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ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

OCT 17 2003

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

LAURENCE TAIN, D.C.; DONALD NIELSEN, D.C.;)
ROBERT BITTERS, D.C.; STEPHANIE)
WATTENBERG, D.C.; and LORI PRESCOTT, D.C.)

Plaintiffs/Petitioners,)

v.)

STATE BOARD OF CHIROPRACTIC EXAMINERS;)
CALIFORNIA ACUPUNCTURE BOARD; THE)
COUNCIL ON CHIROPRACTIC EDUCATION, INC.;)
and DOES 1 to 20)

Defendants/Respondents.)

NO: CGC-03-419378

POINTS & AUTHORITIES
IN OPPOSITION TO THE
GENERAL DEMURRERS
OF THE CALIFORNIA
ACUPUNCTURE
BOARD TO THE
PLAINTIFFS' SECOND
AMENDED COMPLAINT

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

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INTRODUCTION

1
2 The California Acupuncture Board (CAB) is named as a defendant/respondent in only
3 the Fourth Cause of Action (C/A) to the Second Amended Complaint. (SAC) However, the
4 allegations of the First and Second Causes of Action are expressly incorporated by reference
5 into the Fourth Cause of Action. (SAC ¶91)

6
7 The plaintiffs have, contemporaneously with the filing of these Points and Authorities,
8 (P & As) filed Points and Authorities in Opposition to the Demurrers of the State Board of
9 Chiropractors Examiners.¹ (SBCE) (Opposition to SBCE's Demurrers) Arguments 3, to 8(B -
10 E) and 11, inclusive, of the plaintiffs' Opposition to SBCE's Demurrers are incorporated
11 herein by reference as if set forth in full.

12
13 A. Count One to the Fourth C/A Has Been Substantially Ignored by the CAB

14 In Count One to the Fourth C/A the plaintiffs contend that B & P section 4935 does not
15 apply to chiropractors because: 1) Section 18 of the Chiropractic Act expressly repeals any
16 later legislative acts "in conflict" with the practice rights granted to chiropractors by the
17 Chiropractic Act; and 2) California Constitution, Art. 2 (sometimes II), Sec. 10(c) precludes
18 the legislature from amending or repealing an initiative statute. (The Chiropractic Act does not
19 now, nor has it ever, provided for amendment by the legislature.)

20
21 The CAB has relegated Count One in the plaintiffs' Fourth Cause of Action to two
22 short paragraphs at the end of its moving papers. There, the CAB cites to only the case of
23 *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41,
24 at 54. The *Sacramento* case held that courts assume the legislature was aware of existing,
25 related, laws in enacting a new law. Plaintiffs agree and assert that the same rule applies to the
26 voters in adopting initiative statutes. (*Larson v. Duca* (1989) 213 Cal.App.3d 324, 329; see fn.
27

28

¹ Plaintiffs' counsel asked the SBCE and CAB to stipulate to the filing of a combined response to their
respective demurrers. They refused.

1 2) But, the point raised by the *Sacramento* court is not material to the issues raised by the
 2 plaintiffs in Count One.

3 **B. The Primary Question Raised by the Plaintiffs' Fourth Cause of Action**

4 Assuming that chiropractors are entitled to use needles, the primary question presented
 5 in the Fourth C/A is whether the limitation on the use of acupuncture needles to
 6 acupuncturists, MD/DOs, dentists and podiatrists stated in Business and Professions Code (B
 7 & P) section 4935 lawfully regulates the conduct of chiropractors?
 8

9 **ARGUMENTS**

10 **1. THE FOUR ELEMENTS OF A JUSTICIABLE CONTROVERSY HAVE BEEN**
 11 **WELL-PLEADED**

12 **A. The Specific Controversy over Opposing Interpretations of the term "Surgery"**

