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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

11 MANUELA ZERMENO, etc., et al.

12 Plaintiffs,

13 v.

14 PRECIS, INC., etc., et al.

15 Defendants.

16 CALIFORNIA FOUNDATION FOR
17 BUSINESS ETHICS, INC., etc.,

18 Plaintiffs,

19 v.

20 PRECIS, INC., etc., et al.

21 Defendants.

22 **Case No. CV 03-6974 SJO (MANx)**
23 *(Consolidated with Case No. 03-6997*
24 *SJO (MANx) Dec. 9, 2003)*

25 **PLAINTIFFS' OPPOSITION TO**
26 **DEFENDANTS' MOTION TO**
27 **DISMISS**

28 Date: March 15, 2004

Time: 10:00 a.m.

Place: Courtroom 1600

Hon. S. James Otero

Trial date: Nov. 9, 2004

Complaint Filed Aug. 28, 2003
Action Removed Sept. 26, 2004

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1 **I. INTRODUCTION**

2 This action seeks to stop defendants’ discount health care referral
3 business and require them to follow discount buying service laws until they are
4 shut down. The health care referral business is expressly prohibited by Cal.
5 Health and Safety Code §445. While defendants operate their business,
6 however, they must comply with California’s discount buying service laws, Cal.
7 Civil Code §§1812.100-1812.129.

8 Plaintiffs seek injunctive relief and a refund under those statutes. They
9 also seek injunctive relief and refunds under California’s unfair business
10 practice statutes, Cal. Business and Professions Code §§17200-17209.
11 Defendants, however, do not challenge plaintiffs’ claims under the Business
12 and Professions Code.

13 Defendants’ motion should be denied because the Health and Safety
14 Code specifically prohibits defendants’ business and plaintiffs, as injured
15 members of the public for whose benefit the statute was enacted, have a private
16 right of action to enforce it. Plaintiffs also have valid claims under the Civil
17 Code because it expressly allows actions for refunds to consumers who cancel a
18 discount buying contract when the company fails to comply with that law, as
19 defendants tacitly admit.

20 **II. FACTS**

21 Defendants sell memberships in a discount health care referral service
22 marketed as Care Entrée. First Amended Complaint (filed Jan. 29, 2004)
23 (1stAmCmplt), ¶¶ 4, 9, 10. Defendants sell referrals to discounted medical and
24 dental services and prescription medications. 1stAmCmplt, ¶ 9. They charged
25 plaintiffs a monthly fee of \$54.95 to join Care Entrée’s discount health care
26 referral service. 1stAmCmplt, ¶ 10. Plaintiffs paid the monthly fee directly
27 from their bank account. 1stAmCmplt, ¶ 10. Plaintiffs were dissatisfied with
28 Care Entrée because the dental providers defendants referred them to said they

1 did not participate in the discount plan. 1stAmCmplt, ¶¶ 11, 12. As a result,
2 plaintiffs cancelled their contract with defendants within the first 30 days of
3 membership as allowed by defendants’ contract and state law. 1stAmCmplt, ¶¶
4 8, 13, 16, 33. Nonetheless, defendants continued to take \$54.95 from plaintiffs’
5 bank account each month for a full year. 1stAmCmplt, ¶¶ 14, 17, 18, 19, 34.
6 Although defendants took a total of \$714.35 from plaintiffs’ bank account, they
7 refunded only \$164.85, and thus owe plaintiffs a refund balance of \$549.50.
8 1stAmCmplt, ¶¶ 18, 19, 34, 35.

9 Plaintiffs bring three claims against defendants: (1) to enjoin defendants’
10 business under Health and Safety Code §445, which prohibits companies from
11 making health care referrals for profit; (2) to obtain a refund and treble damages
12 under Civil Code §1812.123, which regulates discount buying services; and (3)
13 to enjoin various unlawful business practices and obtain refunds for plaintiffs
14 and other members of the general public under Business and Professions Code
15 §§17200-17209, which prohibit unfair business practices. Defendants do not
16 challenge plaintiffs’ claim under the unfair business practice statutes.

