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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)**  
*(Consolidated with Case No. 03-6997*  
*SJO (MANx) Dec. 9, 2003)*

23 **PLAINTIFFS' NOTICE OF**  
24 **MOTIONS AND MOTIONS FOR**  
25 **SUMMARY JUDGMENT,**  
26 **PARTIAL SUMMARY**  
27 **JUDGMENT, AND PERMANENT**  
28 **INJUNCTION**

Date: Aug. 9, 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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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at the date and time listed above or as soon thereafter as the matter may be heard in Courtroom 1600 of the above-entitled court, located at 312 North Spring Street, Los Angeles, California, plaintiffs Manuela and Juan A. Zermeno will ask the court to (1) enter summary judgment in their favor and against defendants on the first cause of action of their First Amended Complaint (filed Jan. 21, 2004), finding that defendants' Care Entrée discount health care referral business is unlawful under Cal. Health and Safety Code §445, and (2) enter partial summary judgment under the third cause of action of the First Amended Complaint finding that defendants' Care Entrée discount health care referral business is an unlawful business under Cal. Business and Professions Code §§17200-17209 in that it violates Cal. Health and Safety Code §445 and fails to comply with California discount buying organization statutes, Cal. Civil Code §§1812.100-1812.129.

PLEASE TAKE FURTHER NOTICE that plaintiffs will also ask the court to enter a permanent injunction against defendants prohibiting them from operating the Care Entrée or any other discount health referral business in California and requiring defendants to comply with California's discount buying organization statutes until the Care Entrée business is terminated.

These motions will be based on the grounds that defendants' Care Entrée discount health referral business is prohibited by Cal. Health and Safety Code §445, fails to comply with California discount buying organization statutes, Cal. Civil Code §§1812.100-1812.129, and constitutes an unfair and unlawful business under Cal. Business and Professions Code §§17200-17209.

These motions are based on this notice, Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law and attached evidence filed herewith, the attached memorandum of points and authorities, all pleadings,

1 documents, and other papers filed in this and the consolidated action, and on  
2 such other evidence that may be presented at the hearing.

3 Pursuant to Local Rule 7-3, counsel discussed the substance of these  
4 motions on at least two occasions, Jan. 23, 2004 and June 23, 2004, but were  
5 unable to resolve the issues.

6 Date:

Neighborhood Legal Services  
of Los Angeles County

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10 David Pallack  
11 Attorneys for Plaintiffs  
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**I. INTRODUCTION**

This action seeks to stop defendants’ discount health care referral business and require them to follow discount buying service laws until they cease operations. Plaintiffs seek summary judgment on the first cause of action of their First Amended Complaint (filed Jan. 21, 2004) that defendants’ health care referral business is prohibited by Cal. Health and Safety Code §445 and a permanent injunction prohibiting defendants from operating that business in California. Plaintiffs also seek a partial summary judgment on the third cause of action of their First Amended Complaint finding that defendants’ discount health care referral business is an unlawful business under Cal. Business and Professions Code §§17200-17209 in that it violates Cal. Health and Safety Code §445 and fails to comply with California’s discount buying organization laws, Cal. Civil Code §§1812.100-1812.129. Plaintiffs seek an injunction requiring defendants to comply with the California discount buying organization statutes until their business is terminated.

Plaintiffs seek this relief on behalf of themselves and the general public pursuant to California’s unfair business practices act, Business and Professions Code §§17200-17209.