13 In their SAC, the plaintiffs contend that a Chiropractic Board rule promulgated in 1991
 14 (Rule 302 – Exhibit B to SAC) does, both generally and specifically, impair their practice
 15 rights and that it is, therefore, invalid and void. In their Fourth C/A, the plaintiffs more
 16 specifically address Rule 302(a)(4)(A) which states that a chiropractor is not authorized "to
 17 practice surgery or to sever or penetrate tissues of the human body." Plaintiffs contend that
 18 this is an erroneous interpretation of the Chiropractic Act. [SAC ¶ 26(b)(2)] In their moving
 19 papers, the State Board of Chiropractic Examiners (SBCE) and the California Acupuncture
 20 Board (CAB) each contend that Rule 302(a)(4)(A) correctly interprets the Chiropractic Act;
 21 both as first adopted in 1922 and as amended. (See Rule 302(b)(2) relative to the
 22 amendments, – SAC, Exhibit B.)
 23

24 The CAB argues that "[s]ection 4935(b) is consistent with the prohibition that
 25 chiropractors may not penetrate human tissues in order to treat patients." (CAB, Points and
 26 Authorities (P & A), p. 14, line 27.)
 27

28 The meaning of the word "surgery" as used in section 7 of the Chiropractic Act is

1 inexorably intertwined with the meaning of the Chiropractic Act as a whole and is should be
 2 noted that the term "or to sever or penetrate tissue of the human body" does not appear in the
 3 Chiropractic Act, or the amendments. The controversy relative to the meaning of the word
 4 "surgery" cannot properly be resolved without a full consideration of all extrinsic evidence
 5 relating to a proper construction of the Chiropractic Act as amended. (First and Second C/A)

6
 7 B. The "Ripeness" and "Standing" Issues of Justiciability

8 The ripeness and standing aspects of "justiciability" were described by the court in the
 9 case of *California Water & Telephone Co. v. The County of Los Angeles* (1967) 253
 10 Cal.App.2d 16, 22-23 as follows:

11 "The concept of justiciability involves the intertwined criteria of ripeness
 12 and standing. A controversy is "ripe" when it has reached, but has not
 13 passed, the point that the facts have sufficiently congealed to permit an
 14 intelligent and useful decision to be made. [FN9] One who invokes the
 15 judicial process does not have "standing" if he, or those whom he properly
 16 represents, does not have a real interest in the ultimate adjudication because
 the actor has neither suffered nor is about to suffer any injury of sufficient
 magnitude reasonably to assure that all of the relevant facts and issues
 will be adequately presented." [FN. omitted. Emphasis added.]

17 1) Ripeness

18 In its P & A Argument II, the CAB contends that there is "no justiciable
 19 controversy between the plaintiffs and the Acupuncture Board" (CAB's P & As, p. 4, lines 11-
 20 12) because "plaintiffs do not allege that any action has been taken or threatened by the
 21 Acupuncture Board upon which a claim can be based." (CAB's P & A p. 3, lines 23-26.)

22 Although paragraph 19 of the SAC contains the allegation that there are no actions
 23 pending against any of the plaintiffs, paragraph 19 reads, in full, as follows:

24 "19. No administrative or other action has been brought against any of the
 25 named plaintiffs alleging any violation of the Chiropractic Act or any rule or
 26 regulation of the Chiropractic Board. Nor are there any charges pending
 27 against any of the plaintiffs charging them with practicing medicine (or
 28 some other licensed practice) without a license. However, each plaintiff
 faces disciplinary action by the Chiropractic Board and/or criminal
 prosecution for practicing medicine (or some other licensed practice)
 without a license in the event they perform any act or procedure outside

1 **their scope of practice under the Chiropractic Act.”** (Emphasis added.)

2 Moreover, in paragraphs 106 and 117 of the SAC, the plaintiffs further allege:

3 “A judicial declaration is necessary (as to the binding effect of B & P Code,
4 § 4935) and appropriate at this time so that the plaintiffs may not exceed
5 their lawful scope of practice and thereby face disciplinary action against
6 their license and possible incarceration.”

