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8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN FRANCISCO**

10 Laurence Tain, D.C.; Donald Nielsen, D.C.;
 11 Robert Bitters, D.C.; Stephanie Wattenberg,
 D.C.; and Lori Prescott, D.C.,

12 Plaintiffs and Petitioners,

13 v.

14 State Board of Chiropractic Examiners;
 15 Medical Board of California; California
 State Board of Pharmacy; California
 16 Acupuncture Board; and Does 1 to 20,

17 Defendants and Respondents.

CASE NO. CGC-03-419378

**REPLY MEMORANDUM IN SUPPORT OF
 DEFENDANT AND RESPONDENT
 BOARD OF CHIROPRACTIC
 EXAMINERS' MOTION FOR SUMMARY
 JUDGMENT OR, IN THE ALTERNATIVE,
 SUMMARY ADJUDICATION**

Date: January 28, 2004
 Time: 2:00 p.m.
 Place: Dept. 502

18 **I. INTRODUCTION**

19 Despite the efforts of Plaintiffs to divert the attention of this Court with extrinsic
 20 evidence, and arguments about the chiropractic profession as having been marginalized, the fact
 21 remains that the chiropractic statutory scheme establishing their scope of practice is clear, and
 22 constitutional. This has been established by several appellate court opinions, going back over 65
 23 years.

24 **A. Section 302 is Not Vague**

25 The essence of plaintiffs' claims in this case is that California Code of Regulations, Title
 26 16, section 302, which dictates the scope of practice for chiropractors, is vague. They assert that
 27
 28

1 the Court must look to extrinsic evidence in order to determine the meaning of the statute and the
2 intention of the voters when the Chiropractic Initiative Act was passed in 1922. Plaintiffs,
3 however, fail to confront several basic tenets of statutory construction:

4 1. "When statutory language is . . . clear and unambiguous there is no need for
5 construction, and courts should not indulge in it." *California Ins. Guarantee Assn. v. Liemsakul*
6 (1987) 193 Cal.App.3d 433, 439.

7 2. The interpretation of a statute is a question of law. *California Teachers Assn. v.*
8 *San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.

9 3. Courts must give great weight to an administrative agency's interpretation of a
10 statute governing its powers and responsibilities. *Jacobs, Malcolm & Burt v. Voss* (1995) 33
11 Cal.App.4th 1399, 1404

12 Section 302 is clear on its face, and no judicial interpretation is necessary. Even
13 assuming, *arguendo*, that there is ambiguity, an ambiguity would not create an issue of material
14 fact. The "material facts" that plaintiffs claim exist have absolutely no bearing on the clarity of
15 section 302. Even if it were true that chiropractors have been "marginalized," and that there were
16 once several schools of chiropractic, those issues do not make section 302 vague or
17 unconstitutional. The fact remains that section 302 is clear, and that the statutory chiropractic
18 scope of practice has passed constitutional and judicial muster for over fifty years. *People v.*
19 *Fowler* (1938) 32 Cal.App.2d Supp. 737 and *Crees v. California State Board of Medical*
20 *Examiners* (1963) 213 Cal.App.2d 195.

21 For the same reasons, plaintiffs' argument that extrinsic evidence is required to determine
22 the meaning of the statute, is inapposite. The Court should only consider extrinsic evidence if
23 the statute is unclear to begin with. Again, *Fowler* and *Crees* established that the statutory
24 chiropractic scope of practice was unambiguous as early as 1938.

25 Plaintiffs similarly argue that the amendments to the 1922 Act are also ambiguous.
26 However, an amendment increasing the minimum number of hours of education required does
27 not make an amendment ambiguous. Plaintiffs have failed entirely to articulate any ambiguity.

28

1 Therefore, no extrinsic evidence regarding the meaning of the amendments should be considered

2
3 **B. This is Not a Government Code Section 11350 Case**

4 Plaintiffs may indeed be entitled to bring an action for declaratory relief pursuant to
5 Government Code section 11350. However, if that is the case, then the Court is strictly limited
6 in what evidence it may consider. Government Code section 11350 provides, in pertinent part:

7 (d) In a proceeding under this section, a court may only consider
8 the following evidence:

9 (1) The rulemaking file prepared under Section 11347.3.

10 (2) The written statement prepared pursuant to subdivision (b) of
11 Section 11346.1.

12 (3) An item that is required to be included in the rulemaking file
13 but is not included in the rulemaking file, for the sole purpose of
14 proving its omission.

15 (4) Any evidence relevant to whether a regulation used by an
16 agency is required to be adopted under this chapter.

