LEXSEE 1998 U.S. DIST. LEXIS 3071

Caution
As of: Dec 27, 2006

CITY AND COUNTY OF SAN FRANCISCO, et al., Plaintiffs, v. PHILIP MORRIS, INC., et al., Defendants.

No. C-96-2090 DLJ

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1998 U.S. Dist. LEXIS 3071

March 3, 1998, Decided
March 3, 1998, Filed

DISPOSITION: [*1] Defendants' motion to dismiss plaintiffs' fraud and misrepresentation cause of action DENIED; defendants' motion to dismiss plaintiffs' claim for negligent breach of a special duty DENIED; and defendants' motion to dismiss plaintiffs' claim for intentional breach of a special duty GRANTED. Plaintiffs' intentional breach of special duty cause of action DISMISSED WITH PREJUDICE.

COUNSEL: For CITY AND COUNTY OF SAN FRANCISCO, COUNTY OF CONTRA COSTA, COUNTY OF ALAMEDA, COUNTY OF MARIN, COUNTY OF SACRAMENTO, SAN BERNARDINO COUNTY, COUNTY OF SAN MATEO, SANTA BARBARA COUNTY, SANTA CLARA COUNTY, COUNTY OF SANTA CRUZ, COUNTY OF SHASTA, Plaintiffs: Richard M. Heimann, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA. Elizabeth D. Laporte, City Attorney's Office, San Francisco, CA.

For COUNTY OF MONTEREY, COUNTY OF VENTURA, Plaintiffs: Robert J. Nelson, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA. Elizabeth D. Laporte, City Attorney's Office, San Francisco, CA.

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For LORILLARD TOBACCO CO., defendant: H. Christian L'Orange, Lane Powell Spears & Lubersky, San Francisco, CA.

JUDGES: D. Lowell Jensen, United States District Judge.

OPINION BY: D. Lowell Jensen

OPINION:

ORDER

On December 10, 1997, the Court heard arguments on defendants' motion to dismiss. Ronald L. Olson, Daniel P. Collins and Kelly M. Klaus appeared on behalf of defendants; Richard M. Heimann, Robert J. Nelson, Elizabeth Laporte and Owen J. Clements appeared on behalf of plaintiffs. Having considered the arguments of counsel, the papers submitted, the applicable law, and the

record in this case, the Court hereby GRANTS IN PART and DENIES IN PART defendants' motion.

I. BACKGROUND [*3]

A. Factual Background and Procedural History

Plaintiffs are the City and County of San Francisco and twelve other California counties. Defendants are cigarette manufacturers and their trade associations.

Plaintiffs filed their Complaint on June 6, 1996 and their First Amended Complaint ("FAC") on September 5, 1997. Plaintiffs allege that defendants have engaged in a conspiracy to mislead plaintiffs and their residents regarding the dangers associated with smoking and the addictiveness of nicotine, resulting in plaintiffs spending millions of dollars each year to provide medical services to their indigent residents suffering from diseases caused by smoking. Plaintiffs seek economic damages for their smoking-related costs, including expenditures for medical care for their residents and health insurance for their employees. Plaintiffs also request equitable relief, including an injunction requiring defendants to disclose their research on smoking, to fund a remedial public education campaign on the health consequences of smoking, and to fund smoking cessation programs. Finally, plaintiffs seek restitution and declaratory relief.

Plaintiffs allege that defendants falsely represented [*4] to the public at large and the plaintiffs specifically that they would assume a special duty to undertake all possible efforts to learn the facts and disclose the truth about smoking and health. Plaintiffs claim that contrary to their promises, the defendants have attempted to keep the public ignorant of the true facts regarding smoking and addiction, with the purpose of increasing cigarette sales. As the factual basis for their allegations, plaintiffs assert that beginning in the 1950s, defendants agreed to suppress scientific and medical information regarding the deleterious health effects of smoking and the addictiveness of nicotine. In addition, defendants allegedly agreed among themselves not to undertake efforts to develop a safer cigarette. They also allegedly directed false and misleading advertising to solicit minors and others to purchase and become addicted to cigarettes.

On September 25, 1996, defendants moved to disqualify Lieff, Cabraser, Heimann and Bernstein and to dismiss the complaint. The Court denied the motion to disqualify and granted the motion to dismiss with leave to amend on February 26, 1997. See *City and County of San Francisco, et al., v. Philip Morris,* [*5] *Inc., et al., 957 F. Supp. 1130 (N.D. Cal. 1997).*

On March 31, 1997, plaintiffs filed their Second Amended Complaint ("SAC"). The SAC alleges fraud and misrepresentation against all defendants (Count I); intentional breach of special duty against all defendants (Count II); negligent breach of special duty against all defendants (Count III); violation of RICO § 1962(c), (d) against all defendants except The Tobacco Institute ("TI") and The Council for Tobacco Research ("CTR") (Count IV); violation of RICO § 1962(a), (d) by all defendants (Count V); breach of express and implied warranties by all defendants except TI and CTR (Count VI); restitution (Count VII); and unjust enrichment against all defendants (Count VIII). n1

n1 Plaintiffs have realleged Counts IV through VIII to avoid waiver of such claims on appeal. For the reasons stated in the Court's February 26, 1997 Order, those claims are once again dismissed. The new claims advanced in the SAC, and the only claims relevant to the instant motion, are: (1) fraud and misrepresentation; (2) negligent breach of special duty; and (3) intentional breach of special duty.