7 The allegations of paragraphs 19, 106 and 117 must be read in the context of the SAC
8 as a whole and, more particularly, in the context of paragraphs 100, 101 and 105. (The rule
9 that a complaint is to be liberally is particularly applicable to declaratory relief actions. *City of*
10 *Tiburon v. Northwestern Pacific R.R. Co.* (1970) 4 Cal.App.3d 160, 170; see also, *Ludgate*
11 *Insurance Company, Ltd. v Lockheed Martin* (2000) 82 Cal.App.4th 592, 596-600 as to the
12 pleading of declaratory relief actions.)

13 The court in the case of *California Water & Telephone Co., supra*, at pp. 24-25,
14 eloquently clarified the point that a case may be “ripe” before any prosecution is brought:

15 “A person need not violate or plan to violate a penal ordinance before he can
16 obtain a declaration construing it and deciding its application to him.
17 (Citations) To hold otherwise is like ‘telling the prospective victim that the
18 only way to determine whether the suspect is a mushroom or a toadstool is
19 to eat it.’”

20 The CAB’s argument that plaintiffs have failed to establish a justiciable controversy
21 because there are no actions presently pending against them simply fails to get off the ground.

22 2. Standing

23 Plaintiffs rely here, primarily, on Argument 8B of the Opposition to SBCE’s
24 Demurrers. These plaintiffs are strongly motivated to present to this court all “relevant
25 facts” relative to their practice rights, in general, and, more specifically, relative to the
26 meaning of the word “surgery” in the context of the Chiropractic Act and B & P section
27 4935.²

28

2 Historically, the word surgery included both manipulative and/or operative procedures. In fact, the
word surgery is derived from the same root words as chiropractic. (By separate motion, the court is

1 C. The Plaintiffs seek Definitive and Conclusive Relief

2 The plaintiffs must, and they do, seek definitive and conclusive relief. They seek to
3 have this court declare that B & P Code section 4935 does not preclude them from using
4 acupuncture needles; assuming they are otherwise entitled to penetrate the tissues of human
5 beings. That is, they seek to have the court declare that said section "has no force or effect
6 with respect to chiropractors." (SAC p. 36, line 26 to p. 37, line 7.) In the alternative, they
7 seek reformation of B & P section 4935 to include chiropractors in the list of practitioners
8 entitled to use acupuncture needles.
9

10 **2. THE LEGISLATURE MAY NOT REPEAL OR AMEND THE CHIROPRACTIC**
11 **(INITIATIVE) ACT**

12 As previously indicated, the CAB has virtually ignored Count One to the plaintiffs'
13 Fourth Cause of Action. (See CAB's P & As, p. 14, line 16 to p. 15, line 1.) The plaintiffs, in
14 Count One, allege that B & P Code section cannot be applied to them because section 18 of the
15 Chiropractic Act (SAC, Exhibit A, p. 90) and California Constitution, Art. 2, Sec. 10(c) both
16 preclude that result. (See, Cal. Jur., Initiative and Referendum, (Westlaw, Third Ed., Database
17 updated May, 2003) §45 included in the Request for Judicial Notice filed contemporaneously
18 herewith.)
19
20

21
22 requested to take judicial notice of the definition of the word "surgery" in Webster's Third New
International Dictionary, p.2301 and the reference to the word "Chirurgeons" - 1649 Province of
Massachusetts statutes as quoted in Shyrock, Medical Licensing in America, 1650-1965 (1967) p. vii.)

23 Drugless practitioners under the 1913 California Medical Practice Act were expressly prohibited
24 from "severing or penetrating any of the tissues of human beings...." The California First District
25 Court of Appeal, in the case of *People v. Chong* (1915) 28 Cal.App. 121, 123 defined the limitation
26 applicable to drugless practitioners to refer to operative surgery, with a knife. Chiropractors, in the
1922 Chiropractic Act were prohibited from performing surgery; meaning operative surgery with a
knife. (The evidence will show that anyone could purchase a hypodermic needle in 1913 through the
Sears and Roebuck catalog; along with a packet of heroin.)

