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FILED 4
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JUL 28 2010

ALAN CARLSON, Clerk of the Court

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BY S. HERRERA-WILSON

11 Attorneys for Defendants PROFESSIONAL
12 COMMUNITY MANAGEMENT, INC. and JANET
13 PRICE

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

BY FAX

16 THIRD LAGUNA HILLS MUTUAL, a
17 California non profit corporation,

CASE NO. 30-2010-00380231

18 Plaintiff,

[Assigned for all purposes to the Honorable
Kirk H. Nakamura, Department C-8]

19 vs.

20 PROFESSIONAL COMMUNITY
21 MANAGEMENT, INC., a California
22 corporation, also known as PCM; MILT
23 JOHNS, an individual; JANET PRICE, an
24 individual; and DOES 1 to 20, inclusive,

**DEFENDANTS PROFESSIONAL
COMMUNITY MANAGEMENT, INC.'S
AND JANET PRICE'S NOTICE OF
HEARING ON DEMURRER AND
DEMURRER TO PLAINTIFF THIRD
LAGUNA HILLS MUTUAL'S
COMPLAINT; OPENING
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

25 Defendants.

[Cal. Code Civ. Proc., § 430.10]

Date: September 2, 2010
Time: 2:00 p.m.
Dept.: C-8

[Request for Judicial Notice filed
concurrently herewith]

Complaint Filed: June 10, 2010
Trial Date: Not set.

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stockholders or members].) In addition, this cause of action is also untenable on the grounds that TLHM is not the real party in interest and has no standing to pursue any claims of the individual “elders.” (*Gantman v. United Pac. Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566 [real party in interest requirement]; *Carsten v. Psychology Examining Comm. of Bd. of Med. Qual. Assur.* (1980) 27 Cal.3d 793, 796 [demurrer is proper when the plaintiff has no standing to sue]; *Jones v. H.F. Ahmanson & Co., supra*, 1 Cal.3d at 107 [standing for claims of a corporation].)

- (2) Fraud – TLHM’s Third Cause of Action for Fraud by Concealment is untenable, as TLHM failed to plead this cause of action with the requisite “particularity.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1332.)
- (3) All Causes of Action against Price – TLHM’s Second through Sixth Causes of Action are all barred against Price individually under the agent immunity doctrine. (*Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 255; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 512, fn.4.)

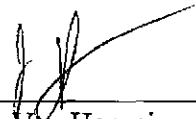
This Demurrer is based upon this Notice, the above Demurrer, the accompanying Opening Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, any other matters of which the Court may take judicial notice, the papers, records and

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1 pleadings on file in this matter, any oral argument as may be requested by or presented to this
2 Court in connection with the hearing on this Demurrer, and any other matters properly before this
3 Court.

4
5 DATED: July 28, 2010

6 Respectfully submitted,
7 MUCH SHELIST DENENBERG
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1 PCM and Price concealed the incentive plan, but it did not specify any facts whatsoever as to
2 how this purported concealment occurred. Therefore, TLHM's vacuous allegations concerning
3 the means of the alleged concealment are not "particular" and do not satisfy TLHM's pleading
4 burden.

5 Finally, as to Price individually, all of TLHM's causes of action against her (*i.e.*, its
6 Second through Sixth Causes of Action) are barred under the agent immunity doctrine. TLHM
7 admits that Price was acting at all relevant times within the course and scope of her agency and
8 employment with PCM, and it only alleges economic damages as a result of her alleged conduct.
9 Accordingly, because TLHM did not allege physical damage to a person or property, and
10 because it did not allege that Price acted outside the course and scope of her agency and
11 employment with PCM, TLHM's claims against Price fall squarely within the agent immunity
12 doctrine and are barred as a matter of law. (*Sanchez v. Lindsey Morden Claims Services, Inc.*
13 (1999) 72 Cal.App.4th 249, 255; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7
14 Cal.4th 503, 512, fn.4; *Kacludis v. GTE Sprint Communications Corp.* (N.D. Cal. 1992) 806 F.
15 Supp. 866, 873.)