**II. FACTS**

Defendants operate a discount health care referral business in California under the name of Care Entrée. Plaintiffs’ Statement of Uncontroverted Facts and Conclusions of Law, Uncontroverted Fact No. 1 (UF 1). Families and individuals join the Care Entrée program (and become “members”) by paying defendants monthly fees of \$9.95 to \$69.95. UF 2, 7. In exchange for these monthly fees, defendants refer Care Entrée members to health care providers and sellers of health products who agree to charge members discounted rates for their health care services and goods. UF 3. Defendants contract with health care providers through various networks to provide Care Entrée members with

1 health care services at discounted rates. UF 4. Defendants also contract with  
2 sellers of health care goods such as prescription and non-prescription  
3 medications, eyeglasses, contact lenses, lens and eye solutions, hearing aids,  
4 and hearing aid batteries to sell these products to Care Entrée members at  
5 discounted rates. UF 5. Health care providers and goods sellers provide  
6 services and products to Care Entrée members at discounted rates at least in part  
7 because defendants refer members to participating providers and sellers and  
8 represent the members will pay the full discounted bills at the time services are  
9 rendered or the products are provided. UF 6.

10 The Care Entrée programs range from the sale of goods only (such as  
11 prescription and non-prescription medications, eyeglasses, contact lenses, lens  
12 and eye solutions, hearing aids, and hearing aid batteries) under the \$9.95 per  
13 month “Prescription Plus Program” to the \$69.95 per month “Total Care  
14 Program,” which provides members with, among other things, referrals to  
15 discount-providing hospitals, physicians, dental care providers, and “alternative  
16 care” providers such as chiropractors. The Total Care Program also provides  
17 members with discounts on prescription medications, eyeglasses, contact lenses,  
18 lens and eye solutions, and hearing aids and batteries. UF 7-12.

19 Care Entrée members are *required* to call Care Entrée employees to  
20 access the discounted in-patient hospital services. UF 13. The employee  
21 discusses the member’s hospital needs and ability to pay and then recommends  
22 a specific hospital for the member, provided the member ensures in advance  
23 that he or she can pay for the hospital services, generally through an escrow  
24 account. UF 13. Defendants recommend members call a Care Entrée employee  
25 before using outpatient hospital services so the employee can recommend a  
26 particular hospital to the member. UF 14. Defendants provide members with  
27 referrals for other medical services and goods by giving them lists of  
28 participating health care providers and health product sellers in their geographic

1 area and information over the internet. UF 15. Members must call Care Entrée  
2 employees to get current or additional referral information about the providers  
3 and sellers in the program. UF 15.

4 **III. SUMMARY JUDGMENT IS PROPER TO INTERPRET**  
5 **AND APPLY STATUTES**

6 Summary judgment should be granted when the evidence shows “there is  
7 no genuine issue as to any material fact” and “the moving party is entitled to a  
8 judgment as a matter of law.” Fed. R. Civ. P. 56(c). “Questions of statutory  
9 construction and legislative history traditionally present legal questions  
10 properly resolved by summary judgment.” *Union Pacific Land Resources*  
11 *Corp. v. Moench Investment Co., Ltd.*, 696 F.2d 88, 93 n.5 (10th Cir. 1982).  
12 Since this is a diversity action, the court applies state substantive law and  
13 federal procedural law. *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th  
14 Cir. 2003). The court must follow California appellate courts in interpreting  
15 California’s statutes. *Smith v. City of Hemet*, 356 F.3d 1138, 1141 (9th Cir.  
16 2004).

17 The court may also grant a partial summary judgment on “any part” of a  
18 claim. Fed. R. Civ. P. 56(a); *Wang Laboratories, Inc. v. Mitsubishi Electronics*  
19 *America, Inc.*, 860 F.Supp. 1448, 1450-51 (C.D. Cal. 1993). “The standards  
20 and procedures are the same as for summary judgment of a claim.” *Wang*  
21 *Laboratories v. Mitsubishi Electronics*, 860 F.Supp. at 1451.

22 In this case the relevant facts are either undisputed or proven by  
23 defendant’s own documents, videotape and marketing CD. Summary judgment  
24 is thus proper to determine whether defendants’ business practices violate  
25 California statutes.