27 On page 8, lines 7-11, of its moving papers, the CAB cites to the case of *Mitchel v. Clayton* (7th Cir.
1993) 995 F2d 772, 775. The *Mitchel* court, followed (see p. 773) the Illinois Supreme Court decision
28 in *People v. Roos* (1987) 118 Ill.2d 203 in which that Supreme Court held that **the use of acupuncture
needles does not constitute operative surgery**. (The history of chiropractic in Illinois is particularly
important to the history of chiropractic alleged in paragraphs 13-17 of the SAC. A Westlaw copy of
the *Roos* case is included in the separately filed Request for Judicial Notice.)

1 A. Section 18 of the Chiropractic Act Repeals Any Statutory Provision Which
 2 Conflicts with the Provisions of the Chiropractic Act

3 Section 18 of the Chiropractic Act provides, in part:

4 “Sec. 18. Nothing herein shall be construed as repealing the ‘medical
 5 practice act’ on June 2, 1913, or any subsequent amendments thereof, except
 6 that in so far as that act or said amendments may conflict the provisions of
 7 this act as applied to persons licensed under this act, to which extent any and
 8 all acts or parts of acts in conflict herewith are hereby repealed.”
 9 (SAC ¶103)

10 This provision was construed and applied in the early case of *People v. Schuster* (1932)
 11 122 Cal. App. Supp. 790. (The *Schuster* case was modified in the opinion in the case of *People*
 12 *v. Fowler* (1938) 32 Cal. App.2d Supp. 737 but not as to the point here under consideration;
 13 see also, [Fn. 3] of the Cal. Jur., *supra*.)

14 In *Schuster*, a chiropractor was charged with two counts of violating the 1913 Medical
 15 Practice Act. First, he was charged with willfully and unlawfully using the prefix “Dr.” in
 16 violation of the medical practice act. Second, he was charged with practicing medicine
 17 without a license. (The second issue was addressed in the *Fowler* case, *supra*.)

18 The *Schuster* court held that to prosecute a chiropractor “under the Medical Practice
 19 Act for any misuse of the prefix ‘Dr.’” would violate section 18 of the Chiropractic Act. The
 20 California Attorney General’s Office took a similar position to that of the *Schuster* court in the
 21 opinion cited it paragraph 104 of the SAC. (9 Ops.Atty.Gen. 309, 311 (1947); see Request for
 22 Judicial Notice.) The Attorney General reasoned that provisions of healing arts laws that are
 23 inconsistent with rights granted by the Chiropractic Act must be deemed inapplicable to
 24 chiropractors. That is the primary remedy sought by plaintiffs under their Fourth C/A.

25 B. Any Legislative Act which Takes Away from, or Adds to, Rights Previously
 26 Created by Initiative, Violates California Constitution, Art. 2, Sec. 10(c)

27 As alleged in paragraph 103 of the SAC, “[t]he Chiropractic Act never has, and it does
 28 not now, permit alteration, amendment or repeal by the Legislature and California Constitution

1 Art. 2, sec. 10(c) provides:

2 '(c) The Legislature may amend or repeal referendum statutes. It may amend
3 or repeal an initiative statute by another statute that **becomes effective only**
4 **when approved by the electors** unless the initiative statute permits
amendment or repeal without their approval.'" (Emphasis added)

5 That is, the Initiative contains no provision permitting amendment or repeal without the
6 voters' approval. The court in the case of *Proposition 103 Enforcement Project v.*
7 *Quackenbush* (1998) 64 Cal.App.4th 1473, 1484-1485 defined an amendment to be:

8 "any change of the scope or effect of an existing statute, whether by
9 addition, omission, or substitution of provisions, which does not wholly
10 terminate its existence, whether by an act purporting to amend, repeal,
11 revise, or supplement, or by an act independent and original in form, ..."
[Citation.] A statute which adds to or takes away from an existing statute is
12 considered an amendment."

