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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Appellant, v. JEFFREY A. COLE et al., Defendants and Respondents; PEARLE VISION, INC., et al., Defendants and Appellants.	D040475 (Super. Ct. No. GIC783135)

APPEALS from orders of the Superior Court of San Diego County, J. Richard Haden, Judge. Affirmed in part and reversed in part.

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Chief Assistant Attorney General, Albert Norman Shelden, Robert M. Foster, Susan A. Ruff, Antoinette Cincotta, Jennifer Weck and Diane de Kervor, Deputy Attorneys General, for Plaintiff and Appellant.

Jones, Day, Reavis & Pogue, Jones Day, Thomas R. Malcolm, Richard J. Grabowski, Daniel H. Bromberg, Amar D. Sarwal and Dominick V. Freda for Defendants and Appellants Pearle Vision, Inc., et al., and Defendants and Respondents Jeffrey A. Cole et al.

This action was brought by The People of the State of California against Pearle Vision, Inc. (Pearle), Pearle VisionCare, Inc. (Pearle VisionCare), alleged officers and directors Jeffrey A. Cole, Peggy J. Deal, Joseph Gaglioti, Stephen L. Holden, Dennis C. Osgood, Larry Pollack, David J. Sherriff, and David Stefko (collectively, Management), as well as various related entities and officers and directors.[1] The People's complaint charged Pearle, an optician and retailer of eyeglasses; Pearle VisionCare, a provider of optometry services; and Management with violating California law governing the practice of optometry that prohibits opticians and eyeglass retailers from advertising optometric services, forbids opticians and eyeglass retailers from having financial connections with optometrists, and prohibits optometrists from charging a fee for "dispensing" therapeutic drugs.

The People filed a motion for preliminary injunction, seeking to enjoin Pearle from advertising eye exams and to enjoin Pearle VisionCare from charging a fee for dilating patients' eyes with eye drops. Management brought a motion to quash service of

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1 These other entities, officers and directors are not parties to these appeals.

summons, arguing that they were residents of Ohio who had insufficient contacts with California to support personal jurisdiction over them.[2]

The court granted Management's motion to quash. The court found that Management lacked minimum contacts with California sufficient for the exercise of jurisdiction over those individuals. The court further found that the alleged violations of California law were the acts of the corporate entities, not Management in their individual capacities. The court made its order without prejudice to the People conducting further discovery to establish facts supporting personal jurisdiction over Management.

The court granted the People's request for a preliminary injunction, prohibiting Pearle from disseminating advertising in California that would mislead consumers into believing that it employed optometrists. The order further provided that Pearle could still mention eye examinations, doctors and optometrists in its advertisements as long as they contained a disclaimer that Pearle did not employ optometrists or provide eye exams in California. The court also enjoined Pearle VisionCare from charging a fee for dilating patients' eyes with eye drops.

Pearle and Pearle VisionCare appealed from the order granting the preliminary injunction, asserting that (1) the People had not shown a reasonable probability of success on the merits of their claim attacking Pearle's advertising; and (2) they also did not show

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2 Other defendants, including Dr. Stanley Pearle and various parent companies of Pearle and Pearle VisionCare, also brought motions to quash. Their motions were denied, and they have not challenged that decision in this appeal. Therefore, we do not address those motions in this decision.

a reasonable probability of success on their claim again Pearle VisionCare for charging for dilation of patients' eyes.

The People also appealed from the court's order granting preliminary injunction, contending that the court (1) failed to rule upon the People's contention that Pearle's advertising was illegal; (2) improperly allowed Pearle to continue to advertise eye exams as long as they provided a disclaimer; (3) issued an order that was ambiguous because it did not specify how it affected Pearle VisionCare's advertisements or whether Pearle VisionCare could charge fees for eye drops if they disguised such fees under another name; and (4) issued an order that did not apply to any successors-in-interest or related parties of Pearle and Pearle VisionCare.

The People have also appealed from the order granting Management's motion to quash, asserting that (1) the court improperly considered the merits of their action against Management in granting the motion; (2) the People demonstrated a violation of California law by Management; (3) the People established sufficient minimum contacts to establish personal jurisdiction over Management; and (4) Management waived the right to challenge jurisdiction because they attacked the merits of the People's case.

We conclude that the court properly enjoined Pearle's advertising, as it was both illegal and misleading. However, the court erred in allowing Pearle to continue advertising optometric services if it also provided a disclaimer that Pearle VisionCare provided those services. We also conclude that the court erred in enjoining Pearle VisionCare from charging a fee for dilating patients' eyes with eye drops. The People's other objections to the terms of the injunction are unpersuasive. We conclude last that

the court did not err in granting Management's motion to quash. Accordingly, the court's order is affirmed in part and reversed in part and the court is ordered to enter a new order consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A. *California's Optometry Laws*

The practice of optometry is highly regulated in California. (*California Assn. of Dispensing Opticians v. Pearle Vision Center, Inc.* (1983) 143 Cal.App.3d 419, 424 (*CADO*).) "Optometrists in California are licensed and regulated by the Board [of Optometry]. Optometry is regarded as a learned profession. To become licensed as an optometrist an individual must have at least three years of undergraduate education in a scientific field and four years of optometry school culminating in a doctor of optometry degree. Upon admission to practice optometrists are allowed to correct refractive errors and to detect eye disease. Most optometrists also dispense ophthalmic products consisting of eye glasses and contact lenses." (*Ibid.*)

"In contrast, a registered dispensing optician is licensed by the Division of Allied Health Professions of the Board of Medical Quality Assurance. Dispensing opticians fill prescriptions for glasses or contact lenses from optometrists and ophthalmologists (physicians and surgeons who specialize in eye care and treatment). Dispensing opticians do not examine eyes and dispense ophthalmic goods only on prescription." (*CADO, supra,* 143 Cal.App.3d at p. 424.) Thus, while an optometrist "may engage in retail sales of eyeglasses and contact lenses, the reverse is not equally true: the eye wear retailer is not allowed to engage in the practice of optometry." (*Id.* at p. 426.)

In this regard, Business and Professions Code section 655[3] prevents financial affiliations of any kind between optometrists and opticians or optical retailers:

> "(a) No person licensed under Chapter 7 (commencing with Section 3000) of this division may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profit-sharing arrangement in any form, directly or indirectly, with any person licensed under Chapter 5.5 (commencing with Section 2550) of this division. [¶] (b) No person licensed under Chapter 5.5 (commencing with Section 2550) of this division may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profit sharing arrangement in any form directly or indirectly with any person licensed under Chapter 7 (commencing with Section 3000) of this division. [¶] (c) *No person licensed under Chapter 7 (commencing with Section 3000) of this division may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profit-sharing arrangement in any form, directly or indirectly, either by stock ownership, interlocking directors, trusteeship, mortgage, trust deed, or otherwise with any person who is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, or dispensing opticians of lenses, frames, optical supplies, optometric appliances or devices or kindred products.* [¶] *Any violation of this section constitutes a misdemeanor* as to such person licensed under Chapter 7 (commencing with Section 3000) of this division and *as to any and all persons*, whether or not so licensed under this division, who *participate with such licensed person in a violation of any provision of this section*." (Italics added.)

The legislative intent behind this provision is to "prevent lay control of optometrists." (*CADO, supra,* 143 Cal.App.3d at p. 428.)[4]

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3 All further statutory references are to the Business and Professions Code unless otherwise specified.

4 In their brief Pearle and Pearle VisionCare opine that California's prohibitions on financial and other relationships between optometrists and opticians are misguided. However, the wisdom of these restrictions is not at issue. Pearle and Pearle VisionCare's

California law also prohibits opticians from providing optometric services, advertising the provision of optometric services, and employing or maintaining an optometrist at or near their retail premises:

> "It is unlawful to do any of the following: to advertise the furnishing of, or to furnish, the services of a refractionist, an optometrist, or a physician and surgeon; to directly or indirectly employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician and surgeon, or a practitioner of any other profession for the purpose of any examination or treatment of the eyes; or to duplicate or change lenses without a prescription or order from a person duly licensed to issue the same." (§ 2556.)

Optometrists are also prohibited from charging for the "dispensing" of certain drugs: "Any dispensing of a therapeutic pharmaceutical agent by an optometrist shall be without charge." (§ 3041, subd. (h).) "Mydriatics," i.e., eye drops used for dilation of eyes, are included in the definition of therapeutic pharmaceutical agents. (Cal. Code Regs., tit. 16, § 1567, subd. (f).) Section 4024, subdivision (b) defines "dispense" as including not only the furnishing of drugs to a patient through a prescription, but also an optometrist's direct furnishing of drugs to a patient: "'Dispense' also means and refers to the furnishing of drugs or devices directly to a patient by a physician, dentist, optometrist . . . ." "Furnishing" is defined as "to supply by any means, by sale or otherwise." (§ 4026.) However, that same chapter also defines the term "administer," which means "the direct application of a drug or device to the body of a patient or research subject by injection, inhalation, ingestion, or other means." (§ 4016.)

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objections to the stated public policy supporting such restrictions are best directed to the Legislature.

B. *Previous Litigation Involving Pearle*

In 1982 the California Association of Dispensing Opticians, the California State Board of Optometry and others brought an action against Pearle Vision Center, Inc. and related entities alleging violations of California statutes regulating the practice of dispensing opticians, optometrists and optical suppliers. (*CADO, supra,* 143 Cal.App.3d at p. 422.) The plaintiffs obtained an injunction prohibiting the defendants from, among other things, selling franchises to optometrists and from advertising in a manner that suggested that the defendants furnished optometry services. (*Id.* at p. 423.) The defendants appealed, and in May 1983 we issued a published opinion upholding the granting of the preliminary injunction. (*Id.* at pp. 434-435.)

