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9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 10 FOR THE COUNTY OF SAN FRANCISCO

12 **Laurence Tain, et al.,**

13 Plaintiff,

14 v.

15 **State Board of Chiropractic Examiners, et al.,**

16 Defendant.

Case No. CGC-03-419378

**DEFENDANT CALIFORNIA  
 ACUPUNCTURE BOARD'S  
 CLOSING MEMORANBUM  
 OF POINTS AND  
 AUTHORITIES IN SUPPORT  
 OF DEMURRER TO  
 PLAINTIFFS' SECOND  
 AMENDED COMPLAINT**

Date: October 29, 2003  
 Time: 9:30 a.m.  
 Dept: 502

20 I

21 INTRODUCTION

22 COMES NOW Defendant California Acupuncture Board ("CAB"), and makes the  
 23 following closing reply to the opposition of plaintiffs to the CAB's demurrer to plaintiffs second  
 24 amended complaint ("SAC"). For all the reasons set forth herein, plaintiffs opposition fails, and  
 25 the demurrer of the CAB should be sustained without leave to amend.

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II

**PLAINTIFFS CONCEDE THAT NO FACTUAL QUESTIONS ARE PRESENTED IN THEIR SECOND AMENDED COMPLAINT THAT SEEK A DECLARATION OF "THEIR PRACTICE RIGHTS UNDER THE 1922 CHIROPRACTIC ACT." CONSEQUENTLY A GENERAL DEMURRER IS APPROPRIATE TO DETERMINE WHETHER A CAUSE OF ACTION EXISTS AS A MATTER OF LAW.**

Plaintiffs in their filed opposition brief to the demurrers of the State Board of Chiropractic Examiners at page 12, lines 1-4, concede that "the issue as to the plaintiffs' practice rights under the 1922 Chiropractic Act is clearly a question of law." Plaintiffs then refer to their SAC at ¶47(d), which states in pertinent part, "...[T]he issue as to the chiropractor's and patient's rights under the 1922 Chiropractic Act is to be determined by this court as a matter of law..."

In addition, plaintiffs concede that they seek a judicial declaration "[T]hat Business and Professions Code section 4935 does not preclude them from using acupuncture needles; assuming they are otherwise entitled to penetrate the tissues of human beings. That is, they seek to have this court declare that section [4935] has no force or effect with respect to chiropractors. (SAC p. 36, line 26 to p. 37, line 7.) In the alternative, they seek reformation of Business and Professions Code section 4935 to include chiropractors in the list of practitioners entitled to use acupuncture needles." (Opposition Brief of Demurrer of the CAB, p. 5, item C, lines 1-9).

The construction of statutes and the ascertainment of legislative intent are purely questions of law. *Burnsed v. State Board of Control* (1987) 189 Cal.App.3d 213, 218, fn. 3. Consequently, a general demurrer can be used to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. Moreover, California Evidence Code sections 451-455 specifically authorize the court to consider, as grounds for demurrer, any matter which the court must or may judicially notice.

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1           **A.   Neither D'Amico 1 or 2 Stand For The Proposition That A General**  
2           **Demurrer Along With A Properly Noticed Request For Judicial Notice Is An**  
3           **Inappropriate Means To Test The Validity Of A Complaint That Solely**  
              **Raises Pure Questions Of Law.**

4           The D'Amico 1 trial court decided the question of the constitutionality of section 2310 of  
5 the Business and Professions Code (denying osteopathic reciprocity) on demurrer with the trial  
6 court taking some extrinsic evidence into consideration without providing the parties an  
7 opportunity to object to the sources and value of the materials. The Court of Appeal then  
8 reversed, stating that, "...the matter of classification of the D.O.'s and M.D.'s is one that should  
9 not be decided on the limited showing which can be made on demurrer, but should be determined  
10 on a full scale hearing. For that reason the court's determination of the constitutionality of  
11 section 2310 must be reversed." *D'Amico v. Board of Medical Examiners (1976) 6 Cal.3d 716,*  
12 *728(D'Amico 1).*

13           Secondly, the D'Amico 1 court stated *supra* at p. 727 that as to, "...[T]he  
14 constitutionality of the 1962 Osteopathic Act ..., the question of whether there are facts which  
15 could justify a different classification of graduates from medical schools from those of  
16 osteopathic schools is one which, under the pleadings in this case, should be decided in the first  
17 instance by the superior court and that court not having determined that question, the case will  
18 have to be remanded for that determination. This question should not be determined on demurrer  
19 but by a trial". (Emphasis added.)