13 The *Proposition 103* case involved certain "roll-back" provisions relative to insurance
14 matters which had been adopted through the initiative process. The initiative provided certain
15 formulas for the calculation of the roll-back amounts. The legislature enacted into law a
16 provision related to deductible expenses to be used in applying the roll-back formula.
17 Proposition 103 allowed for amendment by the legislature in "furtherance of" the provisions
18 provided by the initiative.

19 The trial court granted summary judgment in favor of defendant *Quackenbush*; the
20 Insurance Commissioner. The court of appeal reversed and found that the "deductible
21 expense" legislation was an "amendment" and that it was not in the furtherance of the
22 purposes of the initiative.

23 The legislature is precluded from amending or repealing the Chiropractic Act in any
24 manner. Therefore, assuming chiropractors are entitled to use acupuncture needles, B & P
25 4935 does, on its face (and as argued for by the CAB) purport to "take away" that right and the
26 plaintiffs seek to have the purported limitation held inapplicable to chiropractors.
27
28

1 3. EVEN IF THE RATIONAL BASIS STANDARD IS APPLICABLE TO THE
 2 PLAINTIFFS CONSTITUTIONAL CLAIMS (Counts 2, 3 & 4) THE
 ACUPUNCTURE BOARD'S DEMURRER MUST BE OVERRULED

3 The CAB cites the case of *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1
 4 (hereafter, *D'Amico 2*.) as central to its argument that the "rational basis standard" is the
 5 appropriate standard for review of the constitutional claims presented by the plaintiffs.
 6 *D'Amico 2* was the last in a series of cases relating to the war fought by osteopaths with
 7 orthodox, allopathic, medicine. Those cases will be addressed further in sub-part B, hereof.
 8 First, however, it is necessary to clarify the CAB's fundamental distortion of the plaintiffs'
 9 constitutional arguments.
 10

11 A. The CAB has Distorted the Plaintiffs' Basic Constitutional Argument

12 In its P & A Argument IIIC, the CAB argues that the rational basis standard applies to
 13 the plaintiffs' constitutional arguments and states "[t]urning to the plaintiffs' SAC, it is clear as
 14 a matter of law that chiropractors are not similar to physicians, podiatrists and dentists ...
 15 because.... [p]hysicians, podiatrist and dentists are allowed by virtue of their education,
 16 training, and passage of a licensing exam to perform surgery...." (P & A, p. 11, lines 1-5)
 17

18 The "class" with whom the plaintiffs compare themselves is not limited to "physicians,
 19 podiatrists or dentists". Rather, they state that "[i]n Counts Two, Three and Four the plaintiffs
 20 contend that provisions of the Acupuncture Law purporting to limit the lawful use of
 21 acupuncture needles to acupuncturists, physicians and surgeons, dentists and podiatrists are
 22 constitutionally underinclusive." (SAC ¶93; See also, ¶¶ 16, 28 and 104; emphasis added.)
 23

24 The acupuncture license requires the completion of 2,348 hours education and training
 25 as described in California Code of Regulations, Title 16, §1399.436 a copy of which is
 26 included in the separately filed Request for Judicial Notice. (There is no requirement for
 27 training in surgery for acupuncturists and they are not entitled to perform any kind of surgery.)
 28 The required hours for an acupuncture license are, as alleged in paragraph 28 of the SAC, less

1 than 50% of the hours of education and training required for the chiropractic license.

2 The CAB's surgery argument is a straw man. Again, if chiropractors are entitled to
3 penetrate human tissues with a needle, they are in a similar class to acupuncturists, physicians,
4 dentists and podiatrists for purposes of B & P 4935.

5 B. Case Law Cited by the CAB Requires that Its Demurrers Must Be Overruled

6 The osteopathic profession obtained its own separate licensing board through the
7 initiative process at the same 1922 election as chiropractors. (*D'Amico v. Board of Medical*
8 *Examiners* (1970) 6 Cal.App.3d 716, 722 - hereafter *D'Amico 1*.)