In upholding the preliminary injunction, we held that the defendants' franchise agreements constituted improper control over optometrists by nonoptometrists in violation of California law. (*CADO, supra,* 143 Cal.App.3d at pp. 426-428.) We also held that the franchise agreement provisions for the remission of a percentage of optometrists' income to the defendants violated state law prohibiting profit sharing between an optometrist and lay person and that the agreement improperly contemplated a co-ownership arrangement between such parties. (*Id.* at pp. 429-430.) Finally, we held that the optical retailer/optician defendants' advertising improperly implied that they were holding themselves out as optometrists and that the statement defendants provided "total eye care" misleadingly implied they were providing optometric services. (*Id.* at pp. 433.)

C. *The Pearle Entities*

In 1986, Pearle VisionCare was incorporated to provide optometrists and optometric services in Pearle's eyeglass retail stores. Pearle VisionCare is a California corporation doing business in California. It is a wholly owned subsidiary of Pearle, Inc., which is not a party to this appeal.

Pearle VisionCare was licensed under the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act) (Health & Saf. Code, § 1340 et seq.), as a specialized health care service plan. The Knox-Keene Act regulates plans that provide group medical benefits to individuals who enroll in or subscribe to those plans. The act covers general health service plans (i.e., HMO's), as well as specialized health care plans that deal with only one health care field such as dentistry or optometry. (Health & Saf. Code, §§ 1343, subd. (a), 1345, subds. (f) & (o).) It is designed, among other things, to maintain "the continued role of the professional as the determiner of the patient's health needs which fosters the traditional relationship of trust and confidence between the patient and the professional." (Health & Saf. Code, § 1342, subd. (a).)

The Knox-Keene Act provides an exception to the general rule prohibiting corporations from hiring optometrists. In this regard, Health and Safety Code section 1395, which we will discuss in more detail, *post*, provides in part:

> "(b) Plans licensed under this chapter *shall not be deemed to be engaged in the practice of a profession, and may employ, or contract with, any professional* licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code *to deliver professional services. Employment by or a contract with a plan as a provider of professional services shall not constitute a ground for disciplinary action against a health professional* licensed pursuant to

> Division 2 (commencing with Section 500) of the Business and Professions Code by a licensing agency regulating a particular health care profession. [¶] (c) *A health care service plan licensed under this chapter may directly own, and may directly operate through its professional employees or contracted licensed professionals, offices and subsidiary corporations* . . . as are necessary *to provide health care services* to the plan's subscribers and enrollees. [¶] (d) A professional licensed pursuant to the provisions of Division 2 (commencing with Section 500) of the Business and Professions Code *who is employed by, or under contract to, a plan* may not own or control offices or branch offices beyond those expressly permitted by the provisions of the Business and Professions Code. [¶] (e) . . . [¶] (f) Except as specifically provided in this chapter, nothing in this chapter shall be construed to limit the effect of the laws governing *professional corporations*, as they appear in applicable provisions of the Business and Professions Code, upon specialized health care service plans." (Italics added.)

However, the regulation and enforcement of the practice of optometry is still governed by the State Board of Optometry and the Attorney General. (§§ 3010.1, 3131.)

Pearle operates optical retail stores and is a registered dispensing optician. Pearle, like Pearle VisionCare, is a subsidiary of Pearle, Inc. Since 1996, Pearle, Inc. has been a wholly owned subsidiary of Cole National Corporation (Cole).

Pearle VisionCare hires optometrists, and Pearle VisionCare rents space for the provision of optometric services from Pearle in Pearle's stores.

D. *The Individual Defendants*

When Cole acquired Pearle, Inc. and its subsidiaries (including Pearle and Pearle VisionCare) in 1996, Management, who were officers and directors of Cole and its

affiliates, became officers and directors of Pearle VisionCare.[5] Management are all residents of Ohio.

E. *Pearle's Advertising*

In California, Pearle's print advertisements emphasized the provision of optometric services, stating such things as, "See us for your next eye exam," "Eye exams available," "The Doctor is in," and "Optometrist - Eyes Examined." Some had images of a doctor in a white laboratory coat performing an eye examination. However, many of the print advertisements had some sort of disclaimer, stating that the exams were performed by "independent Doctors of Optometry" or that "[t]he Doctors in California are employees of Pearle VisionCare which is a licensed Vision Health Care Service Plan."

Pearle store signs indicated the provision of optometric services. These advertisements included statements such as "Optometrist on Premises - Eyes Examined - Appointments Available - Walk-Ins Welcome"; "OPTOMETRIST - Examination Area"; "The Doctor is in"; or "Eye Examinations Available - Examination Area in Back of Office."

In national advertising Pearle also emphasized the provision of eye care. For example, Pearle maintained a toll-free number where the voice of its founder, Stanley Pearle, would come on the line and state:

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5 There is a dispute as to whether Jeffrey Cole was an officer and director of Pearle VisionCare or whether his listing as such on Pearle VisionCare's corporate records was a mistake. However, based upon the fact that we are affirming the court's granting of Management's motion to quash, we need not reach this issue.

> "Hello, this is Dr. Stanley Pearle, founder of Pearle Vision. Providing complete professional eye care is something I care deeply about. Pearle Vision was started for that purpose and I guarantee that you will still find it at every Pearle Vision Center today."

After a few prompts that locate the nearest Pearle store, the caller is offered the option of receiving additional information concerning Pearle stores. If that option is chosen the caller hears the following recording:

> "Our products include hundreds of designer frames, name brand contact lenses, trendy sun wear and an array of accessories and the latest in lens technology. *Did you know that eye exams are available by independent doctors of optometry at or next to Pearle Vision? Doctors in some states are employed by Pearle Vision or an affiliate. Doctors in California are employed by Pearle VisionCare, a licensed vision health care service plan, an affiliate of Pearle Vision."* (Italics added.)

Pearle's national print and television advertisements contained similar disclaimers. Pearle also had a trademarked slogan, "Nobody cares for eyes more than Pearle," used in some of its advertising."

F. *Pearle VisionCare's Charge for Dilation*

The People employed undercover investigators who contacted four Pearle stores to schedule eye examinations. In scheduling those exams, they spoke with representatives and asked how much the eye examination would be. Pearle or VisionCare representatives stated a basic price of $54.95 for an eye exam, plus an additional $15.00 for any use of eye drops to induce dilation as part of the examination.

G. *The Instant Action*

1. *The People's complaint*

In February 2002 the People filed a complaint against Pearle, Pearle VisionCare, Cole, their related entities, and Management. The complaint contained causes of action for unfair competition, false and misleading advertising, charging unlawful fees for using drops to dilate patients' eyes, violations of laws forbidding financial connections between optometrists, opticians and optical retailers, and unlicensed practice of optometry. The complaint sought an injunction prohibiting (1) the defendants from distributing any false or misleading advertising; (2) Pearle VisionCare from charging fees for dilation drops; (3) Pearle from advertising eye exams and maintaining an optometrist on or near its premises; (4) Pearle founder Stanley Pearle from holding himself out as an optometrist; (5) Pearle and Stanley Pearle from practicing optometry without a license; (6) Pearle from having improper financial and other relationships with Pearle VisionCare and its optometrists; and (7) Management from participating in improper financial and other relationships between Pearle and Pearle VisionCare.

2. *The motion to quash*

In April 2002 Management brought a motion to quash service of summons upon them, arguing that they did not have the necessary minimum contacts with California sufficient to impose personal jurisdiction. In support of that motion Management submitted declarations stating that they were residents of the State of Ohio and that they did not regularly visit California, conduct business there, or own property in that state.

All but Jeffrey Cole admitted that they had served as officers and/or directors of Pearle VisionCare.[6]

In opposing the motion to quash, the People asserted that Management purposefully availed themselves of the benefits of California law by becoming officers and directors of Pearle VisionCare, a California corporation, and thereby were subject to personal jurisdiction in California. The People further asserted that their claims against Management arose out of their activities in California because they were officers and directors of Pearle VisionCare. The People asserted that Management violated California law by serving as both officers and directors of Pearle VisionCare and Pearle.

In May 2002 the court issued a telephonic ruling granting Management's motion to quash, finding:

> "[T]he individual defendants, directors/officers of the Cole entities, lack [sufficient] contacts. Merely being an officer/director [of] interlocking boards does not constitute a violation of [section] 655. Moreover, the acts at issue were those of the corporate entities, not the director/officers as individuals."

Following oral argument the court confirmed its telephonic ruling, adding the caveat that its ruling was "without prejudice to plaintiff's right to conduct further discovery and/or move to add parties."

The People timely appealed from the motion granting Management's motion to quash.

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6 See footnote 5, *ante.*

3. *The application for preliminary injunction*

In April 2002 the People brought a motion for preliminary injunction, seeking to enjoin Pearle from advertising eye examinations and to enjoin Pearle VisionCare from charging patients a fee for eye drops used to dilate patients' eyes. The People asserted that the advertisements were illegal because they suggested that eye examinations were available at Pearle's store or, in the alternative, that they were misleading as they would lead consumers to believe that Pearle itself provided optometric services. In support of these contentions, the People submitted the advertisements discussed, *ante*. In support of its proposed injunction prohibiting charging a fee for eye drops, the People submitted declarations from the undercover investigators concerning their contacts with Pearle VisionCare or Pearle employees and the charges for eye examinations and dilations, also discussed, *ante*.

Pearle and Pearle VisionCare opposed the motion, arguing that the advertisements were not misleading because they state that the optometric services are performed by Pearle VisionCare, not Pearle, and the in-store signs identify the optometrists' affiliation with Pearle VisionCare. Pearle also argued that some of the submitted evidence was out-of-date, with the Pearle VisionCare examination areas now segregated from Pearle's retail space by internal walls, and the examination areas marked with indications that optometric services are furnished by Pearle VisionCare. Pearle also asserted that its slogan, "Nobody cares for eyes more than Pearle," was not misleading because it did not advertise the provision of optometric services. Pearle argued the advertisements were not illegal because they did not state that Pearle itself provided optometric services.

Pearle VisionCare also argued that it should not be enjoined from charging for dilation of eyes. Pearle VisionCare argued that the application of eye drops did not constitute prohibited "dispensing" of drugs and also that charging for the eye drops was not prohibited by statute because they did not constitute "therapeutic" agents, but rather "topical" agents. Pearle further argued that the charging for eye drops was not improper because the State Department of Managed Health Care (DMHC) had approved such action when Pearle VisionCare submitted documents to that agency, and that agency had exclusive authority over health care plans such as Pearle VisionCare.