16 For these reasons, this Court should sustain this Demurrer to TLHM's Fifth Cause of
17 Action for Elder Abuse and Third Cause of Action for Fraud by Concealment as to PCM and
18 Price, jointly and severally, as well as sustain this Demurrer to TLHM's Second through Sixth
19 Causes of Action as to Price individually. (Cal. Code Civ. Proc., § 430.10(e).) Otherwise, not
20 only will the Court be permitting TLHM to proceed against an employee of PCM who does not
21 even belong in this lawsuit, it will also be allowing TLHM to improperly morph a corporate
22 claim into non-existent elder abuse claims as well as maintain an improperly pleaded fraud cause
23 of action.

24 **II. BACKGROUND.**

25 On June 10, 2010, TLHM filed its Complaint in which it alleges causes of action for
26 breach of contract, breach of fiduciary duty, fraudulent concealment, violation of Business &
27 Professions Code section 17200, elder abuse and negligence. (*See* Request for Judicial Notice
28 filed concurrently herewith at Exh. "A" [Complaint].) However, as set forth in detail below,

1 TLHM's factually devoid and improper allegations render virtually all of its causes of action
2 defective as a matter of law.

3 **III. LEGAL DISCUSSION.**

4 **A. The Court Has Authority To Grant This Demurrer.**

5 California Code of Civil Procedure section 430.10 provides, in pertinent parts, that the
6 "party against whom a complaint...has been filed may object, by demurrer...to the pleading on
7 any one or more of the following grounds:... (e) [t]he pleading does not state facts sufficient to
8 constitute a cause of action;" and "(f) [t]he pleading is uncertain." Thus, a demurrer tests the
9 legal sufficiency of a complaint. (*Id.*; see also, *Committee on Children's Television, Inc. v.*
10 *General Foods Corp.* (1983) 35 Cal.3d 197, 213-14.) Although the Court is generally required
11 to accept the truth of all properly pleaded material facts in the complaint when ruling on a
12 demurrer, it "will not assume the truth of contentions, deductions, or conclusions of law," and
13 "may disregard any allegations that are contrary to the law or to a fact of which judicial notice
14 may be taken." (*Crystaplex Plastics, Ltd. v. Redevelopment Agency of the City of Barstow*
15 (2000) 77 Cal.App.4th 990, 993.) Doubt in the complaint may be resolved against the plaintiff,
16 and facts not alleged are presumed not to exist. (*C & H Foods Co. v. Hartford Ins. Co.* (1984)
17 163 Cal.App.3d 1055, 1062.)

18 In addition, where there is no possibility of curing a defective complaint by amendment,
19 a court must sustain a demurrer without leave to amend. (*See, e.g., Industrial Indem. Co. v.*
20 *Mazon* (1984) 158 Cal.App.3d 862, 866 [demurrer sustained without leave where cause of
21 action against insurer did not accrue until action between insured and claimant was resolved];
22 see also, *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436 ["Leave to amend should
23 be denied where the facts are not in dispute and the nature of the claim is clear, but no liability
24 exists under substantive law"].) Before leave to amend may be granted, the "[p]laintiff must
25 show in what manner he can amend his complaint and how that amendment will change the legal
26 effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

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1 **B. TLHM's Elder Abuse Cause Of Action Fails As A Matter Of Law For**
2 **Several Reasons.**

3 In its Complaint, TLHM bases its Fifth Cause of Action for Edler Abuse on the following
4 allegations:

- 5 • “Defendants, and each of them, have taken, misappropriated, obtained and
6 retained Plaintiff's money for a wrongful use and with the intent to defraud in
7 violation of *California Welfare & Institutions Code* § 15610.30(a).” (Complaint at
8 11:1-3 [emphasis added].)
- 9 • “The residents of Third Mutual, who were over the age of 65 at the time of the
10 misconduct, were the ultimate victims of Defendants' malfeasance. Third Mutual
11 is an interested person and by this action protects the victims of Defendants'
12 abuse.” (*Id.* at 11:4-6 [emphasis added].)

13 This cause of action, though, is facially defective for two glaring reasons: (1) TLHM has not
14 alleged the required elements of its elder abuse claim; and, (2) even if it did, TLHM has no
15 standing to assert the claims of the individual elders.