26 ///

1           **IV. HEALTH AND SAFETY CODE §445 PROHIBITS**  
2           **DEFENDANTS’ BUSINESS AND PLAINTIFFS MAY**  
3           **ENFORCE IT**

4           **A. Section 445 Prohibits Companies From Referring**  
5           **Individuals to Medical Providers for Profit**

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

13           The uncontroverted facts show that defendants operate a health care  
14 referral service business. UF 1-4, 6-11, 13-15. Defendants *require* Care Entrée  
15 members to contact them for individual referrals for in-patient hospital services  
16 (UF 13) and they recommend individual referrals for outpatient hospital  
17 services. UF 14. Defendants make referrals for other medical services to Care  
18 Entrée members through *limited* referral lists of *specific* physicians and other  
19 providers who have *contracted* to provide *particular discounted services* to  
20 Care Entrée members. UF 15. Members must call Care Entrée employees to  
21 update and supplement these lists. UF 15.

22           California’s Attorney General has determined that Health and Safety  
23 Code §445 prohibits companies that do *precisely* what Care Entrée does. 84  
24 Ops.Cal.Atty.Gen. 113, 2001 WL 814658 (2001). The Attorney General  
25 concluded that §445 prohibits a company from charging a fee “for furnishing a  
26 *list* of physicians willing to provide medical services at discounted rates to  
27 uninsured indigent persons.” 2001 WL 814658 at \*1 (emphasis added). The  
28 Attorney General applied “established principles of statutory interpretation,”

1 considered other opinions dealing with similar subject matters, and “examined  
2 in detail the legislative history of section 445.” *Id.* at \*1-\*3. The Attorney  
3 General found “no basis for the notion that furnishing for a fee a list of  
4 physicians based exclusively on their willingness to charge discounted rates to  
5 uninsured indigents is something other than a referral proscribed by section  
6 445.” *Id.* at \*3.

7 ““Opinions of the Attorney General, while not binding, are entitled to  
8 great weight.”” *Cal. Ass’n of Psychology Providers v. Rank*, 51 Cal.3d 1, 17,  
9 270 Cal.Rptr. 796 (1990) (citations omitted). “In the absence of controlling  
10 authority, these opinions are persuasive since the Legislature is presumed to be  
11 cognizant of that construction of the statute.” *Id.* (internal quotation marks and  
12 citation omitted). That presumption is particularly apt in this case as the  
13 opinion was prepared at the request of a member of the California State  
14 Assembly. 84 Ops.Cal.Atty.Gen. 113, 2001 WL 814658 at \*1.

15 Defendants argued that §445 does not apply to the discount health care  
16 industry. Defendants’ Notice of Motion and Motion to Dismiss for Failure to  
17 State a Claim, etc. (filed Feb. 13, 2004) (Motion to Dismiss) at 7-8. The court  
18 rejected this claim when it denied defendants’ motion to dismiss. Order  
19 Denying Defendants’ Motion to Dismiss (filed May 7, 2004) at 7-9, 11.

20 **B. Plaintiffs May Enforce Health and Safety Code §445**  
21 **Under §445 and California’s Unfair Business Practices**  
22 **Act**

23 Plaintiffs have standing to enforce Health and Safety Code §445 under both  
24 §445 and California’s unfair business practices act. On May 7, 2004, the court  
25 ruled that plaintiffs have a private right of action under §445 to enforce it. Order  
26 Denying Defendants’ Motion to Dismiss at 7-9.

27 Plaintiffs can also enforce §445 under California’s unfair business practices  
28 act. Cal. Business and Professions Code §17200 prohibits “any unlawful, unfair,

1 or fraudulent business act or practice.” “The unlawful practices prohibited by  
2 section 17200 are any practices forbidden by law, be it civil or criminal, federal or  
3 state, or municipal, statutory, regulatory or court made.” *Saunders v. Superior*  
4 *Court*, 27 Cal.App.4th 832, 838-39 (1994). “[S]ection 17200 ‘borrows’ violations  
5 of other laws and treats them as unlawful practices independently actionable”  
6 under the unfair business practices act. *State Farm Fire & Casualty Co. v.*  
7 *Superior Court*, 45 Cal.App.4th 1093, 1103 (1996) (citing *Farmers Ins. Exchange*  
8 *v. Superior Court*, 2 Cal.4th 377, 383 (1992)).