17 Clearly, the evidence and arguments submitted by plaintiffs exceed subsection (d) of
18 section 11350. By their own actions, plaintiffs have taken this case out of the ambit of section
19 11350.
20

21 **C. Strict Scrutiny Does Not Apply to Analysis of Section 302**

22 Laws which discriminate against a group of persons are violative of the Equal Protection
23 Clause of the U.S. Constitution only if they are motivated by an intent to discriminate. Only if
24 the class of persons discriminated against is a suspect class (race, national origin, gender) or a
25 fundamental right is at stake, would strict scrutiny of the statute be applicable. *Kim v. Workers'*
26 *Comp. Appeals Bd.* (1999) 73 Cal.App.4th 1357

27 In order to invoke constitutional strict scrutiny analysis of Section 302, plaintiffs would
28 have to establish that they are a protected class (race, national origin, gender etc.), or that Section
302 involves a fundamental right. Plaintiffs themselves *concede* that strict scrutiny does not
apply in their opposition, in that they admit that "possession of a professional license does not
establish them as a 'suspect class'" and that "no fundamental right, per se, exists to practice (or

1 retain the right to practice) any profession.” Opposition to SBCE’s Motion for Summary
2 Judgment/Adjudication at 6:24-7:3.

3 Section 302 does not discriminate against chiropractors. It merely establishes limits on
4 their scope of practice. If, indeed, chiropractors are the victims of “invidious discrimination,” it
5 is not a result of Section 302. Plaintiffs’ argument is akin to nurses arguing that they are being
6 discriminated against because the Nursing Practice Act which defines the scope of nursing
7 practice does not entitle them to perform surgery.

8
9 **D. Plaintiffs Have Failed to Exhaust Administrative Remedies**

10 Plaintiffs rely upon Government Code section 11350 for the proposition that they are not
11 required to exhaust their administrative remedies. As stated above, this is not a section 11350
12 case, therefore the language in section 11350 excusing exhaustion of administrative remedies is
13 inapplicable to this case.

14
15 **E. Plaintiffs Lack Standing**

16 Plaintiffs have not alleged that they have practiced in excess of the statutory scope of
17 chiropractic practice. They are therefore not subject to discipline by the Board, or any other law
18 enforcement agency.

19
20 **F. Plaintiffs’ Claims Are Subject to Laches**

21 The plaintiffs sought training and licensing to practice chiropractic with a full
22 understanding of the scope of practice as outlined in the statutory scheme. They have persisted in
23 their practices since at least 1991, when section 302 was promulgated. Plaintiffs have provided
24 no justification for their failure to initiate this action before now.

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27 ///

28

1 **G. If The Chiropractic Profession as a Whole Wishes to Increase the Scope of**
2 **Practice, It Must Seek to Have the Statute Amended**

3 As the Court in *Crees* stated,

4 If the chiropractic profession desires to expand the scope of their
5 professional activities so as to include the practice of obstetrics and
6 the right to sever the umbilical cord and perform episiotomy they
7 must turn to the people, from whom they received permission to
8 exercise the privileges they now enjoy, for legitimation of these
9 additional practices.

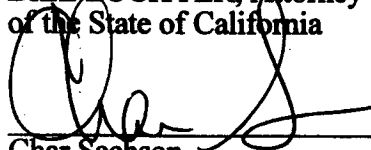
10 *Crees v. California State Board of Medical Examiners* (1963) 213 Cal.App.2d 195, 214.

11 Emphasis added.

12 The logic of the *Crees* Court applies equally here. To argue that a statute is ambiguous
13 and discriminatory because one wishes the statute read differently is disingenuous. The Court in
14 *Crees* stated that the chiropractic profession *must* go to the voters to increase the scope of
15 practice. Accordingly, plaintiffs' attack on the statutory scope of practice cannot succeed.

16 DATED: January 22, 2004

17 **BILL LOCKYER, Attorney General**
18 **of the State of California**



19 Char Sachson
20 Deputy Attorney General

21 Attorneys for Defendant and Respondent
22 State Board of Chiropractic Examiners

DECLARATION OF SERVICE
(AG Mailroom)

Case Name: *Tain, et al. v. State Board of Chiropractic Examiners, et al.*

No. CGC 03-419378

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 23, 2004, I served the attached **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT AND RESPONDENT BOARD OF CHIROPRACTIC EXAMINERS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, addressed as follows:

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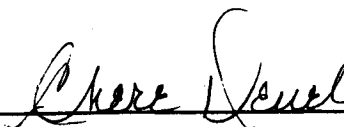
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Acupuncture Board

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The Council on Chiropractic Education

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 23, 2004, at San Francisco, California.

Chere Deuel

Typed Name



Signature