In its telephonic ruling, the court initially denied the People's motion, finding:

> "[T]he [defendants] appear to have shown the People do not have a reasonable probability of prevailing on the merits, given the lengths [defendants] have gone to in their advertising (TV, print, and signage . . .) to segregate and indicate the distinction in services provided by [Pearle] and [Pearle VisionCare]. The former sells frames and glasses and can do limited eye examinations which does not include dispensing mydriatics [eye drops causing dilation], while the latter can provide professional eye examinations and administer mydriatics through independent optometrists who in California, are employees of [Pearle VisionCare], which is a licensed HMO."

The court's order, however, did not address Pearle VisionCare's charging for applying eye drops to dilate patients' eyes.

The People requested oral argument, which was held in June 2002. Following oral argument, the court took the matter under submission. Thereafter, the court issued its ruling, reversing itself and granting the People's requested preliminary injunction. In doing so, the court stated:

> "The People have carried their burden to demonstrate a reasonable probability of prevailing on the merits and the equities balance in

> their favor as the advertisements of defendants have the tendency or capacity to mislead trusting, unwary consumers. As examples, an optician advertisement which says 'Schedule your exam today' . . . suggests the [optician] employs an optometrist. Similarly, an optician advertisement 'eye exams available' . . . suggests the same which violates [section] 2556. . . . [¶] Additionally, the People have shown defendants are violating [section] 4024[, subdivision] b by having optometrists employed by [Pearle VisionCare] charge dilation fees for applying mydriatics. The People's motion for preliminary injunction to enjoin charging this illegal fee is also granted. [¶] The court adopts and signs the proposed order for preliminary injunction submitted by the People."

The order submitted by the People, enjoined the following activities with regard to dilation of patients' eyes:

> "Defendant [Pearle VisionCare] and its successors in interest, whether corporate or otherwise, and all owners, officers, directors, representatives, agents, consultants, executive committee members, assignees, affiliates, merged or acquired predecessors, parent or controlling entities, subsidiaries, and employees of defendant [Pearle VisionCare] and any other persons or entities acting under, by, through, or on behalf of defendant [Pearle VisionCare] or pursuant to its direction, and all persons or entities acting in concert or participating with defendant [Pearle VisionCare] who have actual or constructive knowledge of this injunction *are enjoined, during the pendency of this action, from, charging or receiving a fee for dispensing therapeutic pharmaceutical agents, including mydriatics, by any means whatsoever, including the following*: [¶] A. *Charging or receiving a fee, in addition to the fee for an eye exam, for dilating patient's eyes;* [¶] B. *Charging or receiving a fee, in addition to the fee for an eye exam, for dilating the patient's eyes and/or completing the eye examination through the dilated pupils.*" (Italics added.)

The order also provided for an injunction against Pearle using advertisements that stated or implied that it provided optometric services:

> "Defendant [Pearle] and its successors in interest, whether corporate or otherwise, and all owners, officers, directors, representatives, agents, consultants, executive committee members, assignees, affiliates, merged or acquired predecessors, parent or controlling

> entities, subsidiaries, and employees of defendant [Pearle] and any other persons or entities acting under, by, through, or on behalf of defendant [Pearle] or pursuant to its direction, and all persons or entities acting in concert or participating with defendant [Pearle] who have actual or constructive knowledge of this injunction *are enjoined during the pendency of this action from making or disseminating or causing to be disseminated before the public in California, by any means whatsoever, statements that use words or images to state or imply that defendant [Pearle] can or does provide optometric services, including but not limited to, eye exams, eye care, and the services of an optometrist . . . .*" (Italics added.)

The order then gave several examples of Pearle's advertisements (discussed, *ante*) that would be barred by the injunction.

Pearle objected to the order enjoining its advertising. Pearle argued that the order was overly broad, and that the First Amendment required that they be allowed to remedy any consumer confusion by using disclaimers. Pearle further objected that the order impermissibly banned nationwide advertisements and statements made on their web sites or 800 number. Pearle argued that the order did not comply with the court's ruling because it did not identify which specific advertisement would be banned and impermissibly cited numerous specific phrases without regard to the total advertisement or sign in which they appeared. Pearle also objected to the injunction against their tag line, "Nobody Cares For Eyes More Than Pearle," as being overbroad and because the court did not find that phrase misleading.

Pearle VisionCare argued that the order was improper as it could be construed as also prohibiting Pearle VisionCare from advertising that it provided optometric services. Pearle VisionCare additionally objected to the order as prohibiting not only charging a fee for applying eye drops, but also for conducting the eye exam itself after the provision

of eye drops. Finally, Pearle objected to the timing of the order, stating that they needed time to correct offending advertisements and that telephone book and coupon book advertising could only be corrected at the next advertising cycle.

The court thereafter vacated the original order submitted by the People, stating, "The People and the defense are each invited to submit within ten (10) days a revised order on preliminary injunction which is not national in scope, and which goes into effect after 45 days from entry, except as to phone book ads and coupon book ads, to which the order shall apply at commencement of the next advertising cycle."

The People submitted a new proposed order that tracked the language of its original proposed order, but that also (1) specified that it was limited to advertising that was disseminated in California and (2) was to go into effect 45 days from the date of the order, except that telephone book and coupon book advertisements would not be subject to the injunction until the commencement of the next advertising cycle.

Pearle and Pearle VisionCare submitted their own proposed order and objections to the People's order. Pearl and Pearle VisionCare's order specified that Pearle was enjoined from using advertisements and signage in California that had "the tendency or capacity to mislead the gullible, unwary or trusting consumer, that [Pearle], a registered dispensing optician, employs optometrists within the State of California." However, the order also specified that any advertisement that used the words "'eye examination[s],' 'exams[s],' 'examination[s],' 'doctor[s],' 'optometrist[s],' or used the image of a doctor was not enjoined if it prominently and, in close proximity to such word or image, stated or displayed: '[Pearle] does not employ Doctors of Optometry and does not provide eye

exams in California. [Pearle VisionCare], a licensed vision health care service plan, provides eye exams in California.'" The order further specified that the injunction did not apply to Pearle's "800 telephone number, internet web sites and nationally used trademarked slogan 'Nobody cares for eyes more than Pearle.' However, the international 800 telephone number and web sites would state or display the following: '[Pearle] does not employ Doctors of Optometry and does not provide eye exams in California. [Pearle VisionCare], a licensed vision health care service plan, provides eye exams in California.'" The order also specified that that portion of the injunction did not apply to Pearle VisionCare. The order stated that Pearle VisionCare was "enjoined and restrained from charging a fee for applying mydriatics to a patient's eyes." The order also specified that it would become effective in 45 days, except that telephone book ads, catalogs, national promotional ads and coupon books would not be subject to the injunction until the commencement of the next advertising cycle.

Before the People could file objections to Pearle and Pearle VisionCare's proposed order, the court signed an order that substantially tracked the order submitted by Pearle and Pearle VisionCare. Thereafter, the People filed objections to Pearle and Pearle VisionCare's proposed order and appeared ex parte before the court, asking it to vacate or clarify the court's order. However, Pearle and Pearle VisionCare informed the court at the ex parte hearing that they had filed an appeal from the order, divesting the court of any jurisdiction to alter the preliminary injunction. The court agreed with Pearle and Pearle VisionCare and denied the People's ex parte request.

Pearle and Pearle VisionCare timely appealed from the order granting preliminary injunction, and the People filed a timely cross-appeal from that order.

4. *Motion on appeal to consider additional evidence*

After the appeals were filed in this case, the People filed a motion to consider additional evidence regarding Pearle VisionCare's charge for eye drops for dilating patients' eyes. In support of the motion the People submitted declarations from two undercover investigators who had eye exams performed at Pearle VisionCare after the preliminary injunction was issued. The undercover investigators stated that when they had their eye exams they were informed they would be charged a separate fee of $15.00 for dilation. The billing for the eye exams reflected a separate $15.00 charge for "dilated fundus exa[m]." The People assert that this evidence should be considered on this appeal because it shows the need for clarification of the court's preliminary injunction order as Pearle VisionCare is attempting to get around the injunction by renaming the dilation charge as a dilation "exam" fee. Pearle VisionCare and Pearle oppose this motion asserting that (1) it is improper for this court to engage in fact finding and consider facts developed after the appeal was filed; and (2) resolution of the issue would require an evidentiary hearing not appropriate before this court as they contend it was appropriate to charge this fee for the extra services involved in examining eyes after dilation. We ordered that this motion be considered in conjunction with the appeal.

DISCUSSION

I. *Appeals from the Preliminary Injunction Order*

A. *Law Applicable to Preliminary Injunctions*

1. *Standard of review*

The grant or denial of a request for a preliminary injunction rests within the sound discretion of the trial court. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69 (*IT Corp.*).) The trial court abuses its discretion only if its ruling """exceeded the bounds of reason or contravened the uncontradicted evidence.""" (*Ibid.*) Further, in reviewing an order granting a preliminary injunction, we view the facts in favor of the prevailing party, resolving all conflicts in its favor and drawing all inferences that can reasonably be made in support of the trial court's order. (*People v. James* (1981) 122 Cal.App.3d 25, 28-29.) However, where the issue is one of law only, we review the preliminary injunction ruling de novo. (*CADO, supra,* 143 Cal.App.3d at p. 426.)

2. *Showing required to grant preliminary injunctions*

Ordinarily, a party seeking an injunction must demonstrate (1) a reasonable probability of success on the merits at trial and (2) that the harm to the plaintiff if an injunction is denied exceeds the harm to a defendant if an injunction is granted. (*IT Corp., supra,* 35 Cal.3d at pp. 69-70.)