20           Unlike D'Amico 1, plaintiffs in their SAC have solely raised pure questions of law,  
21 which they have conceded in their filed oppositions. Moreover, defendant CAB has formally  
22 asked the trial court to take judicial notice of the legislative history of Business and Professions  
23 Code section 4935, as well as relevant legal authorities that should apply to this case. Plaintiffs  
24 have not filed any opposition. Consequently, unlike D'Amico 1 this court has been provided with  
25 legally sufficient information to decide all questions of law presented.

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1 **B. As a Matter of Law Plaintiffs Have Failed to State a Cause of Action That**  
2 **Business and Professions Code Section 4935 is Unconstitutional Because it**  
3 **Denies Plaintiffs Equal Protection.**

4 First of all plaintiffs have failed to overcome the presumption of constitutionality  
5 afforded all statutes. In *Central Delta Water Agency v. State Water Resources Control Board*  
6 (1993) 17 Cal.App.4th 621,636, the Court of Appeal stated:

7 " [A]ll presumptions and intendments favor the validity of a statute  
8 and mere doubt does not afford sufficient reason for a judicial  
9 declaration of invalidity. Statutes must be upheld unless their  
10 constitutionality clearly, positively, and unmistakably appears. If  
11 the validity of the measure is fairly debatable, it must be  
12 sustained...(citation ommitted)."

13 Secondly, plaintiffs fail to understand the rational basis standard of review. They  
14 erroneously believe that because the licensing requirements for acupuncturists when compared  
15 to chiropractors is fifty percent less , that this difference alone creates a factual issue that  
16 overcomes a general demurrer. (See Opposition to CAB's demurrer, pp.8-9). They are wrong.  
17 As the appellate courts have stated on numerous occasions, "Appellants misunderstand the  
18 rational-basis test. The question under this test is not whether the reason advanced to support the  
19 legislatively drawn distinction are supported by the record, but simply whether the distinction  
20 bears a rational relationship to a 'conceivable legitimate state purpose' (*Peretto v. Department of*  
21 *Motor Vehicles* (1991) 235 Cal.App.3d 449, 455). If it were otherwise, even reasons plainly  
22 stated by the Legislature to justify a statutory distinction might often fail the rational-basis test.  
23 The Legislature sometimes acts to anticipate potential problems without waiting for a body of  
24 evidence about those problems to accumulate. Under appellants' version of 'rational basis', any  
25 reasons given by the Legislature to support such anticipatory lawmaking would necessarily be  
26 insufficient, no matter how plausible and closely tied to a legitimate state interest, for want of  
27 evidentiary support. Appellants cite no authority for their attempt to transform 'rational basis'  
28 into something more closely resembling 'strict scrutiny', and we are aware of none that would  
support their position." (*Central Delta Water Agency v. State Water Resources Control Board*  
(1993) 17 Cal.App.4th 621,638.

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1 Likewise, the First District Court of Appeal in *Thompson v. Board of Supervisors* (1986)  
2 180 Cal.App.3d 555, 564, stated, “[A] statute will be set aside on equal protection grounds only  
3 if it is based on reasons totally unrelated to the pursuit of that goal. The Legislature is presumed  
4 to have acted constitutionally and the statutory classification will be set aside only if no ground  
5 can be conceived to justify it. (Citations omitted).” See also *Re W.* (1972) 29 Cal.App.3d 623,  
6 628, (... “Thus, as an evitable rule, a distinction in legislation is not arbitrary if any set of facts can  
7 be conceived that would sustain it, and the burden of overcoming the presumption of  
8 constitutionality is cast upon the assailant. (Citation omitted).”; *McAllister v. South Coast*  
9 *Quality etc. Dist.* (1986) 183 Cal.App.3d 653, 659, “...state legislatures are presumed to have  
10 acted within their constitutional powers despite the fact that in practice, their laws result in some  
11 inequality...”.