16 1. TLHM has not alleged the required elements of its claim.

17 A cause of action for financial abuse of an “elder” under the Elder Abuse and Dependent
18 Adult Civil Protection Act requires proof of the following elements: (1) the defendant took or
19 appropriated an individual's property; (2) the individual was 65 years of age or older, or a
20 dependent adult, at the time of the defendant's conduct; (3) the defendant took or appropriated
21 the property for a wrongful use, with the intent to defraud or by undue influence; (4) the
22 individual was harmed; and (5) the defendant's conduct was a substantial factor in causing the
23 individual's harm. (*See, e.g.*, Cal. Welf. & Inst. Code, §§ 15610.27 [“elder” defined] and
24 15610.30 [financial abuse of an elder]; *see also*, Cal. Judicial Council Civil Jury Instructions
25 3100, Financial Abuse -- Essential Factual Elements (2008 Ed.).)

26 However, with respect to a corporation like TLHM, the law is clear that claims for injury
27 or damage to a corporation or its property belong to the corporation, not its stockholders; the
28 individual stockholders have no standing to sue for such wrongs even if the value of their stock

1 is diminished. (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 [“a stockholder of a
2 corporation has no personal or individual right of action against third persons, including the
3 corporation’s officers and directors, for a wrong or injury to the corporation which results in the
4 destruction or depreciation of the value of his stock, since the wrong thus suffered by the
5 stockholder is merely incidental to the wrong suffered by the corporation and affects all
6 stockholders alike”][quoting *Shaw v. Empire Sav. & Loan Assn.* (1960) 186 Cal.App.2d 401,
7 407]; see also, *PacLink Communications Int’l, Inc. v. Superior Court* (2001) 90 Cal.App.4th 958,
8 964-65 [same for limited liability company members].)

9 In this case, TLHM admits that it is a “California non-profit corporation.” (Complaint at
10 1:25.) In addition, it admits that the funds at issue belonged to TLHM, the corporation, not to
11 the individuals elders. (*Id.* at 11:1-3 [“Defendants, and each of them, have taken,
12 misappropriated, obtained and retained *Plaintiff’s money* for a wrongful use...”][emphasis
13 added].) Notably, TLHM is a corporation and obviously cannot be a “person” that is 65 years of
14 age or older. Since TLHM is an entity, it can never meet the required element of being an
15 “elder” and cannot independently satisfy the elements for financial abuse under the Elder Abuse
16 and Dependent Adult Civil Protection Act.

17 Likewise, no individual elder has a claim under these facts, because an injury to TLHM
18 does not provide its members with individual causes of action, whether or not they are “elders.”
19 Regardless of their age, it is well settled that members of a corporation or limited liability
20 company do not have individual causes of action for a wrong or injury to their company, and that
21 any argument that they do as an “ultimate victim” fails as a matter of law. (*Jones v. H.F.*
22 *Ahmanson & Co.*, *supra*, 1 Cal.3d at 107; see also, *PacLink Communications Int’l, Inc. v.*
23 *Superior Court*, *supra*, 90 Cal.App.4th at 964-65.) Just as with closely held corporations and
24 limited liability companies, any damage suffered by the stockholder or member is “incidental” to
25 the wrong suffered by the company. (*Id.*)

26 Therefore, because TLHM has only alleged that its funds (*i.e.*, the funds of the
27 corporation) were misappropriated, TLHM cannot properly allege the requisite elements for its
28 Fifth Cause of Action for Edler Abuse. (Cal. Code Civ. Proc., § 430.10(e).)

1 2. TLHM does not have standing to pursue any claims of the individuals.