However, where a government entity brings an action to enjoin violation of a statute that provides for injunctive relief and it establishes a reasonable probability of success on the merits, "a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it

would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties. [¶] Once the defendant has made such a showing, an injunction should issue only if—after consideration of both (1) the degree of certainty the outcome on the merits, and (2) the consequences to each of the parties of granting or denying interim relief—the trial court concludes that an injunction is proper." (*IT Corp., supra,* 35 Cal.3d at p. 72, fn. omitted.) Preliminary injunctions are provided for in actions to restrain false advertising under section 17500 et seq., one of the statutes under which the People have sued. (§ 17535; *People v. Toomey* (1984) 157 Cal.App.3d 1, 20.)

B. *Analysis*

1. *Illegal advertising*

On their appeal, the People assert that the court either erred in failing to consider their claim that Pearle's advertising was illegal under section 2556 or, if the court did implicitly deny its application for preliminary injunction on that ground, that denial was error. We conclude that Pearle's advertising was illegal under section 2556. We also conclude that the court erred by allowing Pearle's advertising to continue with a disclaimer, as it could not cure such illegal advertising.

As a preliminary matter, it is unclear from the court's ruling granting preliminary injunction whether the court was making findings only on the People's false or misleading advertising claim or if it also reached the People's claim that Pearle's advertising was illegal as a violation of section 2556. The court's ruling first stated that "[t]he People have carried their burden to demonstrate a reasonable probability of

prevailing on the merits and the equities balance in their favor as the advertisements of defendants have the tendency or capacity to mislead trusting, unwary consumers." This indicates a ruling on only the misleading advertising claim. However, the ruling goes on to state that "an optician advertisement which says 'Schedule your exam today' . . . suggests the [optician] employs an optometrist. Similarly, an optician advertisement 'Eye exams available' . . . suggests the same *which violates* [*section*] *2556*. . . ." (Italics added.)

However, nothing in the competing orders submitted by the parties indicated that the court had resolved the legality issue, and the court lost jurisdiction to hear the People's objections to Pearle and Pearle VisionCare's order, which the court signed, because Pearle and Pearle VisionCare had filed an appeal from the court's decision. The final written order signed by the court only enjoined misleading, not illegal, advertising. Moreover, nowhere in the court's ruling or written order did it make a finding that Pearle's advertising was *legal*.

At any rate, it does not matter if the court failed to address the illegality of Pearle's advertising in granting the People's application for preliminary injunction. We may reach the issue of the illegality of Pearle's advertising as we review the court's ruling granting the preliminary injunction, not its reasoning. (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.)

As discussed, *ante*, section 2556 prevents opticians from advertising "the furnishing of" the services of an optometrist. Pearle argues that this advertising was

proper because there was also a disclaimer that specified that Pearle VisionCare provided the optometric services. This argument is unavailing.

Under the plain language of the statute, Pearle, as an optician and optical retailer, was prohibited from advertising any furnishing of optometric services. The statute does not state that such advertising is proper if it is specified that another, related entity provides the services. The express intent of the statute is to prevent opticians and optical retailers from expressly or implicitly representing that they can provide optometric services. The advertisements express the notion that Pearle is providing optometric services at or adjacent to its retail establishments, an action itself made illegal by the terms of section 2556. The disclaimer, which identifies an entity with a similar name, only reinforces the idea that it is a "Pearle" entity that is providing the optometric services.

This interpretation of section 2556 is also consistent with the policies behind the regulation of the optometric profession and prohibitions on relationships between optometrists and opticians. The purpose of licensing laws for optometry is protection of the public. (§ 3010.1.) Further, the Legislature has enacted laws such as section 2556 to keep the practice of optometry and the business of opticians separate because the control of optometrists by opticians and optical retailers would harm the public good. (*CADO, supra,* 143 Cal.App.3d at p. 434.) Allowance of such a transparent attempt to violate section 2556's provisions would violate this public policy. Indeed, in *CADO*, we also gave such a broad interpretation to section 2556, holding that an advertisement for "total eye care" constituted advertising of optometric services in violation of section 2556, and

that the misleading nature of such advertising was not cured by Pearle employees telling patients scheduling eye exams that it was optometrists, not Pearle, that provided the exams. (*CADO, supra,* 143 Cal.App.3d at p. 433, fn. 5.)

Pearle asserts that because a violation of section 2556 is punishable as a misdemeanor (see § 2558 ["Any person who violates any of the provisions of this chapter is guilty of a misdemeanor"]), it is penal in nature and therefore must be construed narrowly. However, the purpose of licensing laws is to protect the public, not just punish violators, and therefore they are to be construed broadly to effectuate their purposes. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 607, fn. 4.) Further, this is a civil action seeking injunctive relief and, thus, any interpretation to be given the statute in a criminal setting would not be applicable here. Finally, penal statutes are only interpreted in a defendant's favor if there is a manifest ambiguity and no other intent can be shown. (*People v. Avery* (2002) 27 Cal.4th 49, 58.)

Pearle next argues that section 2556 must be construed narrowly to avoid violating its First Amendment rights. Pearle cites *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 504, which held that "a blanket prohibition against truthful, nonmisleading speech about a lawful product . . . rarely survive[s] constitutional review." However, this citations begs the question. The advertising is misleading because it implies that Pearle furnishes optometric services, and it advertises what would appear to be illegal conduct: its maintenance, directly or indirectly, of an optometrist at or near its retail establishment. To find protection within the First Amendment, commercial speech "at least must concern lawful activity and not be misleading." (*Central Hudson Gas & Elec. v. Public*

Serv. Comm'n (1980) 447 U.S. 557, 566.) As we shall discuss in the following section, Pearle advertising was not only barred by section 2556, it was also misleading and therefore not protected by the First Amendment.

In support of its narrow interpretation of section 2556, Pearle also cites to a previous version of section 2556, a portion of which was declared unconstitutional. As originally enacted in 1939, section 2556 provided that:

> "It is unlawful to do any of the following: *to advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof; to advertise any examination or treatment of the eyes in connection with the sale of eyeglasses, spectacles or the parts thereof; to insert any statement in any advertising in connection with the business of dispensing optician which is false or tends to mislead the public; to make use of any advertising statement of a character tending to indicate to the public any superiority of any particular system or type of eyesight examination or treatment over that provided by other licensed ocular practitioners;* to advertise the furnishing of, or to furnish, the services of a refractionist, an optometrist, or a physician and surgeon; to directly or indirectly employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician and surgeon, or a practitioner of any other profession for the purpose of any examination or treatment of the eyes; or to duplicate or change lenses without a prescription or order from a person duly licensed to issue the same." (Stats. 1939, ch. 955, p. 2694, § 1, italics added.)

The italicized portions of section 2556 were deleted when that section was amended following United States Supreme Court decisions holding that prohibitions on price advertising violated the First Amendment (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 770; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 384 & *Board of Medical Examiners v. Terminal-Hudson Elec., Inc.* (1977) 73 Cal.App.3d 376, 384-387 (*Board of Medical Examiners*)), which held that section 2556's prohibition

on price advertising by opticians violated the First Amendment. (See Comment, *Review of Selected 1979 California Legislation* (1979) 11 Pacific L.J. 318, 323.) Pearle argues that the deleted portion of the original section 2556 making it illegal to "advertise any examination or treatment of the eyes in connection with the sale of eyeglasses" would have been "superfluous" if the ban on advertising the furnishing of optometric services, contained in the original and current version, had applied to all advertising. However, this argument is unavailing. First, Pearle submits nothing as far as legislative history to support this interpretation of the original or amended version of section 2556.

The *Board of Medical Examiners* decision only declared the prohibition on price advertising unconstitutional. The original version of section 2556, under a plain meaning analysis, appears to have been intended to attack two separate problems: (1) the provision of eye examinations and treatment that are given with a purchase of eye glasses; and (2) advertisements that represented an optical store as providing the services of an optometrist. The omitted section could be construed as prohibiting the advertisement of free or discounted optometric services along with the purchase of eye glasses. Thus, the Legislature must have felt that this restriction could be in violation of First Amendment rights.

Moreover, there is nothing in the prior or current version of section 2556 that would support Pearle's narrow interpretation of that section. To allow opticians and optical retailers to avoid the prohibition on advertising the furnishing of optometric services by merely placing disclaimers that the optometric services were provided by "independent doctors of optometry" or by its related entity Pearle VisionCare would

prevent any meaningful enforcement of section 2556. It is proper and legal for Pearle VisionCare, which provides optometric services through the optometrists it hires, to advertise that it provides optometric services. However, the only purpose served by Pearle, an optician/optical retailer, in advertising the furnishing of optometric services is to lead potential customers to believe that they can receive optometric services from Pearle at its retail establishment, an activity expressly made illegal by section 2556 itself.

Pearle also argues that the court was correct in rejecting the People's illegal advertising claim because it implicitly found that the harm to Pearle outweighed the benefits to Pearle in obtaining an injunction. This argument is unpersuasive. Pearle ignores the fact that in cases brought by a governmental entity seeking to enjoin violation of a statute that specifically provides for injunctive relief "a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant." (*IT Corp., supra,* 35 Cal.3d at p. 72, fn. omitted.) It is only if a defendant then demonstrates "that it would suffer grave or irreparable harm from the issuance of the preliminary injunction" that the court must weigh the relative harms to the parties. (*Ibid.*)

Pearle did not make such a showing. Pearle claims that it would suffer grave or irreparable harm because its first amendment rights would be violated if the injunction proposed by the People issued. However, as discussed, *ante*, the First Amendment does not protect unlawful or misleading advertising. (*Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 566.) Indeed, we rejected a similar argument in *CADO, supra,* 143 Cal.App.3d 419.

Pearle also argues it would suffer irreparable harm because the injunction might apply to its national advertising and its trademarked slogan, "Nobody Cares for Eyes More than Pearle." However, the court's order limited its application to advertising directed to California and exempted Pearle's 800 number, its websites and its trademarked slogan. In their cross-appeal the People did not specifically object to these portions of the injunction order and therefore cannot challenge them on appeal. Moreover, the People submitted evidence to the trial court from an expert witness that it is possible to direct different advertisements to specific states within the nation. The court properly struck a balance by forbidding advertisements directed to Californians while still allowing Pearle to utilize its 800 number, websites and trademarked slogan.