[*6]

Defendants filed the instant motion to dismiss plaintiffs' complaint on May 19, 1997. Plaintiffs filed their opposition to the motion July 7, 1997 and defendants replied on July 23, 1997. On July 2, 1997, the Court ordered a stay of proceedings in light of the pendency of a proposed tobacco litigation settlement agreement in the United States Congress. On October 9, 1997, when action by Congress appeared uncertain, the Court lifted the stay and granted the parties the opportunity to submit supplemental memoranda in support of their position on the instant motion. The issue now before the Court is whether to dismiss plaintiffs' complaint for failure to state a claim on which relief can be granted.

B. Legal Standard

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether she is entitled to offer evidence in support of her claim. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).*

In answering this question, the Court must assume that plaintiffs' [*7] allegations are true and must draw all reasonable inferences in plaintiffs' favor. *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).* Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow plaintiffs to develop their case at this stage of the proceedings.

United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

If the Court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)* (quoting *Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)* (per curiam)); see *Poling v. Morgan, 829 F.2d 882, 886 (9th Cir. 1987)* (citing *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962))* (futility is basis for denying amendment under Rule 15).

II. ARGUMENTS

A. Fraud and Misrepresentation

Count I of the SAC asserts a cause of action against all defendants for fraud and misrepresentation. Defendants argue [*8] that plaintiffs' fraud and misrepresentation causes of action must be dismissed for failure to state a claim. The elements of fraud are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Cicone v. URS Corp., 183 Cal. App. 3d 194, 200, 227 Cal. Rptr. 887 (1986)* (citations omitted). A promise made without any intention to perform it is an actionable misrepresentation of fact. See *Cicone v. URS Corp., 183 Cal. App. 3d 194, 203, 227 Cal. Rptr. 887 (1986).* The suppression of a fact by one who is bound to disclose it, or one who gives information or other facts which are likely to mislead without disclosure of the suppressed fact, is also actionable. See *Cal. Civ. Code § 1710* (defining deceit).

1. Relationship Between the Parties

Defendants contend that the fraud claim must be dismissed because plaintiffs failed to plead the existence of a special relationship between the parties. Defendants direct the Court's attention to *Deteresa v. American Broadcasting Co., 121 F.3d 460, 467 (9th Cir. 1997).* In Deteresa, the Ninth Circuit explained that in California, [*9]

> there are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) where the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.

121 F.3d at 467. The court noted that the first of these circumstances requires the existence of a fiduciary relationship between the parties; the other three "presuppose[] the existence of some other relationship between the plaintiff and the defendant in which a duty to disclose can arise." Id. (citing *LiMandri v. Judkins, 52 Cal. App. 4th 326, 336 (1997)).*

Under California law regarding nondisclosure, it does not appear that the absence of a pre-existing special relationship is fatal to plaintiff's fraud claim. While a duty to disclose a material fact normally arises only where a special relationship already exists between the parties or other special circumstances require disclosure, "where one does speak he must speak [*10] the whole truth to the end that he does not conceal any facts which materially qualify those stated." *Cicone v. URS Corp., 183 Cal. App. 3d 194, 201, 227 Cal. Rptr. 887 (1986); Jacobs v. Freeman, 104 Cal. App. 3d 177, 192, 163 Cal. Rptr. 680 (1980).*

Here, plaintiffs allege that defendants' "partial and incomplete statements" regarding the health risks of smoking gave rise to a duty to reveal all material facts "in order not to deceive or mislead" plaintiffs. SAC at PP 207, 212. Plaintiffs assert that these statements created a duty to disclose, which duty was allegedly breached by defendants' nondisclosure. This pleading is sufficient to survive the motion to dismiss.