2 It is well-settled in California that a complaint filed by someone other than the real party
3 in interest is subject to general demurrer. (See, e.g., *Carsten v. Psychology Examining Comm. of*
4 *Bd. of Med. Qual. Assur.* (1980) 27 Cal.3d 793, 796 [“If the petition reveals that Carsten lacks
5 either the right or standing to sue, it is vulnerable to a general demurrer on the ground that it fails
6 to state a cause of action”]; see also, *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 789-90.)
7 Generally, the real party in interest is the person who has the right to sue under the substantive
8 law; it is the person who owns or holds title to the claim, as opposed to others who may be
9 interested or benefited by the litigation. (*Gantman v. United Pac. Ins. Co.* (1991) 232
10 Cal.App.3d 1560, 1566 [“the person possessing the right sued upon by reason of the substantive
11 law is the real party in interest”][quoting *Del Mar Beach Club Owners Assn. v. Imperial*
12 *Contracting Co.* (1981) 123 Cal.App.3d 898, 906].) Furthermore, as discussed above, claims for
13 damage to a corporation or its property belong to the corporation, not its members. (*Jones v.*
14 *H.F. Ahmanson & Co.*, *supra*, 1 Cal.3d at 107; see also, *PacLink Communications Int’l, Inc. v.*
15 *Superior Court*, *supra*, 90 Cal.App.4th at 964-65.)

16 Here, TLHM’s allegations at best amount to a wrong committed against the corporation.
17 As such, there is no elder abuse claim under TLHM’s allegations, nor can there be under the
18 factual framework already pleaded. (See Section III.B.1. of this Demurrer, *supra*.) Even if there
19 was such a claim, though, TLHM admits that it is only an “interested person” for such claim, not
20 the real party in interest -- which it must be in order to pursue its Elder Abuse cause of action.
21 (See Complaint at 11:5-6.) Accordingly, as TLHM is not the real party in interest for any of the
22 individual elders’ claims (assuming *arguendo* that there were any), TLHM does not have
23 standing to pursue any such claims and its Fifth Cause of Action for Elder Abuse fails as a
24 matter of law on this basis as well. (Cal. Code Civ. Proc., § 430.10(e).)

25 C. TLHM’s Fraud Cause Of Action Is Not Pleaded With "Particularity" As
26 Required Under Longstanding California Law.

27 “The elements which must be pleaded to plead a fraud claim are ‘(a) misrepresentation
28 (false representation, concealment or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c)

1 intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.”
2 (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363 [quoting *Agricultural Ins. Co.*
3 *v. Superior Court* (1999) 70 Cal.App.4th 385, 402].) On this front, allegations of fraud must be
4 pled with “particularity” so that the Court will have the opportunity to dismiss non-meritorious
5 claims before the defendant is required to answer. (See, e.g., *Committee on Children’s*
6 *Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216-17.)

7 The particularity requirement demands that every element of fraud be set forth with full
8 and specific factual allegations. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186
9 Cal.App.3d 1324, 1331 [“every element of the cause of action for fraud must be alleged in full,
10 factually and specifically, and the policy of liberal construction of pleading will not usually be
11 invoked to sustain a pleading that is defective in any material respect”].) That is, the pleading
12 must “show how, when, where, to whom, and by what means” the fraudulent conduct took place.
13 (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 [citations omitted]; see also, *Robinson*
14 *Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993.) Furthermore, the plaintiff must
15 specially plead the factual allegations of the injury/damage suffered, as well as the causal
16 connection with reliance on the fraudulent conduct. (*Service By Medallion, Inc. v. Clorox Co.*
17 (1996) 44 Cal.App.4th 1807, 1818; see also, *Furia v. Helm* (2003) 111 Cal.App.4th 945, 956.)

18 In the present case, TLHM’s fraud cause of action fails as a matter of law because it was
19 not pleaded with particularity. Specifically, TLHM failed to satisfy the “means” element of the
20 test set forth in *Lazar v. Superior Court, supra*, as it simply concludes that PCM and Price
21 “actively concealed and suppressed” the incentive plan from it, but specifies no facts whatsoever
22 as to the means by which such concealment / suppression occurred. (See Complaint at ¶¶ 39-41.)
23 How did PCM and Price conceal the plan? What did they do? Did they fail to disclose it in
24 board meetings? Did they fail to disclose it in budget review meetings? Were any of the prior
25 presidents of TLHM advised of the plan and/or its criteria? Did PCM and Price instruct
26 employees to keep the plan a secret and not tell anyone from TLHM about it? TLHM’s mere
27 conclusion that PCM and Price actively concealed the plan does not satisfy its pleading burden.
28 Rather, as discussed above, TLHM must set forth with particularity exactly what conduct PCM

