

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER TWELVE

THE PEOPLE OF THE STATE OF CALIFORNIA,
et al.,
Plaintiffs,

vs.

PHILIP MORRIS, et al.,
Defendants.

Civil Case No. 980864

October 23, 1997

**ORDER PARTIALLY SUSTAINING AND
PARTIALLY OVERRULING DEMURRER TO
ANSWERS AND DENYING MOTION TO STRIKE
ANSWERS**

Plaintiffs' demurrer and motion to strike were heard at 3:30 p.m. on August 14, 1997 in this Court. Elizabeth D. Laporte appeared on behalf of plaintiffs, and James F. Speyer, Barry S. Levin, and H. Joseph Escher appeared on behalf of defendants. The Court, having reviewed all papers supporting and opposing the demurrer and motion to strike, the arguments of counsel, and all judicially noticeable materials, and good cause appearing, makes the following ruling.

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' demurrer to the defenses based on Cal. Civil Code § 1714.45, and any legislative determination purportedly contained in § 1714.45, is sustained without leave to amend, on the ground that § 1714.45 does not apply to statutory law enforcement actions brought under Business and Professions Code §§ 172000, *et seq.* and Business and Professions Code §§ 17500, *et. seq.*

2. Plaintiffs' demurrer to defenses based on comparative fault, assumption of risk, and failure to mitigate is sustained without leave to amend. Defendants concede these defenses do not apply to plaintiffs' causes of action because plaintiffs do not seek an award of compensatory damages, but merely seek to require defendants to disgorge any ill-gotten profits.

3. The demurrer to the other defenses based on tort principles -- proximate cause, intervening cause, and superseding cause -- is sustained with leave to amend so that defendants can clarify whether they assert these defenses with regard to plaintiffs' conduct. Defendants are not permitted to amend to allege these defenses with regard to the behavior of individual smokers, since the actions of individual smokers are irrelevant to an action under Business and Professions Code § 17200, *et seq.* and/or § 17500, *et seq.*

4. The demurrer to the defenses of improper class action, improper aggregation of individual claims, and failure to join an indispensable party is sustained without leave to amend. See *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 20.

5. The demurrer to the defense of "deprivation of procedural and substantive safeguards generally available to the manufacturer and/or seller of any product, including California common law and statutory defense to liability: is sustained without leave to amend so that defendants may provide supporting factual allegations in a non-conclusory manner. These amendments must not include those defenses to which a demurrer has been sustained without leave to amend in any other paragraph of this order.

6. The demurrer to the defenses of unclean hands, unjust enrichment, set off, offset, estoppel, laches, waiver, ratification, in *paro delicto*, and recoupment is sustained with leave to amend so that defendants may include factual allegations regarding the behavior on the part of the People that would serve as a basis for these equitable defenses.

7. The demurrer to the defense of selective prosecution is sustained with leave to amend so that defendants may include factual allegations regarding plaintiffs' allegedly wrong behavior in pursuing this case against these defendants.¹

8. The demurrer to the defense of federal preemption is sustained without leave to amend in part and overruled in part. With regard to defendants' defense that the Federal Cigarette Labeling and Advertising Act, 15 USC §§ 1331, *et seq.* ("FCLAA") preempts plaintiffs' claims, the demurrer on that ground is sustained without leave to amend. See *Cipollone v. Liggett Group, Inc.* (1992)

¹ The Court makes no decision about the applicability to this type of action.

505 U.S. 504; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1069. However, the demurrer to defendants' defense that the FCLAA preempts the relief sought by plaintiffs is overruled with regard to plaintiffs' prayer that defendants be required to fund a corrective public education campaign relating to the issue of smoking and health, administered by a third party.²

With regard to defendants' defense that the Food, Drug, and Cosmetic Act, 21 USC §§ 301, et seq. Preempts plaintiffs' claims and/or requested relief, the demurrer on that ground is sustained without leave to amend. See *Medtronic v. Lohr* (1996) 116 S.Ct. 2240; *Armstrong v. Optical Radiation Corp.* (1996) 50 Cal.App.4th 580; *Comm. Dental Amalgam Mfrs. & Distribs. V. Stratton* (9th Cir. 1996) 92 F.3d 807.

9. The demurrer to the defense of lack of standing is sustained without leave to amend based upon: plaintiffs' stipulation that the non-governmental plaintiffs are not seeking civil penalties, the fact that the City Attorney of San Francisco has standing to sue on behalf of the People of the State of California, and an action under Business and Professions Code §§ 17200, et seq. May be based upon any unlawful, unfair, or fraudulent business practice.

10. The demurrer to the defense that the government plaintiffs lack authority to retain outside counsel on a contingency fee basis is sustained without leave to amend based on defendants' concession that this does not constitute a valid affirmative defense.

11. The demurrer is overruled as to the defense that the First Amendment bars plaintiffs' claims.

12. The demurrer to the defense that plaintiffs' claims violate the Separation of Powers doctrine is sustained without leave to amend on the ground that the legislature has properly vested in the courts the power to order remedies for violations of Business and Professions Code §§ 17200, et seq. And Business and Profession Code §§ 17500, et seq. See *Consumers Union of U.S., Inc., v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963, 974.

13. The demurrer to the defense that the complaint invokes Business and Professions Code §§ 17200, et. seq. In a manner which renders the

requirements of that provision unconstitutionally vague is overruled.³

14. The demurrer to defendants' anti-trust-related defenses is sustained without leave to amend on the ground that these defenses do not apply to actons under Business and Professions Code § 17200, et. seq. See *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, modified at 1990 Cal.App.LEXIS 793; *People v. McKale* (1979) 25 Cal.3d 626; *Consumers Union of U.S., Inc. v. Fisher Development, Inc.* (1989) 208 Cal.App.3d 1433, 1439-40.

15. Plaintiffs' motion to strike defendants' unverified answers in their entirety is denied.

16. The Court finds good cause to stay discovery relating to any defense for which plaintiffs' demurrer has been sustained with leave to amend, given the question of whether defendants can amend their answers to state legally viable theories to support these defendants. This stay will remain in effect until defendants file an amended answer containing that amended defense and either plaintiffs do not demur to that defense within 20 days from the date defendants' amended answer are filed, or plaintiffs' demurrer to such defense is overruled.

Defendants shall have 20 days from the date of this order to file second amended answers that conform to the terms of this order.

IT IS SO ORDERED.

Paul H. Alvarado
Judge of the Superior Court

² However, this Court expresses no opinion regarding any possible preemptive effect the FCLAA may have upon that particular requested relief.

³ The Court expresses no opinion about the legal merits of defendants' vagueness challenge.