Even if defendants were correct that liability for fraud by nondisclosure requires proof of some independent special relationship, they would not be entitled to dismissal of plaintiffs' fraud cause of action. There is no such requirement under California law for fraud by affirmative misrepresentations. See e.g., *Cicone, 183 Cal. App. 3d at 200-01.* In the SAC, plaintiffs assert a cause of action for fraud based on allegations of affirmative misrepresentation. Count I of the SAC alleges that defendants represented [*11] to plaintiffs that "defendants would discover and disclose all material facts about the effects of cigarette smoking on human health, including addiction." SAC at P 208. Plaintiffs allege that defendants "have made and continue to make representations and statements about the safety of cigarettes and their effect on human health and addiction." SAC at P 209. Plaintiffs state that "such representations and statements were and remain materially false, incomplete and fraudulent at the time Defendants made them." SAC at P 209. Plaintiffs thus state a cause of action for fraud by alleging affirmative misrepresentations made by defendants.

2. Reliance

Defendants argue that the SAC must be dismissed because plaintiffs have failed to allege reliance. To state a cause of action for fraud based on misrepresentation, a plaintiff must plead that he or she actually relied on the misrepresentation. See *Mirkin v. Wasserman, 5 Cal. 4th 1082, 1088, 858 P.2d 568 (1993)* (citations omitted). A plaintiff must plead that he or she actually relied on the defendants' statements n2 and that the reliance on those statements was justifiable. *Alliance Mortgage v. Rothwell, 10 Cal. 4th 1226, 900* [*12] *P.2d 601 (1995); Mirkin, 5 Cal. 4th at 1088.*

> n2 Thus, a fraud action cannot be maintained based on a third party's reliance. *957 F. Supp. at 1142.*

In the SAC, plaintiffs have now alleged that they directly relied on defendants' misrepresentations. Plaintiffs state that "plaintiffs and other governmental entities which bear responsibility for the public health relied on Defendants' misrepresentations and material nondisclosure." SAC at PP 214, 218. Plaintiffs argue that their reliance caused them to forego relevant action, claiming that had they not relied on defendants' misrepresentations and nondisclosures, the city and counties "would have initiated or initiated sooner programs that would have reduced the incidence of smoking and the costs of smoking-related illness." SAC at PP 216, 218. The Court is satisfied that plaintiffs have sufficiently alleged actual reliance in the SAC to withstand defendants' motion to dismiss.

Plaintiffs, however, must also allege that their reliance is justifiable in order [*13] to state a cause of action. Reliance is justifiable only if the "circumstances were such as to make it reasonable for the plaintiff to accept defendant's statements without an independent inquiry or investigation." *Wilhelm v. Pray, Price, Williams & Russell, 186 Cal. App. 3d 1324, 1332, 231 Cal. Rptr. 355 (1986).* "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance on defendant's representations is reasonable is a question of fact." *Blankenheim v. E.F.Hutton & Co., 217 Cal. App. 3d 1463, 1475, 266 Cal. Rptr. 593 (1990).*

Defendants argue that even if plaintiffs claim to have relied on defendants' statements, any such reliance was unjustified. "If the conduct of the complaining party in light of his own intelligence and information, or ready available information, was manifestly unreasonable, he will be denied recovery." *Kahn v. Lischner, 128 Cal. App. 2d 480, 489, 275 P.2d 539 (1954).* Defendants claim that plaintiffs were highly knowledgeable, had ready access to competing information, and had an obligation to make an independent inquiry into the relevant facts. See Defs.' [*14] Mot. to Dismiss SAC at 2:8-11. Defendants direct the Court's attention to *General American Life Insurance Co. v. Castonguay, 984 F.2d 1518 (9th Cir. 1993),* a case involving allegations of reliance by an insurance company on defendant trust fund's representations regarding the financial condition of the defendant corporation. The Ninth Circuit concluded that given plaintiff's "sophistication, the amount of money at stake, the tell-tale danger signals that should have alerted [plaintiff] to the need for further investigation and the ease with which [plaintiff] could have discovered the truth," no rational jury could have found that plaintiff behaved reasonably. *Id. at 1521.*

In this case, defendants claim that plaintiffs could not have justifiably relied on any representations made by defendants in light of the "vigorous public controversy with respect to smoking and health issues" that has existed for decades. Defs.' Mot. to Dismiss SAC at 10:13-15. Defendants point to plaintiffs' allegations of the existence of research dating back to the 1950s that purports to link smoking and cancer and the Surgeon General's public report confirming such a link in 1964. In addition, defendants [*15] cite allegations in the SAC regarding the longstanding debate about the addictiveness of nicotine. Defendants use plaintiffs' own statement that plaintiffs were charged with an affirmative obligation to protect the public health to argue that any reliance by plaintiffs was unjustified.

For the purposes of this motion, the Court must take plaintiffs' factual allegations as true and accept that defendants have been conducting secret research and suppressing the evidence of the deleterious health effects of smoking. For instance, the SAC alleges that in the 1960s, defendant RJR established a facility to study the health effects of smoking but closed the facility in one day and fired all 26 scientists without notice upon making "significant progress" in studies of the development of emphysema. SAC at P 106. These allegations suggest that information regarding the health dangers of smoking was highly-guarded and insulated within the tobacco industry. So insulated, the information was not readily available to plaintiffs.