17 **III. HEALTH AND SAFETY CODE §445 PROHIBITS**
18 **DEFENDANTS’ BUSINESS AND AFFECTED**
19 **INDIVIDUALS MAY ENFORCE IT**

20 **A. Section 445 Prohibits Companies From Referring**
21 **Individuals to Medical Providers for Profit**

22 Health and Safety Code §445 provides that no person or entity “shall for
23 profit refer or recommend a person to a physician, hospital, health-related
24 facility, or dispensary for any form of medical care or treatment of any ailment
25 or physical condition.” Section 445 also prohibits physicians and health care
26 facilities from contracting “to accept for medical care or treatment any person
27 referred or recommended for such care or treatment by a medical referral
28 service business” even if the referral service is located in another state.

1 Plaintiffs allege that defendants operate a health care referral service
2 business. 1stAmCmplt, ¶¶ 1, 3, 4, 9, 10 (defendants gave plaintiffs “a list of
3 providers that were allegedly participating in the program.”). They seek to
4 permanently enjoin defendants from continuing that business. 1stAmCmplt, ¶¶
5 20-24.

6 California’s Attorney General has determined that §445 prohibits
7 companies that do *precisely* what Care Entrée does. 84 Ops.Cal.Atty.Gen. 113,
8 2001 WL 814658 (2001). The Attorney General concluded that §445 prohibits
9 a company from charging a fee “for furnishing a *list* of physicians willing to
10 provide medical services at discounted rates to uninsured indigent persons.”
11 2001 WL 814658 at *1 (emphasis added). The Attorney General applied
12 “established principles of statutory interpretation,” considered other opinions
13 dealing with similar subject matters, and “examined in detail the legislative
14 history of section 445.” *Id.* at *1-*3. The Attorney General found “no basis for
15 the notion that furnishing for a fee a list of physicians based exclusively on their
16 willingness to charge discounted rates to uninsured indigents is something other
17 than a referral proscribed by section 445.” *Id.* at *3.

18 ““Opinions of the Attorney General, while not binding, are entitled to
19 great weight.”” *Cal. Ass’n of Psychology Providers v. Rank*, 51 Cal.3d 1, 17,
20 270 Cal.Rptr. 796 (1990) (citations omitted). “In the absence of controlling
21 authority, these opinions are persuasive since the Legislature is presumed to be
22 cognizant of that construction of the statute.” *Id.* (internal quotation marks and
23 citation omitted). That presumption is particularly apt in this case as the
24 opinion was prepared at the request of a member of the California State
25 Assembly. 84 Ops.Cal.Atty.Gen. 113, 2001 WL 814658 at *1.

26 Defendants argue that §445 does not apply to the discount health care
27 industry. Defendants’ Notice of Motion and Motion to Dismiss for Failure to
28 State a Claim, etc. (filed Feb. 13, 2004) (Motion to Dismiss) at 7-8. Their

1 argument is that, when literally read, §445 only prohibits referring a *single*
2 customer to a *single* provider. *Id.* at 7. Thus, according to defendants, if a
3 referral service refers several customers to a single provider, a single customer
4 to several providers, or several customers to several providers, it is not covered
5 by §445.

6 Defendants' interpretation is unsound. The California Legislature would
7 not prohibit defendants' narrow range of referrals while allowing all others.
8 Defendants' interpretation also ignores the statute's references to a "medical
9 referral service business" as the business being prohibited. A medical referral
10 service *business* does not make only a single referral to a single individual. Nor
11 does the fact that defendants give their clients a list of several providers rather
12 than a single provider remove it from the reach of §445 as defendants contend.
13 Motion to Dismiss at 7. A list of specific program participants simply
14 constitutes several referrals. If one referral is prohibited, more than one referral
15 is prohibited as well.

16 Defendants ignore the Attorney General's opinion and instead rely on an
17 out-of-state case involving a First Amendment challenge to a New York law
18 similar to California's, *S.P.S. Consultants, Inc. v. Lefkowitz*, 333 F.Supp. 1373
19 (S.D.N.Y. 1971). Motion to Dismiss at 7-8. As defendants acknowledge,
20 however, when interpreting a California statute, federal courts are bound by
21 California rules of construction. Motion to Dismiss at 5 (citing *In re*
22 *Lieberman*, 245 F.3d 1090, 1092 (9th Cir. 2001)). "[F]ederal decisional
23 authority is neither binding nor controlling in matters involving state law."
24 *Nagel v. Twin Laboratories, Inc.*, 109 Cal.App.4th 39, 55, 134 Cal.Rptr.2d 420
25 (2003) (citation omitted). In contrast, the opinion of the California Attorney
26 General is persuasive in the absence of controlling authority. *Cal. Ass'n of*
27 *Psychology Providers v. Rank*, 51 Cal.3d at 17.