9
10 The osteopaths and allopaths warred with one another from the early part of the 20th
11 Century to the 1970s as detailed in *D'Amico 1* and *D'Amico 2* and the other cases cited in
12 *D'Amico 2, supra*, at p. 6. (The relevant case history stretches back to at least 1919; see
13 *D'Amico 1, supra*, at p. 721.) That substantive history is too detailed to be extensively
14 detailed here. Suffice to say, the history of warfare between osteopathy and allopathy is
15 similar to the history of chiropractic as pleaded in the plaintiffs' SAC. (See also, fn. 2 hereof.)

16
17 The procedural history of *D'Amico 1* and *D'Amico 2* is very important to this court's
18 disposition of the pending demurrers of both the CAB and the SBCE. After many years of
19 struggle with orthodox medicine the osteopaths finally negotiated a "treaty" in which then
20 licensed DOs were to be allowed to practice under either the Medical Board or the Osteopathic
21 Board. The Osteopathic Board was to retain jurisdiction over those osteopaths not choosing to
22 go under the jurisdiction of the medical board. (*D'Amico 1, supra*, at p. 723.)

23
24 However, a question arose as to whether new graduates of osteopathic colleges after
25 the date of the "treaty" agreement were to be allowed to become licensed. Eventually, 8
26 graduates of osteopathic colleges sued the Medical and Osteopathic Boards seeking an order
27 directing the respective boards to supply them with forms on which to apply to take the
28 licensing exam. They alleged that to fail to do so would deny them equal protection of the

1 law. Both boards refused to issue such forms and claimed that the osteopathic graduates were
2 not entitled to be licensed by the medical board and the "treaty" agreement, and an initiative
3 measure adopted pursuant thereto, had been intended to preclude the Osteopathic Board from
4 issuing any new osteopathic licenses. (*D'Amico 2, supra*, at pp. 6-7.)

5 The California Medical Association filed an amicus curiae brief at the trial level in
6 which it argued that the Medical Board did, in fact, have the right to license the petitioners.
7 This caused the Medical Board and the attorney general, acting as its counsel, to change their
8 position mid-stream as explained by the Supreme Court in *D'Amico 2, supra*, at p. 7-8:

10 "Perceiving the advantage to be gained by acceptance of the C.M.A.'s
11 position - namely, the possible avoidance of plaintiffs' equal protection
12 argument - the medical board through the Attorney General changed its
13 former position in the midst of the litigation. To evidence its conversion it
14 offered eight blank application forms to plaintiffs and then proceeded to
15 announce that the matter was moot."

16 Following this "conversion experience" the original trial court ruled upon a pending
17 demurrer based upon the pleadings and matters considered "by means of judicial notice."
18 (*D'Amico 2, supra*, at p. 8.) The trial court concluded that the "treaty agreement" and the
19 initiative adopted pursuant thereto were meant to, and did, preclude the licensing of new
20 osteopaths under the Osteopathic Board and then concluded that the Medical Board could still
21 license them under provisions of the 1913 Medical Practice Act. The osteopath plaintiffs were
22 not satisfied with this ruling and they appealed. (*D'Amico 2, supra*, at p. 8.)

23 The appellate court in *D'Amico 1* concurred with the trial court's ruling that the "treaty
24 agreement" and initiative were intended to foreclose further licensing of osteopaths by the
25 Osteopathic Board. However, the appellate court further held that this raised the equal
26 protection issue the osteopathic plaintiffs had sought to raise and indicated that:

27 "Insofar as the question of the constitutionality of the 1962 Osteopathic Act
28 is concerned, the question of whether there are facts which would justify a
different classification of graduates from medical schools from those from
osteopathic schools is one which, under the pleadings in this case, should be
decided in the first instance by the superior court, and that court not having

1 determined that question, the case will have to be remanded for that
 2 determination. **This question should not be determined on demurrer but
 by a trial.** (Emphasis added. *D'Amico 1, supra*, at p. 727-728.)