The SAC alleges:

> Because of Defendants' secret internal research, Defendants' knowledge of the material facts about smoking, health and addiction, was and is . [*16] . . superior to that of Plaintiffs and other governmental entities which bear responsibility for the public health. Public access to these facts

> is limited because such facts are exclusively within Defendants' control.

SAC at P 211.

On this record, the Court finds that defendants' characterization of plaintiffs as highly sophisticated and armed with expansive investigatory powers, see Defs.' Mot. to Dismiss at 13:4-6, does not compel the conclusion that plaintiffs' reliance was unjustified. Plaintiffs allege that the relevant information was within defendants' exclusive control. At this stage of the proceedings, the Court cannot agree with defendants that any reliance by plaintiffs must be deemed unreasonable as a matter of law in light of their knowledge or of the information readily available to them.

3. Injury

Defendants argue that plaintiffs' alleged injuries flow not directly from their own reliance, but derivatively from the alleged reliance and injuries of individual smokers. To recover for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. *Las Palmas Associates v. Las Palmas Center Assoc., 235 Cal. App. 3d 1220,* [*17] *1226 (1991).* In the SAC, plaintiffs allege that had defendants not engaged in misrepresentations and nondisclosures, plaintiffs "would have initiated or initiated sooner programs that would have reduced the incidence of smoking and the costs of smoking-related illness." SAC at P 216. Plaintiffs contend that "had Defendants not undertaken their campaign of disinformation and material falsehoods, governmental entities including the counties, would have implemented sooner more effective tobacco measures to reduce the incidence of smoking and the costs of smoking-related illness." SAC at P 217; accord 218 (same). The Court finds that plaintiffs have alleged a direct injury in the SAC.

4. Causation

Defendants' next argue that the SAC must be dismissed because plaintiffs cannot establish that defendants caused the alleged injuries. In intentional, as opposed to negligent, tort cases, courts look to some of the following factors for determining proximate cause: (1) the defendants' intent to commit harm; (2) the degree of moral culpability; (3) the seriousness of the harm intended; and (4) the connection between defendants' conduct, the harm intended, and the harm actually caused. [*18] See *Restatement (Second) Torts § 435B*; see also *Seidel v. Greenberg, 108 N.J. Super. 248, 260 A.2d 863, 872, 874 (1969)* (citing *Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960)).*

In the SAC, plaintiffs allege that but for defendants' fraud, the Counties would have adopted more stringent regulations concerning cigarette marketing. Plaintiffs allege that had defendants not misrepresented or concealed the truth about smoking and health, and about nicotine addiction, they "would have initiated or initiated sooner programs that would have reduced the incidence of smoking and the costs of smoking-related illness." SAC at P 216. Plaintiffs explain:

> For example, had the Counties known that smoking was "as addictive as heroin," as Defendants' experimentation demonstrated, the Counties would have initiated smoking prevention and cessation programs much sooner than they otherwise did. Had the Counties known that Defendants manipulate the levels of nicotine delivery to ensure addiction, and target minors to get them hooked for life, the Counties would have taken more aggressive steps -- sooner than they otherwise did -- to limit access of minors to cigarettes. [*19] The Counties would have limited cigarette advertising directed toward minors and schoolchildren, such as on billboards and in promotional items popular with youth, and would have, among other things, limited the use of vending machines that are accessible to minors. In addition, the Counties' public health officials would have treated smoking as an addiction, and done so sooner, instead of a habit and health problem limited to individual smokers.

SAC P at 216; see also SAC at P 217 (Counties "would have implemented sooner more effective tobacco measures to reduce the incidence of smoking"), SAC at P 218 (as a result of plaintiffs' reliance, they "did not implement or delayed implementing regulations, as well as prevention and treatment programs").

Defendants argue that the link between plaintiffs' alleged reliance and their ultimate injury remains "entirely dependent upon the allegation that defendants' conduct caused more people to smoke and to smoke more often." Defs.' Mot. to Dismiss at 25:14-17. Defendants devote several paragraphs to the difficulty the trier of fact would face in attempting to address the links in this chain of causation. In their motion to dismiss, [*20] defendants ask several questions to test the theory of causation:

> How can a trier of fact ascertain what it is that various individual County officials would have done if the mix of available information about smoking had been different at any given moment? What effect would that additional information about smoking have had on the multifarious political pressures that are brought to bear on those officials? And even if the shape of the hypothetical policies that would have been adopted could possibly be ascertained, how could it conceivably be determined which smokers would have stopped smoking -- or would have smoked less -- as a result of more aggressive anti-smoking campaigns or stiffer vending-machine regulation? . . .