1 Moreover, the New York case involved a different issue. There, the
2 court stated that supplying a general list of doctors or facilities that performed
3 abortions was not a referral prohibited by the statute. That list, however, was
4 more like a broad “yellow pages” directory, rather than the *limited* referral list
5 of *specific* physicians who have *contracted* to provide the *particular discounted*
6 *services* at issue in this case. The opinion of California’s Attorney General
7 interpreting the California statute at issue in this case is more pertinent than an
8 out-of-state case in a different context – especially since the Attorney General’s
9 opinion is rendered in the context of California law and considers the California
10 statute’s legislative history.

11 **B. Section 445 Reflects Public Policy, Thus Protected**
12 **Members of the Public Can Enforce It**

13 Defendants also assert that plaintiffs have no private right of action under
14 §445 because the statute does not expressly allow private individuals to enforce
15 it. Motion to Dismiss at 6-7 (“Because the language of Section 445 does not
16 explicitly provide for a private right of action and there is no indication of
17 legislative intent to allow such an action, Plaintiffs cannot be allowed to pursue
18 a private right of action for enforcement of this statute.”). California law,
19 however, does not require an explicit authorization for a private right of action,
20 especially when the legislation is designed to protect the public.

21 “Violation of a statute embodying a public policy is generally actionable
22 even though no specific remedy is provided in the statute itself. Any injured
23 member of the public for whose benefit the statute was enacted may bring the
24 action.” *Michael R. v. Jeffery B.*, 158 Cal.App.3d 1059, 1067, 205 Cal.Rptr.
25 312 (1984); accord, *Faria v. San Jacinto Unified School Dist.*, 50 Cal.App.4th
26 1939, 1947, 59 Cal.Rptr.2d 72 (1996) (“Violation of a statute gives to any
27 person within the statute’s protection a right of action to recover damages
28 caused by its violation.”). Section 445 reflects a public policy against medical

1 referral services and, as victims of such a business, plaintiffs are injured
2 members of the public for whose benefit the statute was enacted, entitling them
3 to sue defendants under the statute.

4 Defendants also imply that because the statute has criminal penalties and
5 allows the Attorney General to seek injunctive relief, private litigants should be
6 denied the right to do so. Motion to Dismiss at 7. But many statutes providing
7 criminal sanctions also form the basis for individual civil actions. See, e.g.,
8 *Montalvo v. Zamora*, 7 Cal.App.3d 69, 76, 86 Cal.Rptr. 401 (1970)
9 (“[V]iolations of public policy statutes . . . have been declared justiciable in
10 civil actions. This is true notwithstanding that criminal sanctions are
11 provided.”) (citations omitted). The fact that the Attorney General is authorized
12 to bring an action does not imply private individuals are precluded from doing
13 so either. A “private right of action is an appropriate remedy when it is ‘needed
14 to assure the effectiveness of the provision.’” *Faria v. San Jacinto Unified*
15 *School Dist.*, 50 Cal.App.4th at 1947. Although the Attorney General
16 obviously believes businesses such as defendants’ are expressly prohibited by
17 §445 (84 Ops.Cal.Atty.Gen. 113), he is not prosecuting this case. Private
18 enforcement is thus both necessary and appropriate.

19 **IV. PLAINTIFFS MAY SUE DEFENDANTS FOR FAILING TO**
20 **PROVIDE A REFUND UNDER CIVIL CODE §1812.123**

21 **A. Civil Code §§1812.100-1812.129 Regulate Discount**
22 **Health Care Buying Services**

23 Civil Code §§1812.100-1812.129 regulate contracts for discount buying
24 services. Care Entrée’s business falls within each definition in these statutes. A
25 “[d]iscount buying organization” is defined as any “organization which, for a
26 consideration, provides or purports to provide its clients . . . with the ability to
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28

1 purchase goods or services at discount prices” Civ. Code §1812.101(a).¹
2 Care Entrée, which claims to give consumers the ability to purchase medical
3 and dental services and prescription goods at 40% to 80% off regular prices
4 (1stAmCmplt, ¶ 9), comes within this straightforward definition.