9 The act is not limited to anti-competitive business practices, but also protects  
10 consumers. *Committee on Children’s Television, Inc. v. General Foods Corp.*, 35  
11 Cal.3d 197, 209-10 (1983) (The language of section 17200 “demonstrates a clear  
12 design to protect consumers as well as competitors”).

13 Under §17200, “a private plaintiff who has himself suffered *no injury at*  
14 *all* may sue to obtain relief for others.” *Stop Youth Addiction, Inc. v. Lucky*  
15 *Stores, Inc.*, 17 Cal.4th 553, 561 (1998) (citations omitted) (emphasis added).  
16 “The courts in California have consistently upheld the right of both individual  
17 persons and organizations under the unfair competition statute to sue on behalf  
18 of the public for injunctive relief as private attorneys general, even if they have  
19 not themselves been personally harmed or aggrieved.” *Consumers Union of*  
20 *U.S. v. Fisher Dev., Inc.*, 208 Cal.App.3d 1433, 1439 (1989) (citations omitted).

21 “Moreover, individuals can bring actions under the unfair business  
22 practices act alleging violations of laws even if those laws do not provide a  
23 private right of action themselves.” *Stop Youth Addiction*, 17 Cal.4th at 562-63;  
24 *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 950 (2002). The California Supreme Court  
25 “has repeatedly recognized the importance of these private enforcement  
26 actions.” *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126  
27 (2000); *Kasky v. Nike*, 27 Cal.4th at 950.

1 Defendants' discount health care referral business is unlawful under  
2 Health and Safety Code §445. Plaintiffs may enjoin it under Business and  
3 Professions Code §17203 even if §445 did not provide them with a private right  
4 of action and even if they suffered no harm from defendants' violation of §445.  
5 *Stop Youth Addiction*, 17 Cal.4th at 561-63.

6 **V. THE COURT SHOULD PERMANENTLY ENJOIN**  
7 **DEFENDANTS' HEALTH CARE REFERRAL BUSINESS**

8 In general, to obtain a permanent injunction a party must show (1) the  
9 likelihood of substantial and immediate irreparable injury and (2) the  
10 inadequacy of remedies at law. *G.C. and K.B. Investments, Inc. v. Wilson*, 326  
11 F.3d 1096, 1107 (9th Cir. 2003). The court should also "balance the equities  
12 between the parties and give due regard to the public interest." *Idaho*  
13 *Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002) (citing *Amoco*  
14 *Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)).

15 In this case, the substantive standard for injunctive relief is modified by  
16 Health and Safety Code §445. It states in pertinent part that any violation of  
17 §445 may be enjoined in a civil action "except that the plaintiff shall not be  
18 required to allege facts necessary or show or tending to show lack of adequate  
19 remedy at law or to show or tending to show irreparable damage or loss." Thus  
20 under §445 a plaintiff need only show a violation of the statute to enjoin the  
21 violator's conduct.

22 Both the equities and public interest also militate in favor of a permanent  
23 injunction. Defendants' continuing violation of §445 not only undercuts the  
24 public policy behind the statute, it constitutes a criminal act, punishable by up  
25 to one year in jail and a \$5,000 fine or both. Health & Saf. Code §445, ¶ 4.  
26 The California Legislature has determined the general public is best served by  
27 prohibiting the business defendants operate.

1 A district court may grant both summary judgment and order a  
2 permanent injunction in one hearing if the plaintiff has prevailed on the merits.  
3 See, e.g., *Diva’s, Inc. v. City of Bangor*, 21 F.Supp.2d 60, 63 (D. Maine 1998)  
4 (permanent injunction granted after parties allowed to present full evidence on  
5 merits); *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F.Supp.2d 644,  
6 648-49 (W.D. Texas 1999) (consolidating injunction motion with trial on  
7 merits). Defendants’ unlawful health care referral business should be  
8 permanently enjoined.