In sum, we conclude that the People demonstrated a reasonable probability of success on their claim that any advertising by Pearle in California that expressly or impliedly advertised the furnishing of any optometric services, including eye examinations and statements and depictions alluding to doctors, optometrists and the like, violated section 2556, regardless of whether the advertisement also stated that the services were provided by VisionCare or independent doctors of optometry. Accordingly, we affirm the court's order granting an injunction prohibiting Pearle from advertising optometric services, as modified to provide that "Pearle is prohibited from conducting any advertising in California that expressly or impliedly advertises the furnishing of optometric services, including eye examinations and statements alluding to doctors, optometrists, and the like." We reverse that part of the order that allowed continued advertising with a disclaimer stating: "[Pearle] does not employ Doctors of

Optometry and does not provide eye exams in California. [Pearle VisionCare], a licensed vision health care service plan, provides eye exams in California."

2. *Misleading advertising*

We also conclude that Pearle's advertising was misleading and the court properly entered a preliminary injunction on this ground as well. Section 17200 et seq. prohibits unfair business practices and deceptive advertising. The statutes are construed broadly to protect California consumers from various schemes developed by unscrupulous businesses. (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515.) Any violation of California law in furtherance of business activity presents the necessary predicate for a violation of section 17200. (*People v. McKale* (1979) 25 Cal.3d 626, 631-632.) Further, any advertising that is unfair, deceptive, untrue, or misleading constitutes unfair competition within the meaning of section 17200. (*People v. McKale, supra,* at pp. 631-632; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210 (*Children's Television*).)

An unfair competition/false advertising claim need not contain all the elements of a tort cause of action. (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877.) For example, the People need not show reasonable reliance by consumers on the advertising, nor actual damage to consumers. (*Children's Television, supra,* 35 Cal.3d at p. 211; *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1289 (*Massachusetts Mutual*).) Additionally, a showing of actual falsehood is not necessary. (*Massachusetts Mutual, supra,* 97 Cal.App.4th at p. 1289.) It is sufficient if the advertising is actually misleading or "has a capacity, likelihood or

tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.)

Pearle asserts that the court erred in finding that its advertising was misleading because it did not evaluate the advertising based upon its likely effect upon a reasonable consumer but, instead, based upon its effect on "the unwary or gullible consumer." We reject this contention.

It is true that in determining whether advertising is "likely to deceive," courts look to its effect on a "reasonable consumer." (*South Bay Chevrolet v. General Motors Acceptance Corp., supra,* 72 Cal.App.4th at p. 878.) However, in applying this standard, we look to "'[w]hat a person of ordinary intelligence would imply'" from advertisements. (*Lavie v. Proctor & Gamble Co.* (2003) 105 Cal.App.4th 496, 505 (*Lavie*).) Further, "a reasonable consumer may be unwary or trusting" (*id.* at p. 506) and is not required "to investigate the merits of advertising claims." (*Id.* at p. 504.) "[A] 'reasonable consumer' need not be 'exceptionally acute and sophisticated.' [Citation.]" (*Id.* at pp. 509-510.)

This is consistent with the policies behind consumer protection laws, the "[p]rotection of unwary consumers from being duped by unscrupulous sellers . . . ." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808; *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 959.) The laws are designed to protect such individuals as "unwary targets of false advertising [citation], innocent youths corrupted by lawbreaking retailers [citation], . . . or a 'singularly dense' group of consumers who fall prey to misleading advertising . . . ." (*Rosenbluth Internat., Inc. v. Superior Court* (2002) 101 Cal.App.4th 1073, 1078.)

It is also true that California has rejected the "least sophisticated consumer" test. (*Lavie, supra,* 105 Cal.App.4th at pp. 510-513.) Rather, courts simply recognize that "the general public is 'more gullible' than the 'sophisticated buyer.'" (*Id.* at p. 510.)

Here, whether the court properly used the "reasonable consumer" test, recognizing that such consumers may be "unwary or gullible," or improperly relied upon the "least sophisticated consumer" test, is of no moment. Substantial evidence supports the court's determination that the subject advertisements were misleading to the reasonable consumer, and thus the People demonstrated a reasonable likelihood of prevailing on the merits.

First, it is no defense that with disclaimers that eye exams or optometric services were performed by "independent doctors of optometry" or by Pearle VisionCare the advertisements were technically true. "'Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead.'" (*Lavie, supra,* 105 Cal.App.4th at p. 509.) Here, even with the disclaimers provided in some of Pearle's advertising or that stated in the court's order, the advertisements are still misleading.

As discussed, *ante*, the advertisements attempt to convince reasonable consumers that Pearle is providing optometric services at its retail establishments. The similarity in names between the entities implies that they provide the services together. Any reasonable, unsophisticated consumer seeing Pearle's advertisements would believe that they could receive eye exams or other optometric services from Pearle's retail stores,

regardless of any disclaimers. Indeed, there is no other reason for the emphasis on provision of optometric services in Pearle's advertisements for retail optical products unless Pearle wished to imply just such a fact. However, as a dispensing optician and optical retail store, Pearle is prohibited from providing such services per section 2556. Further, it is not incumbent upon a reasonable consumer to investigate what is meant by "independent doctors of optometry" or the corporate or financial relationship between Pearle and Pearle VisionCare. Thus, the ads were not only illegal, but also misleading to the reasonable consumer, with or without written disclaimers stating that Pearle VisionCare provided the optometric services.

Pearle asserts that the injunction order based upon a finding that the advertisements were misleading was erroneous because there were no "material" misrepresentations. Pearle asserts that there was no showing that the misleading advertisements deceived the public into patronizing Pearle's stores. This assertion is also unavailing.

Pearle confuses the likely-to-deceive element with a reliance element that false advertising cases do not require. While it is true in one sense that the misleading statement must be material in that it is likely to deceive consumers, it is not true that actual deception, reliance or a change of conduct must be shown. As discussed, *ante*, false advertising claims need only show that members of the public are *likely* to be deceived, not that there was actual deception or that the consumer would actually act in reliance upon the misleading advertisements. (*Children's Television, supra,* 35 Cal.3d at p. 211.) Proof of the impact of the advertiser's deception is not required. (*Massachusetts*

Mutual, supra, 97 Cal.App.4th at pp. 1289-1291.) Thus, the People were not required to submit proof that the misleading advertisements actually caused consumers to change their buying habits.

In support of its assertion that the People were required to show that the deceptive advertising caused consumers to act differently, Pearle cites several out-of-state cases. (See *Janusauskas v. Fichman* (Conn.App. 2002) 793 A.2d 1109, 1116 [deceptive statement must be "'material—that is, likely to affect consumer decisions or conduct'"]; *Purity Supreme, Inc. v. Attorney General* (Mass. 1980) 407 N.E.2d 297, 307 [a practice is deceptive "if it 'could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted'"]; *Commonwealth v. Masters of Lancaster, Inc.* (Pa.Super.Ct. 1962) 184 A.2d 347, 350 ["a misstatement does not violate the statute unless it is materially untrue and therefore deceptive"].) As out-of-state authority, however, these cases are not controlling to the extent they conflict with California law.

Pearle also cites *State Bd. of Funeral Directors v. Mortuary in Westminster Memorial Park* (1969) 271 Cal.App.2d 638 (*State Bd.*) in support of its contention that the misleading statements must be "material." That case is inapposite. In *State Bd.*, the court held that because it was established law in California that it was *legal* for cemeteries and mortuaries to be located on the same premises, a separately owned and operated mortuary and cemetery advertising their services together was not deceptive. (*Id.* at pp. 642-643.) The court held that the fact that only one name was used in the advertisements did not give "the false impression of sole ownership, of one entity which

offers both mortuary and cemetery services." (*Id.* at p. 642.) In doing so the Court of Appeal noted that nothing in the advertisements "is directed toward ownership entities or licensing, and it is doubtful that any person reading the advertisements would think about these matters one way or another. What a person of ordinary intelligence would imply is that both mortuary and cemetery services are provided at the same location. Nothing in the advertisements indicates the mortuary is doing cemetery business or the cemetery is doing mortuary business." (*Ibid.*) There is nothing in the *State Bd.* case stating that misleading statements must produce actual reliance and a change of conduct by consumers.

In sum, Pearle's advertisements were misleading and, therefore, as we held in the previous section, the court's order issuing a preliminary injunction against Pearle is affirmed, but we reverse that portion of the order allowing Pearle to continue the advertisements with disclaimers that the optometric services are provided by Pearle VisionCare.

3. *Consumer Cause v. National Vision, Inc. decision*

During the pendency of this appeal, the Court of Appeal, Second Appellate District, Division One, issued an opinion that Pearle and Pearle VisionCare assert conflicts with the court's issuance of a preliminary injunction and much of the legal and policy arguments presented by the People on appeal.[7] In *Consumer Cause, Inc. v. National Vision, Inc.* (2003) 111 Cal.App.4th 1069 (*Consumer Cause*), National Vision,

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7 We requested and received supplemental letter briefs to address this case.

Inc. (National), a registered dispensing optician, entered into an agreement with Wal-Mart under which Wal-Mart provided space in at least 94 Wal-Marts in California for National to operate optical dispensing stores. (*Id.* at p. 1072.) In exchange, National was required to place a licensed optometrist or opthamologist adjacent to or near the optical dispensing stores. (*Ibid.*) National in turn had its wholly owned subsidiary, NVAL Visioncare Systems of California, Inc. (Visioncare), a specialized health care service plan licensed under the Knox-Keene Act, provide the optometrists. (*Ibid.*)

Consumer Cause, Inc., a consumer protection group, sued National for unfair business practices under section 17200. (*Consumer Cause, supra,* 111 Cal.App.4th at p. 1072.) In doing so, Consumer Cause alleged that National's arrangement with Wal-Mart violated sections 655 and 2556 "'by (a) indirectly maintaining near its premises used for optical dispensing in California optometrists for the purpose of examination and treatment of the eyes, and (b) having landlord-tenant relationships indirectly with optometrists in California.'" (*Consumer Cause, supra,* 111 Cal.App.4th at p. 1073.)