5 A “[c]ontract for discount buying services” is defined as a contract where
6 a consumer, for consideration, “receives the right to . . . utilize the discount
7 buying organization services in obtaining goods or services, at discount prices.”
8 Civ. Code §1812.101(b). Again, Care Entrée’s contract says it allows plaintiffs
9 to obtain medical and dental services and prescription goods at discounts from
10 the usual and customary charges. 1stAmCmplt, ¶ 9. “Discount prices” are
11 defined as “prices which are represented to be lower on most or all offered
12 goods or services than those generally charged for the items in the locality in
13 which the representations are made.” Civ. Code §1812.101(c). Care Entrée
14 meets this test as well. 1stAmCmplt, ¶ 9.

15 As a result, Care Entrée must comply with state bonding requirements
16 (Civ. Code §§1812.103-.105), make certain disclosures to consumers
17 (§1812.106), and comply with various contract requirements (§§1812.107-
18 .118). Contracts that fail to comply with these requirements are voidable
19 (§1812.119). Consumers injured by any violation of the discount buying
20 statutes can sue for damages, *a return of all moneys paid*, treble damages and
21 other statutory penalties, and attorney’s fees. Civ. Code §1812.123(a). These
22 discount buying statutes supplement other laws. Civ. Code §1812.126.

23 Plaintiffs are suing defendants for a “return of all moneys paid” plus
24 treble damages – as expressly allowed by Civil Code §1812.123 – because
25 defendants failed to comply with *any* requirement of §1812.100 et seq., making
26

27 ¹ There are some exceptions to this definition that do not apply here, such as
28 organizations that charge only a one-time fee of no more than \$50 or an annual
fee of no more than \$25. Civ. Code §1812.101(a), subds. (1), (2).

1 it voidable under §1812.119. 1stAmCmplt, ¶¶ 29-36. Plaintiffs state a valid
2 claim against defendants under California’s discount buying service statutes.

3 **B. Plaintiffs Were Injured Because Defendants Refused to**
4 **Return Their Monthly Membership Fees After Plaintiffs**
5 **Voided the Contract Under Civil Code §1812.119**

6 Defendants challenge this claim by asserting that, although plaintiffs
7 allege violations of the discount buying service statutes and may be allowed to
8 void the contract, plaintiffs do not allege any “injury” under the statutes.
9 Motion to Dismiss at 10-11.

10 It is hard to understand how defendants could make such a statement as
11 plaintiffs’ claims are expressly allowed by Civil Code §1812.123. Plaintiffs
12 allege in several places that they lawfully voided the contract under Civil Code
13 §1812.119 but defendants continued to take \$714.35 in monthly membership
14 fees and refused to refund all but \$164.85. 1stAmCmplt, ¶¶ 13-19, 33-36.
15 Plaintiffs further allege that they are entitled to a refund of \$549.50 plus treble
16 damages. 1stAmCmplt, ¶¶ 33-36. Refunds are expressly allowed under
17 §1812.123 (buyer of discount services contract may sue for a “return of all
18 moneys paid by the buyer to the seller.”). Plaintiffs even cite the statutes under
19 which they seek relief for their injuries. 1stAmCmplt, ¶¶ 33-36 (§§1812.119,
20 1812.123). Plaintiffs not only allege injury, but support it with statutory
21 authority.

22 **C. The Language and Legislative Findings of the Statutes**
23 **and Basic Principles of Statutory Construction Show the**
24 **Statutes Apply to Discount Health Care Buying Services**

25 Defendants next claim the language and legislative history of the
26 discount buying service statutes show they do not apply to the discount health
27 care industry. In doing so defendants ignore the plain language of the statutory
28 definitions of a “discount buying organization” and “contract for discount

1 buying services,” both of which undeniably apply to defendants’ business. Civ.
2 Code §1812.102, subds. (a), (b) (discount buying organization is one that allows
3 its clients “to purchase goods or services at discount prices”). Care Entrée
4 claims to allow its members to purchase *both* goods and services at a discount –
5 prescription medications and medical and dental services. 1stAmCmpl, ¶ 9.