Defs.' Mot. to Dismiss at 27:11-24. However elusive the answers to these questions may be, they are, as defendants recognize, addressed to the trier of fact and, as such, are generally inappropriate at this stage of the proceedings. In deciding a motion to dismiss, the Court must accept as true plaintiffs' assertions of fact. In considering the motion to dismiss the original complaint in this case, the Court considered the factors for determining [*21] proximate cause in intentional fraud cases. That analysis is equally applicable to the SAC. Given the sufficiency of the pleading at this stage in regard to reliance, while defendants may be correct in arguing that plaintiffs may not ultimately be able to prove their theory of causation, there is no proper basis at this time to grant a motion to dismiss.

Alternatively, defendants argue that inasmuch as the SAC raises an entirely new issue of legislative conduct, it should be dismissed because plaintiffs' theory of "political causation" requires an impermissible and speculative inquiry. Defendants argue that the SAC would require this Court, or a jury, to determine whether the Counties' past legislative and regulatory actions were tainted by defendants' alleged misrepresentations or nondisclosures and to hypothesize what legislation or regulations would have been adopted had different conditions existed. Defs.' Mot. to Dismiss at 28:12-16. According to defendants, this inquiry is beyond the proper judicial role.

In *County of Los Angeles v. Superior Court, 13 Cal. 3d 721, 119 Cal. Rptr. 631, 532 P.2d 495 (1975),* a taxpayer brought suit to invalidate a municipal salary ordinance [*22] on the theory that it had been adopted as a result of a threatened illegal strike by public employees. The plaintiff sought to depose all five supervisors "to probe the reasons behind the supervisors' subsequent adoption of the salary ordinance and to uncover evidence that would demonstrate that the strike threat was a substantial factor in producing the ultimate legislative wage increases." *Id. at 724.* The trial court ordered the officials to answer the questions.

The California Supreme Court issued a writ of prohibition to restrain the trial court from enforcing the order, holding that the entire line of questioning was improper in light of the fundamental principle precluding "any judicially authorized inquiry" into legislative motivation. *Id. at 726.* County of Los Angeles, however, involved a challenge to the validity of the legislative enactment itself. Against this backdrop, the Court explained that "given the general rule that the validity of legislation does not turn on legislative motive, the mental processes of individual legislators become irrelevant to the judicial task, hence, we do not peer into these subjective realms." *Id. 727-28.*

County of Los Angeles, [*23] however, does not stand for the proposition that inquiry into the mental processes of legislators is never permissible. Defendants acknowledge that courts have permitted inquiry into legislative motivation where the question is whether or not legislation was enacted for a constitutionally impermissible purpose. See Mot. to Dismiss at 31, n.14; cf. *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-67, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)* (establishing framework for analyzing legislative intent in racial discrimination context); *Reno v. Bossier Parish School Bd., 520 U.S. 471, 117 S. Ct. 1491, 1501, 137 L. Ed. 2d 730 (1997)* (reviewing cases). In this case, plaintiffs seek to determine legislative motivation for a wholly relevant purpose -- to determine what laws and regulations would have existed in the absence of defendants' misrepresentations and material nondisclosures. The Court is satisfied that this is a permissible purpose not foreclosed by County of Los Angeles.

As already noted, the Court is deciding a Rule 12(b)(6) motion. The Court is not deciding that plaintiffs can prove that defendant's allegedly fraudulent conduct caused any specific legislative [*24] conduct, or, for that matter, that plaintiffs can meet the equally daunting task of proving that any available legislative conduct would have affected any smokers' conduct. The Court is deciding that this alleged chain of causation should not be ruled out as a matter of law and that the case can proceed on Count I of the SAC.

5. Statute of Limitations

Defendants argue that California's statute of limitations for fraud claims bars any fraud claims for which the Counties might establish justifiable reliance. Section 338(d) of the California Code of Civil Procedure im-

poses a three year statute of limitations for fraud claims. A cause of action for fraud accrues, and the statute of limitations begins to run, when the plaintiff becomes "aware of facts which would make a reasonably prudent person suspicious" and further investigation of the matter would have revealed the facts giving rise to the cause of action. *Miller v. Bechtel Corp., 33 Cal. 3d 868, 875, 191 Cal. Rptr. 619, 663 P.2d 177 (1983).* Defendants contend that the same circumstances rendering plaintiffs' reliance unjustified also served to put plaintiffs on notice of their fraud action. Defs.' Mot. to Dismiss at 16:23-25. [*25] Defendants argue that these circumstances have been in existence since well before June 6, 1993 (three years before the filing of the initial complaint), so the statute of limitations bars the action.