3 Thereafter, another round of proceedings took place at the trial level. The plaintiffs
 4 eventually moved for summary judgment on the grounds that to deny graduates of osteopathic
 5 colleges the right to be licensed denied them equal protection of law. **The trial court applied
 6 strict scrutiny and granted the plaintiffs' motion for summary judgment.**

7
 8 The case finally wound its way to the California Supreme Court in *D'Amico 2*. The
 9 Supreme Court reviewed the extensive substantive and procedural history outlined, in part,
 10 here. The Supreme Court reviewed and specifically approved the holding in *D'Amico 1* that a
 11 **final ruling on the merits of the plaintiffs' constitutional claims was not to be made "on
 12 demurrer together with the fruits of judicial notice."** (*D'Amico 2, supra*, at p. 13.)³

13
 14 No matter what due process and/or equal protection review standard is ultimately to be
 15 applied in this case the plaintiffs are entitled to their full day in court and the CAB's demurrer
 16 must be overruled.

17 **4. LIMITED RESPONSE RELATIVE TO THE STRICT SCRUTINY ISSUE**

18 As previously argued herein, the CAB's demurrers must be overruled even if the
 19 rational basis standard applies. Therefore, the plaintiffs will presently limit themselves to two
 20 points addressed by the CAB relative to the claims to strict scrutiny presented by the plaintiffs.

21
 22 The CAB argues that the case of *People v. Privitera* (1979) 23 Cal.3d 697 presently
 23 precludes the plaintiffs' California constitutional right to privacy claims. In *Privitera*, the
 24 Supreme Court held patients do not have a constitutional right to privacy such that they must
 25 be permitted to choose treatment specifically declared unlawful (the use of laetrile). The

26
 27
 28 ³ The Supreme Court did, however, hold that the trial court, in the second go-round, incorrectly applied
 the strict scrutiny test. Even so, the Supreme Court held that the plaintiffs' motion for summary
 judgment was properly granted as there was no rational basis for the distinctions between the
 osteopathic and allopathic professions provided for in the "treaty agreement" and by the amendment to
 the 1922 Osteopathic Initiative based upon that agreement.

1 plaintiffs are not seeking the right to provide unlawful treatment. The issue before this court
2 relative to the Fourth C/A is whether the use of acupuncture needles by chiropractors is within
3 their lawful scope of practice pursuant to the Initiative Act, as amended.

4 Equally important, the court in *Privitera* based its analysis of the California
5 constitutional right to privacy from the limited perspective of "informational privacy". Based
6 upon that view of the constitutional right to privacy, the court concluded that the "right
7 to privacy" does not include a fundamental right of patient's to choose their own form of
8 health care. However, it is presently well-settled that the State Constitutional right to
9 privacy includes the right to personal autonomy; including the right of patient choice
10 relative to health care matters. (See *Conservatorship of Wendland v. Wendland* (2001) 26
11 Cal.App. 4th 519, 534. The *Wendland* court recognized that the constitutional right to privacy
12 includes rights to personal autonomy and control over "any aspect" of health care. Arguably,
13 *Privitera* has been reversed, sub silentio. *Wendland* was a "the right to die" case.)

14
15
16 The CAB cites cases indicating that physicians, dentists, psychoanalysts and lawyers
17 are not members of a suspect class. Plaintiffs agree that professional status alone does not
18 establish a special need for increased judicial scrutiny. Here, the plaintiffs have specifically
19 pleaded a pattern and practice of overt, invidious discrimination against chiropractors; actively
20 participated in by the California Attorney General's Office. [SAC ¶43(b)] Equally important,
21 plaintiffs' contend that this discrimination has been caused, in part, by the rejection of their
22 bio-medical paradigm. (SAC ¶¶31-33)

23
24 The protection of competing bio-medical models (and scientific paradigms in general)
25 as parallel expressions of the basic thirst of human beings to understand their world is also of
26 tremendous social significance (SAC ¶ 33) as recognized by Chief Justice Bird, in her
27 dissenting opinion in the *Privitera* case, *supra*, at p. 724-725. The Chief Justice stated:

28 "To require the doctor to use only orthodox "state sanctioned" methods of
treatment under threat of criminal penalty for variance is to invite a

1 repetition in California of the Soviet experience with 'Lysenkoism.' [FN
 2 omitted] The mention of a requirement that licensed doctors must prescribe,
 3 treat, within "state sanctioned alternatives" raises the specter of medical
 4 stagnation at best, statism, paternalistic Big Brother at worst. It is by the
 5 alternatives to orthodoxy that medical progress has been made. A free,
 6 progressive society has an enormous stake in recognizing and protecting
 7 this right of the physician." [FN omitted; see SAC ¶33]

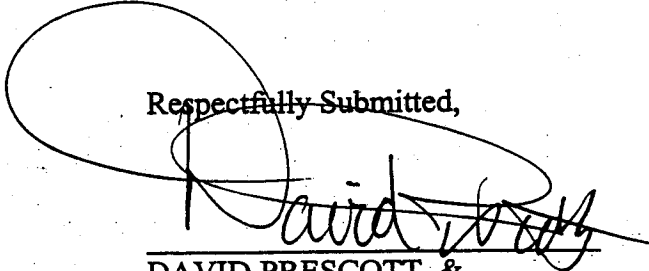
8 The issues in this case go much deeper than "treatment" and involve issues related to the
 9 right to fully explore the fundamental nature of life and living processes and different theories
 10 relative to biological organization, development, regulation and pathology. (SAC ¶31)
 11 Ironically, the holistic paradigm espoused by chiropractors is similar to the paradigm utilized in
 12 Chinese medicine. (SAC ¶¶ 16 & 96-98) These matters need to be fully developed at a trial
 13 where this court can make an informed decision as to the degree of scrutiny due the
 14 constitutional claims raised by the plaintiffs.

15 CONCLUSION

16 The CAB's demurrers to the plaintiffs' Fourth Cause of Action to the Second Amended
 17 Complaint must be overruled for the reasons herein set forth and as incorporated from the P &
 18 A filed in their Opposition to the SBCE's Demurrers.

19 Dated: *OCTOBER 15, 2003*

20 Respectfully Submitted,

21 
 22 DAVID PRESCOTT, &
 23 EDWIN GRAUKE
 24 Veritas Justice & Bioethics Institute
 25 Attorney for Plaintiffs

(PROOF OF SERVICE BY MAIL – 1013a, 2015 C.C.P.)

STATE OF CALIFORNIA)
)
 COUNTY OF ORANGE) ss.

I am a citizen of the United States. I am over the age of eighteen years and not a party to the within entitled action. My business address is 22365 El Toro Rd., Suite 109, Lake Forrest, California 92630.

On October 7, 2003 I served the within POINTS & AUTHORITIES IN OPPOSITION TO THE GENERAL DEMURRERS OF THE CALIFORNIA ACUPUNCTURE BOARD TO THE PLAINTIFFS' SECOND AMENDED COMPLAINT on the defendants Chiropractic Board, Acupuncture Board and The Council on Chiropractic Education by placing a true and correct copy in a sealed envelope, addressed as follows:

STATE BOARD OF CHIROPRACTIC EXAMINERS
 Mr. Fred Slimp, Esq.
 Deputy Attorney General
 P.O. Box 70550
 Oakland, Calif. 94612-0550

THE COUNCIL ON CHIROPRACTIC EDUCATION
 Mr. Michael Schroeder
 Attorney at Law
 1851 East First Street, Suite 1160
 Santa Ana, Calif. 92705

CALIFORNIA ACUPUNCTURE BOARD
 Mr. Jose Guerrero, Esq.
 Deputy Attorney General
 P.O. Box 70550
 Oakland, Calif. 94612-0550


 EXPRESS

I deposited the envelope in the U.S. Postal Service the same day with ~~first-class~~ postage thereon fully prepaid at Lake Forrest, California.

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

Executed on October 15, 2003, at Lake Forrest, California


 David Prescott