National demurred, asserting that the Knox-Keene Act expressly excepted National from the section 655/2556 prohibitions, and, at any rate, Consumer Cause had not shown any harm as a result of the conduct. (*Consumer Cause, supra,* 111 Cal.App.4th at p. 1073.) The trial court sustained the demurrer, finding that there was no violation of section 17200 because Visioncare was licensed as a specialized health care service plan under the Knox-Keene Act, and """the relationship between [Visioncare] and California optometrists is authorized by Health and Safety Code, Section 1395.""" (*Consumer Cause, supra,* at pp. 1073-1074.)

Consumer Cause appealed, asserting that Visioncare's compliance with the Knox-Keene Act did not exempt it and National from the prohibitions contained in sections 655 and 2556. The Court of Appeal affirmed. In doing so, it cited Health and Safety Code section 1395, subdivisions (b) and (c), concluding that "this section expressly defines Knox-Keene-approved health care plans as nonprofessionals, i.e., as not being, among others, optometrists or ophthalmologists. Moreover, this section expressly permits such approved plans to own and operate, through professional employees, offices providing professional health care services." (*Consumer Cause, supra,* 111 Cal.App.4th at pp. 1074-1075.) From that, the Court of Appeal then made the leap, with minimal analysis, that Health and Safety Code section 1395 thus exempted not only Visioncare, but also National, the optician, from the terms of sections 655 and 2556: "Thus, Health and Safety Code section 1395 expressly exempts approved plans such as National's Visioncare from the section 655/2556 prohibitions. Approved plans operating such offices do not violate sections 655 and 2556, are not acting unlawfully, and thus do not violate section 17200." (*Consumer Cause, supra,* at p. 1075.) "Here, the Legislature expressly permits Knox-Keene-approved health care plans to engage in conduct which would be prohibited under sections 655 and 2556 if done by non-approved groups or individuals. Because National's Visioncare is an approved plan, National's relationship with Wal-Mart is legal and does not violate section 17200." (*Consumer Cause, supra,* at p. 1075.) The Court of Appeal also went on to note that the "Knox-Keene Act is a comprehensive plan to assure through regulation that quality health care, specifically including maintaining medical professionals' independence in diagnosing and treating

illness, is provided to the most people at the least cost. Its myriad sections require that only licensed medical professionals make health care decisions, and limits the plans' ability to impact those decisions. Thus, the Act expressly protects against the abuses sections 655 and 2556 prohibit if attempted by non-approved plans." (*Consumer Cause, supra,* at pp. 1075-1076.)

However, analysis of the plain language of Health and Safety Code section 1395 demonstrates that it approved contracts for the provision of optometric srevices between optometrists and ophthalmologists on the one hand, and the Knox-Keene-approved corporations on the other. It has no application to the prohibitions on arrangements and transactions between optometrists and ophthalmologists on the one hand, and opticians and optical retailers on the other.

Prior to adoption of the Knox-Keene Act, corporations were not permitted to hire optometrists or practice optometry unless they met the requirements for professional corporations set forth in the Moscone-Knox Professional Corporation Act, Corporations Code section 13400 et seq.:

> "An optometric corporation is a corporation which is registered with the State Board of Optometry and has a currently effective certificate of registration from the board pursuant to the Moscone-Knox Professional Corporation Act, as contained in Part 4 (commencing with Section 13400) of Division 3 of Title 1 of the Corporations Code, and this article. Subject to all applicable statutes, rules and regulations, *such optometric corporation is entitled to practice optometry*. . . ." (§ 3160.)

However, as discussed above, Health and Safety Code section 1395 changed this rule by allowing Knox-Keene-approved corporations to hire professionals such as optometrists and provide professional services through them:

> "(b) Plans licensed under this chapter *shall not be deemed to be engaged in the practice of a profession, and may employ, or contract with, any professional* licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code *to deliver professional services. Employment by a contract with a plan as a provider of professional services shall not constitute a ground for disciplinary action against a health professional* licensed pursuant to Division 2 (commencing with Section 500) of the of the Business and Professions Code by a licensing agency regulating a particular health care profession. [¶] (c) *A health care service plan licensed under this chapter may directly own, and may directly operate through its professional employees or contracted licensed professionals, offices and subsidiary corporations . . . as are necessary to provide health care services* to the plan's subscribers and enrollees. [¶] (d) A professional licensed pursuant to the provisions of Division 2 (commencing with Section 500) of the Business and Professions Code *who is employed by, or under contract to, a plan* may not own or control offices or branch offices beyond those expressly permitted by the provisions of the Business and Professions Code. [¶] (e) . . . [¶] (f) Except as specifically provided in this chapter, nothing in this chapter shall be construed to limit the effect of the laws governing *professional corporations*, as they appear in applicable provisions of the Business and Professions Code, upon specialized health care service plans." (Italics added.)

Thus, the terms of Health and Safety Code section 1395, subdivisions (b) and (c) show that they were intended only to provide an exception for Knox-Keene-approved corporations from the requirement that optometrists may only be employed by professional corporations. Health and Safety Code section 1395 first provides that the Knox-Keene-approved corporation "shall not be deemed to be engaged in the practice of a profession, and may employ, or contract with" an optometrist to deliver optometric

services, thus not violating the provision that only professional corporations may practice optometry through licensed optometrists. Second, the fact that an optometrist is employed by contract with a Knox-Keene-approved corporation "shall not constitute a ground for disciplinary action," thus allowing optometrists to be so employed without running afoul of the disciplinary laws. Third, the Knox-Keene-approved corporation may operate offices and subsidiary corporations through the contracted optometrists to provide the optometric services. The fact that Health and Safety Code section 1395 was directed only at the employment of optometrists by Knox-Keene-approved corporations is further bolstered by subdivision (d), which refers to restrictions on the number of offices an optometrist employed by a Knox-Keene-approved corporation may have, and subdivision (f), which states that unless Health and Safety Code section 1395 specifically provides otherwise, the provisions governing professional corporations still applied.

What Health and Safety Code section 1395 does *not* do, expressly or impliedly, is create an exemption from the restrictions on relationships between optometrists/ophthalmologists and opticians/optical retailers provided in Business and Professions Code sections 655 or 2556. There is nothing in Health and Safety Code section 1395 that makes any reference to those provisions or to opticians/optical retailers. The drafters of the Knox-Keene Act were obviously aware of Business and Professions Code sections 655 and 2556, referring as they did to the general statutes regulating health care professionals. If they wished to exempt Knox-Keene-approved corporations and their optometrist employees from the provisions of Business and Professions Code sections 655 and 2556, they could have easily and plainly done so. Instead, the plain

language the drafters used limited Health and Safety Code section 1395's scope to the employment of optometrists by Knox-Keene-approved corporations.

This conclusion is also bolstered by the fact that the statute stresses throughout that the exemption is created only to allow the Knox-Keene-approved corporation, through its contracted optometrists, to "deliver professional services," i.e., in this case, optometric services. It does not purport to allow an exemption for the Knox-Keene-approved corporation to provide the commercial sale of eyeglasses or have prohibited relationships with opticians/optical retailers.

It appears that the Court of Appeal in *Consumer Cause* was swayed by the language of Health and Safety Code section 1395 that Knox-Keene-approved corporations "shall not be deemed to be engaged in the practice of a profession . . . ." (Health & Saf. Code, § 1395, subd. (b).) The *Consumer Cause* court focused on this language in holding that Health and Safety Code section 1395 exempted the optician, the Knox-Keene-approved corporation and the optometrists from the terms of Business and Professions Code sections 655 and 2556. (*Consumer Cause, supra,* 111 Cal.App.4th at p. 1075.) Although not explicitly stated, it appears that the Court of Appeal in *Consumer Cause* concluded from this language that because Knox-Keene-approved corporations were deemed not to be engaged in the practice of optometry, they were exempt from any provisions restricting this profession.

However, Health and Safety Code section 1395, subdivision (b) only states that Knox-Keene-approved corporations shall not be deemed to be engaged in the practice of a profession (i.e., optometry), to the extent that they "employ, or contract with, any

professional . . . to deliver professional services." (*Ibid.*) It is only for this narrow purpose that Knox-Keene-approved corporations are exempt from restrictions on the practice of optometry. It does not, expressly or impliedly, exempt them from all restrictions on the practice of optometry, including the prohibitions against certain arrangements and transactions between opticians/optical retailers and optometrists.

Indeed, taken to its logical conclusion, such a proposition would create absurd results. The optician/optical retailer, Knox-Keene-approved corporation and the contracted optometrists would not be subject to *any* restrictions on the practice of optometry. Thus, under this analysis, it would not be unlawful for the optician to "duplicate or change lenses without a prescription or order from a person duly licensed to issue the same." (§ 2556.) It appears that the *Consumer Cause* decision, by virtue of its holding, would eliminate, as to opticians and optometrists associated with Knox-Keene-approved corporations, all other restrictions on the practice of optometry, including restrictions of patient solicitation (§ 3096), employment of "cappers" or "steerers" (§ 3100), or holding oneself out as a specialist (§ 3099). In interpreting a statute, we seek to avoid such an absurd result. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.)

Further, it is not true that the Knox-Keene Act, through its provisions requiring only licensed medical professionals to make health care decisions and placing limits on a plan's ability to affect those decisions, protects against "the abuses sections 655 and 2556 prohibit." (*Consumer Cause, supra,* 111 Cal.App.4th at pp. 1075-1076.) The Knox-Keene Act protects against the abuses that would occur if nonprofessional corporations

were allowed to practice a profession such as optometry and hire optometrists. It does not address the problems associated with opticians and optical retailers controlling and dominating the practice of optometry. Those ills are prevented separately by, in part, sections 655 and 2556.