6 Defendants openly attempt to change the definition of the term “discount
7 buying organization” from entities that provide their members “with the ability
8 to purchase goods or services at discount prices,” as §1812.101 states, to
9 entities engaged in the business of “*selling and shipping goods* to their
10 members.” Motion to Dismiss at 13 (emphasis by defendants). Defendants
11 base this extreme conclusion on the fact that some sections of the statutes refer
12 only to the purchase of consumer *goods* and defendants’ claim that the term
13 “services” is “inconsistent and ambiguous” within the statutes. Motion to
14 Dismiss at 11-12.

15 Defendants’ interpretation has no support in the language of the statutes,
16 the basic principles of statutory construction, or the legislative findings
17 supporting the statutes. The fact that the statutes refer to goods in some areas
18 does not mean they intend to exclude services, only that those provisions apply
19 to goods rather than services. Moreover, defendants conveniently fail to fully
20 quote the statute on which they rely (Motion to Dismiss at 13), which discusses
21 the “goods, *if any*” the organization may deal with. Civ. Code §1812.106(a)
22 (emphasis added).

23 Basic principles of statutory construction also undercut defendants’
24 argument. Every word, phrase, and sentence in a statute should, if possible, be
25 accorded significance. *Dyna-Med, Inc. v. Fair Employment & Housing*
26 *Comm’n*, 43 Cal.3d 1379, 1386-87, 241 Cal.Rptr. 67 (1987). “A construction
27 making some words surplusage is to be avoided.” *Id.* at 1387. Defendants’
28 interpretation, however, effectively eliminates the term “services” from the

1 statutes. The statutes should be “construed liberally” to achieve their goals of
2 protecting the public. Civ. Code §1812.100(b). Instead, defendants’
3 construction radically *restricts* the statutes to protect the targeted industry.

4 The statutes’ legislative findings also undercut defendants’ sweeping
5 definitional changes. The findings show there has been fraud, deceit and
6 financial hardships on the people of California in the discount buying services
7 business and that the purpose of the statutes is to safeguard the public against
8 such practices and to encourage fair dealing in that industry. Civ. Code
9 §1812.100. Nothing in the legislative findings indicates the unwanted business
10 practices are related to the sale of discounted goods as opposed to discounted
11 services or are limited to entities that personally sell the goods or services. *Id.*
12 In fact, the Legislature enacted these statutes to protect consumers from just the
13 type of injury plaintiffs suffered from contracting with a discount buying
14 organization. Civ. Code §1812.123.

15 Defendants point to a letter seeking support of the statutes and a press
16 release issued after the bill was passed to argue the “legislative history”
17 supports defendants’ elimination of the word “services” from the statutes’
18 definitions. Motion to Dismiss at 13-14. Because the statutes’ language is
19 unambiguous, however, it is improper to consider legislative history. *People v.*
20 *Farell*, 28 Cal.4th 381, 394, 121 Cal.Rptr.2d 603 (2002) (“[O]nly when the
21 language of a statute is susceptible to more than one reasonable construction is
22 it appropriate to turn to extrinsic aids, including the legislative history of the
23 measure, to ascertain its intent.”). Moreover, the statements of individual
24 legislators are of “dubious value” in determining legislative intent. *Id.* (“[T]he
25 expressions of individual legislators generally are an improper basis upon
26 which to discern the intent of the entire Legislature.”); *Coalition for Clean Air*
27 *v. U.S. Environmental Protection Agency*, 971 F.2d 219, 227 (9th Cir. 1992)
28 (“The statements of individual legislators are entitled to little, if any, weight.”).

1 Finally, these documents do not even purport to fully describe the statutes or
2 address the issue at hand, so they offer no support for defendants' extreme
3 conclusion. *Kavanaugh v. West Sonoma County Union High School Dist.*, 29
4 Cal.4th 911, 920 n.6, 129 Cal.Rptr.2d 811 (2003) (letter from author of bill to
5 governor unhelpful because, among other reasons, it did not address the issue
6 the court was deciding).

7 Defendants' radical interpretation of the discount buying service statutes
8 conflicts with the language of the statutes, the purpose behind them, and basic
9 principles of statutory construction. These statutes apply to defendants'
10 discount health care and prescription goods buying service.

11 **V. CONCLUSION**

12 Defendants' motion should be denied.

13 Date: Neighborhood Legal Services
14 of Los Angeles County

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16 _____
17 David Pallack
18 Attorneys for Plaintiffs
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