Plaintiffs argue that statute of limitations has been equitably tolled by defendants' alleged acts of fraud. To toll the statute of limitations based on fraudulent concealment, a complaint must allege when the fraud was discovered, the circumstances under which it was discovered, and that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry. *Baker v. Beech Aircraft Corp., 39 Cal. App. 3d 315, 321, 114 Cal. Rptr. 171 (1974).*

Plaintiffs allege that they could not reasonably have discovered the true facts until recently because defendants fraudulently and knowingly concealed the truth. SAC at P 203. In fact, plaintiffs contend, defendants continue to conceal that smoking causes disease, that nicotine is addictive and that the manufacturers have manipulated the level and delivery of nicotine in their cigarettes. SAC at P 205.

In response to plaintiffs' claim of equitable tolling, defendants return [*26] to their argument described above that any reliance by plaintiffs on defendants misrepresentations was not justified. "Defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it." *Bernson v. Browning-Ferris Industries, 7 Cal. 4th 926, 930, 873 P.2d 613 (1994)* (citing *Sanchez v. South Hoover Hospital, 18 Cal. 3d 93, 99, 132 Cal. Rptr. 657, 553 P.2d 1129 (1976)).* Defendants contend that the warning labels placed on cigarette packages in 1985 and the Surgeon General's 1988 report on nicotine addiction placed the Counties on "inquiry notice" sufficient to trigger the statute of limitations.

However, plaintiffs are alleging a pattern of affirmative misrepresentations and deceit dating back to the 1950s. Although information was developed and disseminated thereafter which suggested that defendants' stated beliefs were false, it does not appear to the Court to trigger inquiry notice so as to begin running the statute of limitations for the fraud cause of action. [*27] Plaintiffs cannot reasonably be expected to have known from the existence of a warning label that defendants had been actively suppressing information and making affirmative misrepresentations for decades.

Moreover, plaintiffs argue that they could not be expected to know the truth about the negative health effects of smoking given defendants' persistent denials of any negative effect. Plaintiffs point to the 1994 congressional testimony offered by tobacco executives regarding nicotine and smoking. Top executives from defendants Philip Morris, RJ Reynolds, Lorillard, and Brown and Williamson testified in April, 1994 that their respective companies do not manipulate nicotine, add it, independently control it or otherwise achieve a minimum level of nicotine in their products. SAC at P 181. In April of 1994, cigarette manufacturers placed advertisements in newspapers around the country denying that cigarette smoking is addictive and "making misleading statements to the public and the Plaintiffs about whether cigarette manufacturers deliberately control nicotine levels in their products." SAC at P 182. In light of the circumstances surrounding the defendants' denials about the consequences [*28] of smoking and the insulation of the industry's own research, plaintiffs have alleged facts sufficient to support a finding that defendants' own conduct tolled the statute of limitations.

B. Negligent Breach of Special Duty

Defendants argue that Count III, alleging negligent breach of a special duty, must be dismissed because the claim is barred by this Court's February 26, 1997 Order. In that Order, the Court dismissed without prejudice plaintiffs' claim for breach of a special duty. n3

n3 The Court found the FAC unclear as to whether plaintiffs were alleging intentional and negligent breach, and dismissed the claim with leave to amend to explicitly state whether they are alleging a negligent breach of special duty, an intentional breach of special duty, or both. *957 F. Supp. at 1143.*

The Court noted in the previous Order that plaintiffs could not state a typical negligence claim due to the derivative nature of plaintiffs' alleged injuries. See *957 F. Supp. at 1143.* The Court expressed [*29] concern that plaintiff was attempting "to circumvent the traditional limitations on tort liability by creating a separate cause of action based on an alleged 'special duty.'" Id. Notwith-

standing this concern, the Court stated that it "will not dismiss the special duty claim at the pleading stage provided that plaintiffs amend the claim in accordance with this Order." Id.

The Court then proceeded to consider plaintiffs' breach of special duty claim. The Court noted that "purely economic loss is recoverable in California, even if there is no privity of contract between the parties, where a 'special duty' or 'special relationship" is found to exist." Id. (citing *J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 804-05, 157 Cal. Rptr. 407, 598 P.2d 60 (1979)).* In order to state a special duty claim, the plaintiff must plead the following: (1) that the defendant undertook to act for the benefit or protection of the plaintiff; (2) that the defendant failed to do so; and (3) that the defendant's breach of the assumed duty either increased the risk of harm to the plaintiff or the plaintiff suffered injury because of reliance on the defendant's undertaking. n4 The Court found that plaintiffs [*30] alleged each of the elements required for a special duty claim. *957 F. Supp. at 1143.*

> n4 Alternatively, a plaintiff may plead: (1) that the defendant undertook to act for the benefit or protection of a third party; (2) that the defendant failed to do so; (3) that the defendant should have recognized that the undertaking was necessary to protect plaintiff's interests; and (4) that either the defendants' breach increased the risk of harm to the plaintiff, the defendant undertook to perform a duty owed by the plaintiff to a third party, or that the harm was suffered because of reliance upon the undertaking by the plaintiff or the third party. The Court found that plaintiff alleged these elements in PP 226-230 of the FAC. The SAC retains these allegations in PP 223-238.