1 and/or Price employed to conceal the plan from TLHM.¹

2 In sum, TLHM failed to plead fraud in conformity with California's mandatory pleading
3 requirement. The Complaint only alleges that at some unknown time and via undisclosed means
4 PCM and Price somehow actively concealed the employee incentive plan. Thus, TLHM's
5 allegations are clearly not "particular" and the demurrer should be sustained. (Cal. Code Civ.
6 Proc., § 430.10(e).)

7 **D. All Of TLHM's Causes Of Action Against Price Are Untenable As A Matter**
8 **Of Law Under The Agent Immunity Doctrine.**

9 Where individuals are acting in the course and scope of their employment, or as agents of
10 another, they are immune from individual liability under the doctrine of "agent immunity." (*See*
11 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 512, fn.4 ["Agents
12 and employees of a corporation cannot conspire with their corporate principal or employer where
13 they act in their official capacities on behalf of the corporation and not as individuals for their
14 individual advantage"]; *see also, Kaccludis v. GTE Sprint Communications Corp.* (N.D. Cal.
15 1992) 806 F. Supp. 866, 873 [agents of employer who are vested with the power to act for the
16 employer "stand in the place of the employer, because the employer . . . cannot act except
17 through such agents"].) In *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72
18 Cal.App.4th 249, 255, the Court stated:

19 "Agents are not liable to third parties for economic loss: '[a]n
20 agent's mere failure to perform a duty owed to his principal may
21 render him liable to third persons who rely on his undertaking
22 where there is physical damage to person or property. (*See* Rest.2d,
23 Agency, § 354 and Appendix, Rep. Note, p. 587). But *where the*
24 *effect is merely to cause economic loss, the law does not yet*
25 *recognize liability to a third person, except where a duty is created*
26 *by statute. [Citation]'* (2 Witkin, Summary of Cal. Law (9th ed.

27 ¹ Though not a ground for demurrer, PCM is confident the evidence will show the plan was
28 disclosed at budget and board meetings, and that is why TLHM has not alleged the "means" of
the purported concealment.

1 1987) Agency and Employment, § 149, pp. 144-145, italics
2 added.)” (Emphasis in original.)

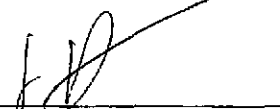
3 In this case, all of TLHM’s allegations concerning Price are based on her conduct as an
4 agent of PCM in the disclosure of the incentive plan, and there are no allegations that she has a
5 duty independent from her duty as an employee of PCM. TLHM admits in its Complaint that
6 Price was “acting within the course and scope of such relationship, agency, [or] employment”
7 (Complaint at 2:14-15); that when it “alleges that any acts were performed by an agent of PCM,
8 it is specifically intended to include any employee, manager...or any person acting on behalf of,
9 or in concert with, Defendant PCM” (*id.* at 2:15-17); and that “[t]his is a case of serious and
10 profound fraud and abuse by defendants PCM *and its agents*, Milt Johns and Janet Price”(*id.* at
11 2:22-23 [emphasis added]). As such, TLHM admits that Price was acting within the course and
12 scope of her agency and employment with PCM at all relevant times, and does not allege
13 anywhere in its Complaint any conduct of Price outside the course and scope of such agency and
14 employment. (*See generally*, Complaint.) Furthermore, TLHM only alleges economic-related
15 damages stemming from the alleged undisclosed incentive plan, not any physical damage to a
16 person or property. (*Id.*) Thus, all of TLHM’s claims against Price fall within the agent
17 immunity doctrine and are therefore barred as a matter of law. (Cal. Code Civ. Proc., §
18 430.10(e).)

19 **IV. CONCLUSION.**

20 Based on the foregoing, PCM and Price respectfully request that the Court sustain this
21 demurrer in its entirety.

22 DATED: July 28, 2010

Respectfully submitted,
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