9 **VI. DEFENDANTS MUST COMPLY WITH THE DISCOUNT**  
10 **BUYING STATUTES UNTIL THEY STOP OPERATING**  
11 **THE CARE ENTRÉE PROGRAM IN CALIFORNIA**

12 **A. Civil Code §§1812.100-1812.129 Regulate Discount**  
13 **Health Care Buying Organizations**

14 Civil Code §§1812.100-1812.129 regulate contracts for discount buying  
15 organizations. Care Entrée’s business falls within each definition in these  
16 statutes. A “[d]iscount buying organization” is defined as any “organization  
17 which, for a consideration, provides or purports to provide its clients . . . with  
18 the ability to purchase goods or services at discount prices . . . .” Civ. Code  
19 §1812.101(a).<sup>1</sup> Care Entrée, which, for a monthly fee, claims to give consumers  
20 the ability to purchase medical and dental services and prescription goods at  
21 discounts (UF 3-5, 7-12), comes within this straightforward definition.

22 “Discount prices” are defined as “prices which are represented to be  
23 lower on most or all offered goods or services than those generally charged for  
24 the items in the locality in which the representations are made.” Civ. Code  
25 §1812.101(c). Care Entrée meets this test as well. UF 3-5, 7-12.

26 \_\_\_\_\_  
27 <sup>1</sup> 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 On May 7, 2004, the court ruled that the discount buying statutes apply to  
2 the discount health care industry and that “Defendants’ Care Entrée Total Care  
3 program falls within the definition of a ‘discount buying organization,’ pursuant  
4 to the language in § 1812.101.” Order Denying Defendants’ Motion to Dismiss  
5 at 10-11.

6 As a result, Care Entrée must comply with state bonding requirements  
7 (Civ. Code §§1812.103-.105), make certain disclosures to consumers  
8 (§1812.106), and comply with various contract requirements (§§1812.107-  
9 .118). Contracts that fail to comply with these requirements are voidable  
10 (§1812.119). Consumers injured by any violation of the discount buying  
11 statutes can sue for damages, a return of all moneys paid, treble damages and  
12 other statutory penalties, and attorney’s fees. Civ. Code §1812.123(a). These  
13 discount buying statutes supplement other laws. Civ. Code §1812.126.

14 Defendants admit the Care Entrée program does not comply with any of  
15 California’s discount buying organization statutes because defendants do not  
16 believe those statutes apply to the Care Entrée program. UF 16.

17 **B. Defendants Should be Ordered to Comply With the Discount**  
18 **Buying Organization Statutes Until the Care Entrée Program**  
19 **Stops Operating in California**

20 Defendants represented to the court that they had 11,178 Care Entrée  
21 members in California as of Sept. 18, 2003. Notice of Removal of Action  
22 Under 28 U.S.C. § 1441(b) (filed Sept. 26, 2003), Declaration of David May, ¶  
23 5. It will thus take defendants some time to cease operations. During that time  
24 defendants should be required to comply with California’s discount buying  
25 organization statutes. Defendants should thus be ordered, at the very least, to  
26 comply with all bonding requirements (Civ. Code §§1812.103-.105) and give  
27 notice to members of their right to void their contracts (§1812.119) and obtain  
28 refunds, damages, penalties, and attorney’s fees, if appropriate (Civ. Code

1 §1812.123(a)). Notice should be given to all current members and all who were  
2 members within four years of the date this action was filed. Bus. & Prof. Code  
3 §17208 (providing a four-year statute of limitations for unfair business practices  
4 actions).

5 **VII. CONCLUSION**

6 Plaintiffs' motions for summary judgment, partial summary judgment,  
7 and permanent injunction should be granted.

8 Date: Neighborhood Legal Services  
9 of Los Angeles County

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12 David Pallack  
13 Attorneys for Plaintiffs  
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