The Court then considered whether to recognize the existence of a special duty in this case. The factors are: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the [*31] degree of certainty the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. See *957 F. Supp. at 1143* (citing *Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16 (1958)).* The Court balanced these factors and found that plaintiffs established all but two of these factors.

The first defect identified in the FAC involved the extent to which the transaction at issue was intended to affect the plaintiffs. The Court granted plaintiffs leave to amend to allege that defendants' conduct was intended to affect plaintiffs. The Court explicitly instructed plaintiffs that any amendment would have to specifically allege that defendants' activities were designed to prevent government officials from taking immediate action to curb smoking. *957 F. Supp. at 1143.*

In the SAC, plaintiffs allege that defendants made the alleged misrepresentations

> to combat emerging concerns about smoking, and more specifically, to avoid or delay public health measures to combat smoking by the Counties and other public entities, and thereby [*32] to protect Defendants' cigarette sales and profits.

SAC at P 225. Moreover, plaintiffs allege, defendants' 1954 "Frank Statement to Cigarette Smokers" n5 and subsequent statements by defendants proclaiming the industry's "responsibility" were intended to affect the public health authorities, including the Counties, as the defendants pledged to cooperate with those responsible for public health. Id.

> n5 On January 4, 1954, defendants issued the "Frank Statement to Cigarette Smokers," in which the defendants announced the formation of the Tobacco Industry Research Committee (now known as CTR). See SAC at PP 67-68.

The SAC alleges that defendants' pledge to support research by independent scientists and share the results, as well as their representation that public health was of paramount concern, were made with the intent to prevent or otherwise delay regulation by the Counties. SAC at P 226-228. The plaintiffs state that these

> undertakings were designed, among other purposes, to cause [*33] the Counties, as well as other governmental entities which bear responsibility for the public health, to believe that their immediate action to curb, regulate or study smoking was not needed or at least to raise doubts as to whether such regulation was needed. Defendants intentionally resisted all efforts to regulate controls on tobacco use, and the "Frank Statement" and its progeny were designed so that Plaintiffs and other governmental entities would not implement or would delay implementing regu-

> lations or legislation restricting cigarette use and sales.

SAC at P 228. In the SAC, plaintiffs have alleged that defendants' conduct was intended to affect plaintiffs.

The Court's prior Order identified a second defect in plaintiffs' breach of special duty cause of action. The Court found that plaintiffs' claims in the FAC did "not link the alleged injury directly to the defendants' alleged breach of duty." *957 F. Supp. at 1144.* The Court noted the possibility of fixing this defect: "if plaintiffs amend their complaint to allege that they were directly injured by defendants' conduct, the Court believes that they may be able to meet the causation requirements at this stage." [*34] Id.

Plaintiffs now allege in the SAC that defendants' activities were designed to prevent government officials from taking immediate action to curb smoking, which resulted in higher health care costs for plaintiffs. Specifically, they contend that:

> as a direct, foreseeable and proximate cause of Defendants' intentional breach of their specially assumed duties, the incidence of smoking-related illness and the cost to treat such illness has been demonstrably higher than it otherwise would have been absent Defendants' conduct, thereby causing the Counties to suffer and continue to suffer substantial injuries and damages.

SAC at P 234; see also SAC at P 230(a) ("The violation of [defendants'] duty directly caused the costs incurred by the Counties in treating the illness that resulted from Defendants' sales of cigarettes."); SAC at P 232 ("The direct result was to increase the risk of harm to the Counties, in the form of increased health care costs associated with the treatment and care of residents who suffer smoking-related illness.")

The Court finds that plaintiffs have adequately responded to the concerns raised by this Court's prior Order regarding their [*35] claim for negligent breach of special duty. Defendants' motion to dismiss this claim on the theory that plaintiffs failed to comply with the Court's prior Order is therefore without merit.

C. Intentional Breach of Special Duty

Finally, defendants argue that plaintiffs' allegation of intentional breach of special duty must be dismissed because it is duplicative of their fraud claim. Defendants argue that the intentional breach of special duty claim is covered by plaintiffs' fraud cause of action.

As a threshold matter, the Court finds that plaintiffs' have provided no legal authority for their intentional breach of special duty cause of action. Although plaintiffs insist that they are not advancing a new cause of action, they offer only scant support for the recognition of their intentional breach of special duty claim. Plaintiffs explain that they

> do not seek recognition of a new cause of action. Plaintiffs should not be denied a remedy merely because they seek to apply established principles of California law to the defendants' egregious misconduct. See e.g., *Stiver v. Parker, 975 F.2d 261, 269 (6th Cir. 1992)* (in diversity case, finding special duty running [*36] from surrogacy broker to surrogate mother and contracting father, where there was no applicable precedent, but court sought guidance from established principles of tort law).