Consumer Cause's holding that Health and Safety Code section 1395 creates an exemption to the prohibitions in Business and Professions Code sections 655 and 2556 regarding relationships between optometrists/ophthalmologists and opticians/optical retailers is contrary to the plain language of that statute. Further, in approving the relationship between National, the optician, Visioncare, the Knox-Keene corporation, and Wal-Mart, the Court of Appeal in *Consumer Cause* failed to distinguish between what Visioncare was permitted to do in hiring optometrists and what National was allowed to accomplish, as an optician. Whether National's relationship with Visioncare and its optometrists violated section 655 and 2556 was not separately analyzed. For the reasons expressed above, we decline to follow the *Common Cause* decision to the extent it conflicts with the conclusions we reach in this appeal.

4. *Injunction allowing Pearle VisionCare to advertise optometric services*

In their appeal the People assert that the portion of the injunction order allowing Pearle VisionCare to advertise or display signs about optometric services or its optometrists is vague and ambiguous because it is unclear if the order allows Pearl VisionCare to advertise optometric services in conjunction with Pearle or place signs in Pearle's retail stores. We do not believe that this section of the order is unclear. The People do not dispute that Pearle VisionCare can advertise optometric services.

Moreover, based upon the conclusions reached in this opinion it is also apparent that its advertising and signs must be kept separate and apart from Pearle's advertising and its retail establishments. Any alleged violation of the order must be addressed to the trial court.

5. *Injunction as to the Pearle entities successors-in-interest and related parties*

The People assert that the court erred by not imposing the injunction, as they requested, against the Pearle entities' successors-in-interest and related parties. The People are concerned that while the litigation is pending, the Pearle entities will be reorganized or sold in an attempt to avoid the injunction. We reject this contention as speculative. There is no evidence in the record that the Pearle entities have any such intention or plans. The People's remedy lies with the trial court if such actions are taken or threatened.

6. *Charges for dilation of eyes*

Pearle VisionCare asserts that the court erred in issuing an injunction prohibiting it from charging for eye drops used to dilate patients' eyes, claiming that such a charge is not illegal. The People in turn contend that the injunction did not go far enough as it should have made clear that the charges were improper no matter how Pearle VisionCare characterized them. We conclude that the court erred in issuing an injunction prohibiting charging a fee for dilating patients' eyes. Accordingly, we need not reach the People's assertion that the injunction was too narrow or vague to prevent violations by Pearle VisionCare.

As discussed, *ante*, "[a]ny *dispensing* of a therapeutic pharmaceutical agent by an optometrist shall be without charge." (§ 3041, subd. (h), italics added.) "Mydriatics," i.e., eye drops used for dilation of eyes, are included in the definition of therapeutic pharmaceutical agents. (Cal. Code Regs., tit. 16, § 1567, subd. (f).) As the People recognize, the term "dispense" is defined in section 4024 as follows:

> "(a) Except as provided in subdivision (b), 'dispense' means the furnishing of drugs or devices upon a prescription from a physician, dentists, *optometrist*, podiatrist, veterinarian, or upon an order to furnish drugs or transmit a prescription from a certified nurse midwife, nurse practitioner, physician assistant, or pharmacist acting within the scope of his or her practice. [¶] (b) 'Dispense' also means and refers to the *furnishing of drugs or devices directly to a patient* by a physician, dentist, *optometrist*, podiatrist, or veterinarian, or by a certified nurse midwife, nurse practitioner, or physician assistant acting within the scope of his or her practice." (Italics added.)

Here, it is undisputed that Pearle VisionCare charged a fee for the application of eye drops to dilate patients' eyes as part of eye examinations. However, Pearle VisionCare asserts that such an action does not constitute "dispensing" of therapeutic agents. Pearle VisionCare contends that by applying eye drops an optometrist is "administering" a drug, and that "dispensing" or "furnishing" of a drug occurs when a doctor gives, sells, or prescribes drugs for a patient's own use. Pearle VisionCare is correct.

The term "furnishing" is defined in section 4026 as meaning "to supply by any means, by sale or otherwise." The term "administer," however, is defined as "the direct application of a drug or device to the body of a patient or research subject by injection, inhalation, ingestion, or other means." (§ 4016.)

From these definitions it is apparent that the application of eye drops to induce dilation of a patient's eye falls under the definition of "administer," not "furnish." This action cannot reasonably be interpreted as "supplying" drugs to a patient. Rather, the term "administer," to apply a drug to a patient's body by any means, is exactly the action taken in applying eye drops to a patient's eyes during an eye examination. Indeed, if the Legislature had intended to include the administration of drugs to a patient under the definition of "dispense," it would have added that term to the definition along with the word "furnish." Since "administer" is separately defined in the same chapter and not contained within the definition of "dispense," the obvious intent of the Legislature was to exclude the administration of drugs to patients' bodies from the section prohibiting optometrists from charging a fee for the dispensing of drugs.

The difference between "furnishing" and "administering" has also been recognized under similar statutory schemes. Under the Uniform Controlled Substances Act (Health & Saf. Code, § 11000 et seq.), the term "dispense" is defined as "to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, *furnishing*, packaging, labeling, or compounding necessary to prepare the substance for that delivery." (Health & Saf. Code, § 11010.) The term "furnish" is there defined as having "the same meaning as provided in Section 4048.5 of the Business and Professions Code." (Health & Saf. Code, § 11016.) Former Business and Professions Code section 4048.5, repealed in 1996, provided that furnish "means to supply by any means, by sale or otherwise." The term "administer" is also defined, meaning "the direct application of a controlled substance, whether by injection,

inhalation, ingestion, or any other means to the body of a patient for his immediate needs . . . ." (Health & Saf. Code, § 11002.) Thus, the definitions under this statutory scheme are substantially identical and also differentiate between dispensing of and administering controlled substances. In an opinion by the Attorney General, applying the Uniform Controlled Substances Act, this distinction was also noted where it was held that "a physician may not *dispense* a Schedule II controlled substance directly to an ultimate user although he may *administer* such a controlled substance directly to his patient." (62 Ops.Cal.Atty.Gen. 65 (1979).)

Finally, our conclusion is supported by the ordinary dictionary definitions of the word "dispense." Dictionaries define this term as meaning to "prepare" or "distribute" medicine. (*Random House Unabridged Dict.* (2d ed. 1993), p. 568, col. 1 ["to make up and distribute (medicine), esp. on prescription"]; *Webster's 3d New Internat. Dict.* (1993), p. 653, col. 3 ["to prepare and distribute (medicines) to the sick"]; *The Sloane-Dorland Annot. Medical-Legal Dict.* (1987) p. 221, col. 2 ["To prepare and distribute medicines to those who are to use them"].)

In sum, we conclude that the court erred in enjoining Pearl VisionCare from charging a fee for the application of eye drops to patients for the purpose of dilation of eyes during eye examinations as such actions constitute "administration" of therapeutic agents, not the "dispensing" of such items. Further, based upon this holding, we need not consider the People's motion to consider additional evidence.

II. *The Appeal from the Order Granting the Motion To Quash*

The People assert that the court erred in granting Management's motion to quash because (1) it improperly considered the merits of the People's claims against Management; (2) the People properly alleged a violation of state law by Management; (3) Management purposefully availed themselves of the benefits of California by becoming officers and directors of Pearle VisionCare; (4) their violations of law relate to their activities in the state; (5) their contacts are such that they should reasonably have anticipated being called into court in this state; (6) their conduct in California its treated as exceptional and subject to special regulation; and (7) they waived their jurisdictional challenge by focusing on the merits of the case. We reject these assertions.

A. *Standard of Review*

On this appeal from the court's order granting Management's motion to quash, we resolve all conflicts in the relevant evidence against the People and in favor of the order. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 535.) """An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary. In the consideration of an order made on affidavits involving the decision of a question of fact, the appellate court is bound by the same rule as where oral

testimony is presented for review." [Citations.] When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.'" (*Kulko v. Superior Court* (1977) 19 Cal.3d 514, 519, fn. 1, citing & quoting *Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 507-508, revd. on other grounds *Kulko v. Superior Court of California in and for City and County of San Francisco* (1978) 436 U.S. 84.)

B. *Applicable Authority*

1. *Minimum contacts test*

Code of Civil Procedure section 410.10 permits California courts to "exercise jurisdiction on any basis not inconsistent" with state or federal constitutional principles. Under this standard, a court may exercise jurisdiction over a nonresident defendant only if the defendant's *minimum contacts* with the forum state are sufficient to make the maintenance of the action inoffensive to traditional concepts of fair play and substantial justice. (*International Shoe Co. v. State of Washington, etc.* (1945) 326 U.S. 310, 320.) The converse is equally true: "[E]ach individual has a liberty interest in not being subject to the judgments of a forum with which he or she has established no meaningful minimum 'contacts, ties or relations.' (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 471-472 (*Burger King*).) As a matter of fairness, a defendant should not be 'haled into a jurisdiction solely as the result of "random," "fortuitous," or "attenuated" contacts.'

(*Burger King, supra*, 471 U.S. at p. 475.)" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445.) Minimum contacts exist if the defendant should reasonably anticipate being subject to suit in the forum state as a result of the defendant's conduct in or connection with the forum state. (*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.)

"The concept of minimum contacts embraces two types of jurisdiction—general and specific. General jurisdiction results where the defendant's contacts with the forum state are so 'systematic and so continuous as to make it consistent with traditional notions of fair play and substantial justice to subject the defendant to the jurisdiction of the forum, even where the cause of action is unrelated to the contacts.' [Citations.] Specific jurisdiction results when the defendant's contacts with the forum state, though not enough to subject the defendant to the general jurisdiction of the forum, are sufficient to subject the defendant to suit in the forum on a cause of action related to or arising out of those contacts. [Citations.] *Specific* jurisdiction exists if: (1) the defendant has purposefully availed itself of forum benefits with respect to the matter in controversy; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the assertion of jurisdiction would comport with fair play and substantial justice. [Citations.]" (*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at p. 536.)

2. *Application to corporations and their officers and directors*

Here, there is no dispute that Pearle VisionCare, as a California corporation, is subject to personal jurisdiction. Nor is there any dispute that Pearle, by virtue of its retail

optical business in California, is also subject to personal jurisdiction in this state. The question is whether Management, as officers and directors of Pearle VisionCare and Pearle, as well as other related entities, are also subject to personal jurisdiction.