12 Moreover, a party challenging the constitutionality of a statute cannot prevail even if they  
13 introduce evidence that the reasons given by the Legislature were wrong (*In Park & Shop*  
14 *Markets, Inc. v. Berkeley* (1981) 116 Cal.App.3d 78, 92).

15 Plaintiffs’ equal protection arguments are therefore without merit. It has been held that,  
16 “Regulation of intrusive and possibly hazardous forms of medical treatment is a proper exercise  
17 of the police power.” *Arden v. Younger* (1976), 57 Cal.App.3d 662, 673.

18 Here the goal of the Legislature in enacting the Acupuncture License Statute was stated in  
19 Section 6 of the Statutes of 1975 as follows:

20 “SEC. 6. This act is an urgency statute necessary for the immediate preservation  
21 of the public peace, health or safety within the meaning of Article IV of the  
22 Constitution and shall go into immediate effect. The facts constituting such  
23 necessity are:

24 There is a growing interest in acupuncture and a substantial amount of practice of  
25 acupuncture and yet there is no statute protecting the public from incompetent  
26 practitioners. Furthermore, the public is not being protected from other practices which  
27 are prescribed in this statute. The promising possibilities of acupuncture make it  
28 imperative that it be practiced as extensively as possible, as soon as possible, with  
adequate protection of the public.” (Acupuncture Board’s Request For Judicial Notice  
filed on July 10, 2003, Exhibit 1, p. 0053, Chapter 268, Statutes of 1975).

26 The articulated goal of the Legislature was to protect the public from incompetent  
27 practitioners by regulating and setting standards to allow the practice of acupuncture in the state.  
28 One such means of protecting the public from incompetent practitioners was to allow licensees

1 whose licenses already permitted penetration of human tissue to practice acupuncture without the  
2 necessity of obtaining an acupuncture license, and as to all others, such as chiropractors,  
3 permitting them to practice acupuncture only after demonstrating their competence to do so by  
4 obtaining an acupuncture license.

5 Consequently, it cannot be said that the Legislature's exclusion of chiropractors from the  
6 exemption granted to licensed physicians, dentists, and podiatrists was arbitrary and based totally  
7 on reasons unrelated to the articulated goal of sanctioning the use of acupuncture but insuring  
8 first that it be practiced by competent practitioners.

9 **III**

10 **PLAINTIFFS HAVE FAILED TO DEMONSTRATE AS A MATTER OF LAW**  
11 **THAT ANY AUTONOMY RIGHTS ARE PRESENT.**

12 Plaintiffs argue in their opposition to California Acupuncture Board's demurrer that  
13 *People v. Privitera* is not controlling and that presumably a patient has a right to choose a health  
14 practitioner of their choice irrespective of whether the practitioner is licensed to perform the  
15 treatment desired by the patient. Plaintiffs cite conservatorship of *Wendland v. Wendland* (2001)  
16 26 Cal.4th 519, 534. (Opposition to CAB demurrer, p. 12).

17 Quite to the contrary, as the California Supreme Court stated in *Nahrstedt v. Lakeside*  
18 *Village Condominium Assn.* (1994) 8 Cal.App.4th 361, 387: "We held, in *Hill v. National*  
19 *Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (26 Cal.Rptr.2d 834) that the privacy provision in  
20 our state Constitution does not 'encompass all conceivable assertions of individual rights' or  
21 'create an unbridled right' of personal freedom. (*Id.* at pp. 35-36.) The legally recognized  
22 privacy interests that fall within the protection of the state Constitution are generally of two  
23 classes: (1) interests in precluding dissemination of confidential information ("informational  
24 privacy"; and (2) interests in making personal decisions or in conducting personal activities free  
25 of interference, observation, or intrusion ("autonomy privacy"). (*Id.* at p. 35.) The threshold  
26 question in deciding whether "established social norms safeguard a particular type of information  
27 or protect a personal decision from public or private intervention," we explained in *Hill*, must be  
28 determined from the "usual sources of positive law governing the right to privacy- common law

1 development, constitutional development, statutory enactment, and the ballot arguments  
2 accompanying the Privacy Initiative." (*Id.* at p. 36.)

