT INTERNEURON:

Pursuant to request of counsel for Interneuron, the stay, previously ordered herein is ordered extended to February 25, 1999. Counsel for Interneuron shall keep this court apprised of any orders in MDL 1205 regarding said defendant.

SETTING OF PRELIMINARY STATUS CONFERENCES:

The Court indicates that preliminary status conferences shall commence on December 15, 1998. Case specific status conferences and law and motion shall be calendared on Tuesdays and Thursdays. Master case conferences and law and motion shall be heard on Fridays.

DEFICIENT RESPONSES TO FACT SHEETS:

The Court indicates that all served defendants should receive complete Fact Sheets from Plaintiffs. Counsel report that a motion to compel compliance with Fact Sheet etc is set for hearing November 13, 1998.

POSSIBLE AMENDMENT TO MASTER COMPLAINT:

Liaison Counsel are directed to brief the issue as to a possible amendment to the Master Complaint re market share theory prior to the hearing November 13, 1998.

PLAINTIFF'S MOTION RE MEDICAL RECORDS:

Liaison Counsel for plaintiffs are directed to file the Motion re Medical Records by next week.

LIAISON COUNSEL TO GIVE NOTICE.

LIAISON COUNSEL APPEARING FOR PLAINTIFFS: MARK ROBINSON, JOSEPH DUNN.
PLAINTIFFS' EXECUTIVE COMMITTEE APPEAR AS FOLLOWS: FRANK PITRE, TINA NIEVES, RAMON LOPEZ, WILLIAM HIRSCH AND GARY PAUL.

LIAISON COUNSEL APPEARING FOR DEFENDANTS: TIMOTHY BRADFORD, DAVID STANLEY, MARK SPOONER, MARIO HORWITZ, DAVID McGOVERN, PATRICIA CARMICHAEL, BARBARA REARDON.

PLAINTIFFS' COUNSEL: PETER POLOS , CARRICK BOLTE, DAWN CRAIG, SALVADOR LICCARDO.

DEFENDANTS' COUNSEL: ELIZABETH FLATLEY, DEBRA POLE, LISA KING, MICHAEL UPDIKE, CHARLOTTE LOWELL, MICHAEL FITZSIMONS, MICHAEL HEALY, BRENT CLEMMER, NANCY DePASQUALE-ERKER, JOSEPH CARLUCCI, MICHAEL RUGGLES, JANET KEUPER, JANE OLIVAS, BRIAN INAMINE, JOHN CHATOWSKI, MELISSA WOO, EYAL GAMLIEL, JOSEPH BUTLER, ANTHONY BRAZIL, JOHN STREETER, PHILLIP HOWARD, WILLIAM PAULSEN (SPECIALLY APPEARING), GEORGE ZISER, NANCY MORRISON, LISA KERR, ANN ASIANO, CATHY SHIPE, R. JOSEPH DECKER, BRIAN MOONEY, MARA MARGULIES, LAWRENCE BUTLER, JOHN NAHRA, BARRY MARSH.