When assessing minimum contacts for jurisdictional purposes, each defendant's contacts with the forum state must be assessed individually. (*Calder v. Jones* (1984) 465 U.S. 783, 790.) Thus, the mere fact that Pearle and Pearle VisionCare are subject to jurisdiction here does not mean that all of its officers, directors, agents and employees are as well. (*Ibid.*)

"For purposes of liability, the acts of the corporation may or may not be the acts of the individual. 'It is well settled that corporate directors cannot be held *vicariously* liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. [Citation.] "[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. . . . While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct." [Citations.] [¶] Directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct. [Citations.] [¶] Directors are liable to third persons injured by their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable. [Citations.] This liability does not depend upon the same grounds as "piercing the corporate veil," on

account of inadequate capitalization for instance, but rather on the officer or director's personal participation or specific authorization of the tortious act. [Citation.] [¶] This rule has its roots in the law of agency. Directors are said to be agents of their corporate principal. (Corp. Code, § 317, subd. (a).) And "[t]he true rule is, of course, that the agent is liable for his own acts, regardless of whether the principal is liable or amenable to judicial action. [Citation.] Moreover, directors are not subordinate agents of the corporation; rather, their role is as their title suggests: they are policymakers who direct and ultimately control corporate conduct. Unlike ordinary employees or other subordinate agents under their control, a corporate officer is under no compulsion to take action unreasonably injurious to third parties. But like any other employee, directors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties. The reason for this rule is that otherwise, a director could inflict injuries upon others and then escape liability behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible. [Citations.] Director status therefore neither immunizes a person from individual liability nor subjects him or her to vicarious liability.' [Citation.] [¶] Thus, some acts taken by a corporate officer are not only the acts of the corporation, but the acts of the individual. Where an act of this type creates contact with the forum state, that contact may be the contact of the individual as well as the contact of the corporation and, therefore, should be considered in determining if the forum state has personal jurisdiction over the individual." (*Seagate*

Technology v. A.J. Kogyo Co. (1990) 219 Cal.App.3d 696, 701-702 (*Seagate Technology*).)

In *Seagate Technology,* the Court of Appeal reversed an order quashing service of summons against a Japanese citizen, who was president of a Japanese corporation and a California corporation. He had no contacts with California as an individual. However, the plaintiff argued jurisdiction was proper based upon his alleged guaranty issued on behalf of both corporations, in which he allegedly misrepresented that he would make good on the guaranty. The plaintiff alleged that it granted credit to the California corporation based upon that letter. (*Seagate Technology, supra,* 219 Cal.App.3d at pp. 699-700.) In reversing the order quashing service, the Court of Appeal held that a California court could properly assume jurisdiction over a nonresident corporate officer whose only contacts with the state were in a corporate capacity if (1) the officer's act was one for which the officer would be personally liable; and (2) the officer's act in fact created contacts between the officer and the forum state. (*Id.* at pp. 703-704.) As the Court of Appeal stated there: "An act taken by a corporate officer may subject the officer to in personam jurisdiction. The act must be one for which the officer would be personally liable and the act must in fact create contact between the officer and the forum state. (For example, no personal contact would result from doing nothing more than ratifying an act taken by the corporation or by another corporate officer.) If both requirements are met, the act may be considered in determining if the contacts between the individual and the state are substantial enough to permit the state to exercise personal

jurisdiction over the individual, or whether the exercise of personal jurisdiction over the defendant offends 'traditional notions of fair play and substantial justice.'" (*Ibid.*)

The court then held that although the reasons given by the trial court in quashing service were incorrect, remand was necessary to determine if there were sufficient facts to justify the exercise of jurisdiction. The court held that jurisdiction over the individual defendant would not be proper if he did not personally cause the Japanese corporation to issue the guaranty, the letter was not in fact a guaranty, or there was no misrepresentation. (*Seagate Technology, supra,* 219 Cal.App.3d at p. 706.)

C. *Analysis*

Based upon the foregoing authority, two conclusions are evident. An officer or director is not automatically immune from jurisdiction simply because he or she is acting in an official capacity. At the same time, mere status as an officer or director will not subject an individual to personal jurisdiction for alleged wrongs committed by a corporation. Rather, a plaintiff must demonstrate some activity by each individual officer and director that would both subject him or her to personal liability *and* create sufficient contacts with the state to satisfy the minimum contacts doctrine. The People have submitted no evidence on either element.

The People submit that jurisdiction is established by the fact that Management served as officers and directors of Pearle (and its related entities) and Pearle VisionCare, and those entities engaged in conduct illegal under the laws of California. The People rely upon section 655, subdivision (c), which makes it a misdemeanor for "any and all

persons" to "participate" with an optometrist in the financial arrangements forbidden by that section.

However, as discussed, *ante*, while Management's status as officers and directors does not shield them from personal jurisdiction here, at the same time that status, *by itself*, does not establish jurisdiction. Assuming for the sake of discussion of the issue presented here that Pearle and Pearle VisionCare were engaged in illegal or improper activity, there was no evidence that each one of Management, or any of them, was personally directing the activity, nor of the nature of any individual's involvement. There was no evidence presented that any one of them personally authorized or participated in the activity or that their actions were the type that could subject them to personal liability.

The evidence in the record establishes that the corporate structure for Pearle and Pearle VisionCare was established in 1986, and they began operating their side-by-side optometry and optician services at that time. It was not until 1996 that the Cole entities purchased Pearle and Pearle VisionCare and their related entities. Thereafter, Management took their roles as officers and directors of Pearle, Pearle VisionCare, and the related entities. This evidence, even viewed most favorably to the People, could at most support an inference that Management ratified the conduct of Pearle and Pearle VisionCare. However, mere ratification of the acts of Pearle and Pearle VisionCare would not support jurisdiction as "no personal contact would result from doing nothing more than ratifying an act taken by the corporation or by another corporate officer." (*Seagate Technology, supra,* 219 Cal.App.3d at p. 704.) The People have produced no

evidence of any of the individual officers and directors' personal participation and direction of alleged wrongdoing by the corporations.

The People assert that it is obvious that Management directed the corporations' wrongdoing, given their positions in Pearle and Pearle VisionCare. It may be that with discovery (as the court allowed in granting Management's motion), such facts can be established as to one or more of the officers or directors, and they can be added as parties to the litigation.[8] The point is, however, that no *evidence* was submitted in opposition to Management's motion to show *any* activity by them, other than their status as officers and directors.

The People also assert that the court improperly ruled on the merits of its claim against Management in quashing service against them. This assertion is unavailing. The court's ruling does indicate a focus on the merits of the claim, finding that Management's status as officers and directors of interlocking boards did not constitute a violation of section 655, and that the complained of acts were acts of the corporations, not the individual officers and directors. However, as the People concede, in assessing the propriety of personal jurisdiction, it is often necessary to consider the nature of the allegations against a defendant and the merits of those allegations. "'[W]hen in personam jurisdiction is claimed on the basis of a foreign defendant's alleged forum-related activities in connection with the cause of action pleaded, facts relevant to the question of

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[8] We take no position on the issue of whether this is the type of case under which jurisdiction over, or personal liability of, individual officers and directors would be appropriate.

jurisdiction often bear upon the basic merits of the complaint. . . . When in personam jurisdiction depends on the validity of the substantive claim against the foreign defendant[, it is expected that the] defendant's showing on the motion to quash negatives the existence of that claim . . . . [Citation.]" (*Malone v. Equitas Reinsurance Ltd.* (2000) 84 Cal.App.4th 1430, 1441.) Here, the merits of the People's claim was relevant. The People were required to produce evidence that the actions of Management were of the type that could result in personal liability to show that personal jurisdiction was proper against the individual defendants.

Further, it is the correctness of the court's ruling, not the court's rationale that is critical to our inquiry. (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co., supra,* 59 Cal.App.4th at pp. 15-16.) Therefore, even if the court improperly considered the merits of the People's claim against Management, there are no grounds for a reversal as we have concluded that the People have not submitted facts sufficient to demonstrate sufficient contacts between Management and this state related to the People's claims to support jurisdiction over them in this matter.[9]

The People also assert that jurisdiction is proper in this case because Management were officers and directors of a California corporation, not a foreign one. However, this

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9 Related to this issue, the People claim that Management waived the right to challenge personal jurisdiction because their motion to quash addressed the merits of the People's claims. As already explained, consideration of the merits of the People's claim, because relevant to the question of jurisdiction, did not constitute a waiver of the right to question in personam jurisdiction. (*Malone v. Equitas Reinsurance Ltd., supra,* 84 Cal.App.4th at p. 1441.)

ignores the fact that we must assess jurisdiction separately as to each defendant. (*Calder v. Jones, supra,* 465 U.S. at p. 790.) Thus, because Management are nonresidents, we must assess their contacts with California without regard to the propriety of exercising jurisdiction over Pearle VisionCare.

In sum, we conclude that the court did not err in quashing service of summons against Management, as the People presented no evidence that in their role as officers and directors of Pearle VisionCare, Pearle, and related entities, they engaged in activities that would subject them to personal liability and that those activities constituted sufficient "minimum contacts" with California such as to make the exercise of jurisdiction just and reasonable. Because we are only addressing a motion to quash jurisdiction, however, and are not ruling on the merits of the People's claim against Management, we render no opinion as to whether upon further discovery they might be properly added as defendants, subject to the jurisdiction of this State, and personally liable for the People's claims.

DISPOSITION

The order granting the preliminary injunction is reversed to the extent it allowed the continued advertising by Pearle of optometric services with a disclaimer that the services were provided by Pearle VisionCare and enjoined Pearle VisionCare from charging a fee for dilating patients eyes with eye drops. The court is directed to modify the order granting preliminary injunction to provide that "Pearle is prohibited from conducting any advertising in California that expressly or impliedly advertises the furnishing of optometric services, including eye examinations and statements alluding to doctors, optometrists, and the like." In all other respects the injunction order is affirmed.

The order granting Management's motion to quash service is affirmed. The parties shall bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.