Pls.' Opp. at 10, n.5. Plaintiffs' rely on Stiver to contend that this Court may properly hear their intentional breach of special duty claim without creating a new cause of action.

In Stiver, the Sixth Circuit considered whether the district court properly granted summary judgment against the contracting parents in a negligence action against a surrogate mother. As plaintiffs suggest, the court in Stiver was asked to apply established principles of law to plaintiffs' novel claim. The court acknowledged that the case raised "issues of first impression concerning the legal rights and duties of all those involved in such surrogate arrangements." *Id. at 264.* Although the central issue in the case was whether defendants owed a duty to plaintiffs by virtue of the surrogacy contract, the underlying claim was one of negligence. See *id. at 266.*

As in Stiver, plaintiffs ask the Court to find the existence of a special duty running from defendants to plaintiffs. But in Stiver, the plaintiffs [*37] contended that defendants' breach of the duty amounted to negligence; here plaintiffs advance a new theory of liability. Stiver cannot justify the creation of a novel theory of liability to support plaintiffs' claim of intentional breach of special duty. While this Court will consider traditional legal principles in applying the elements of a legal claim to a given set of factual circumstances, the Court will not use

traditional legal principles as a point of departure for the creation of new theories of liability.

Moreover, in their intentional breach of special duty claim, plaintiffs simply reallege their fraud cause of action. Section 1710 of the California Civil Code defines deceit to include "a promise, made without any intention of performing it." *Cal. Civil Code § 1710(4)*. Deceit under § 1710 requires that the defendants did not intend to perform the promise at the time the promise was made. See *Conrad v. Bank of America, 45 Cal. App. 4th 133, 157 (1996).*

In pleading the intentional breach of special duty claim, plaintiffs contend that defendants' representations and pledges regarding the health risks of smoking were

> designed . . . to cause the Counties [*38] . . . to believe that their immediate action to curb, regulate or study smoking was not needed or at least raise doubts about whether such regulation was needed. Defendants intentionally resisted all efforts to regulate controls on tobacco use, and the "Frank Statement" and its progeny were designed so that Plaintiffs . . . would not implement or would delay implementing regulations or legislation restricting cigarette use and sales.

SAC at P 228. Plaintiffs allege that "the very purpose behind Defendants' assumption of these special duties" was to "promote the use of and marketing for tobacco products and to continue to addict new smokers and to prevent and/or delay measures by the Counties[.]" SAC at P 232. As evidenced by plaintiffs' focus on the "design" and "purpose" of defendants' statements, plaintiffs argument is that defendants acted without any intention of fulfilling the duty they allegedly assumed. To the extent that plaintiffs claim that defendants promised to investigate the health effects of smoking and share that information, without any intention of actually doing so, the intentional breach of a special duty claim is subsumed in their fraud cause of action. [*39]

Plaintiffs argue that their intentional breach of special duty claim is not based on an allegation that defendants never intended to fulfill any promises allegedly made to plaintiffs. To succeed on their claim for breach of a special duty, plaintiffs argue, they need only to allege that the defendant undertook to act for the benefit or protection of the plaintiff or a third party, but intentionally failed to do so. See Pls.' Opp. at 9:6-8.

Assuming arguendo that the SAC does not allege assumption of duty without any intention of fulfilling the duty, i.e. fraud under *California Civil Code § 1710(4)*, plaintiff's intentional breach claim is nonetheless duplicative of their fraud cause of action. If plaintiffs theory is that defendants undertook to act for the benefit of the plaintiffs and subsequently intentionally failed to do so, then plaintiffs' cause of action is one for fraud under *California Civil Code § 1710(3)*. Section 1710(3) of the California Civil Code defines deceit as "the suppression of a fact by one who is bound to disclose it[.]" As discussed above, plaintiffs state a claim for fraud and misrepresentation by contending that defendants owed and breached [*40] a duty to plaintiffs to speak the whole truth regarding the health effects of smoking. Plaintiffs' intentional breach of special duty cause of action is simply a restatement of their fraud cause of action.

The Court dismisses plaintiffs' claim for intentional breach of special duty because the claim lacks legal foundation and its allegations are wholly subsumed by plaintiffs' fraud cause of action.

III. CONCLUSION

For the foregoing reasons, the Court hereby orders as follows:

(1) defendants' motion to dismiss plaintiffs' fraud and misrepresentation cause of action is DENIED;

(2) defendants motion to dismiss plaintiffs' claim for negligent breach of a special duty is DENIED; and

(3) defendants' motion to dismiss plaintiffs' claim for intentional breach of a special duty is GRANTED. Plaintiffs' intentional breach of special duty cause of action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: March 3, 1998

D. Lowell Jensen

United States District Judge