3 Turning to plaintiffs' SAC and opposition to CAB's demurrer, plaintiffs have failed to  
4 cite to any federal or state constitutional provision or any California statute that confers upon  
5 patients the "right to choose a mode of healing more consonant with their personal beliefs and  
6 philosophical convictions than allopathic medicine" (SAC ¶¶37-38, p. 12).

7 The *Wendland* case only stands for the proposition that a person has a fundamental right  
8 to have life sustaining treatment withheld or withdrawn. (*Wendland*, p. 534).

9 Plaintiffs' argument that a patient has a fundamental right to choose a form of medical  
10 treatment from a specific provider irrespective of whether the provider can legally perform the  
11 treatment desired, would lead to absurd results." Namely, there would be no need for state  
12 regulation of the health professions. Quite to the contrary, the Court of Appeal in *People v.*  
13 *Younghanz*, (1984) 156 Cal. App.3d 811, 816, stated in relevant part that: "...[T]he right to seek a  
14 particular form of medical treatment as a cure for one's illness, however, has not been  
15 recognized as a fundamental right in California." The Court of Appeal then went on to apply the  
16 rational basis test.

#### 17 IV

#### 18 **PLAINTIFFS' COMPLAINT PLACES THE CART BEFORE THE HORSE** 19 **IN ARGUING THAT BUSINESS AND PROFESSIONS CODE SECTION** 20 **4935 IMPERMISSIBLY REPEALS THE CHIROPRACTIC ACT AND** 21 **THAT THE LEGISLATURE MAY NOT REPEAL OR AMEND THE** 22 **CHIROPRACTIC ACT.**

21 Plaintiffs argue that Business and professions Code section 4935 is inconsistent with the  
22 rights granted by the Chiropractic Act and therefore should be deemed inapplicable to  
23 chiropractors. (Opposition to CAB's demurrer, p. 6.)

24 This argument places the cart before the horse. First the court must determine whether  
25 the Chiropractic Act, along with case law interpreting that Act and subsequent amendments, has  
26 granted the right to chiropractors to penetrate human tissues and/or perform surgery. If the court  
27 determines first as defendant California Acupuncture Board has argued that no such rights exist,  
28 then plaintiffs' secondary argument is moot because there is no illegal repeal or amendment.

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V


**CONCLUSION**

The California Acupuncture Board's general demurrer to plaintiffs' Fourth Cause of Action in the Second Amended Complaint should be sustained without leave to amend.

Dated: October 24, 2003

Respectfully submitted,

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**PROOF OF SERVICE**

Page 1 of 2

**CASE NAME:** Laurence Tain, D.C., et al., v. State Board of Chiropractic Examiners, et al.**CASE NO.:** CGC-03-419378

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, Oakland, California 94612-1413. On October 24, 2003, I served the following document(s):

**DEFENDANT CALIFORNIA ACUPUNCTURE BOARD'S CLOSING MEMORANDUM  
OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFFS'  
SECOND AMENDED COMPLAINT**

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Certified Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Personal Delivery:** I caused each such envelope to be personally delivered either by a courier with whom we have a direct billing account, or by interoffice mail, who personally delivered each such envelope to the office of the address on the date last written below.
- (E) **By Facsimile:** I caused each such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (F) **By E-mail:** I caused each such document to be served via electronic equipment transmission (E-mail) on the parties in this action by transmitting a true copy to the following E-mail addresses listed under each addressee below.

**PROOF OF SERVICE**

Page 2 of 2

**TYPE OF SERVICE**

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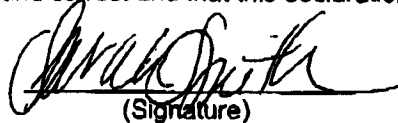
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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 24, 2003, at Oakland, California.

SARAH SMITH  
(Typed Name)

  
(Signature)