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**FILED**  
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 COUNTY OF ORANGE  
 CENTRAL JUSTICE CENTER

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 BY G BARR

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 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 9 FOR THE COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

10  
 11 THIRD LAGUNA HILLS MUTUAL, a )  
 12 California non profit corporation, )  
 13 Plaintiff, )  
 14 vs. )  
 15 PROFESSIONAL COMMUNITY )  
 16 MANAGEMENT, INC., a California )  
 Corporation, also known as PCM; MILY )  
 17 JOHNS, an individual; JANET PRICE, an )  
 individual; and DOES 1 to 20, inclusive, )  
 18 Defendants. )

CASE NO. 30-2010-00380231

*Assigned to the Honorable  
 Kirk H. Nakamura, Department C-8*

**PLAINTIFF THIRD LAGUNA HILLS  
 MUTUAL'S MEMORANDUM OF POINTS  
 AND AUTHORITIES IN OPPOSITION TO  
 DEFENDANTS PCM AND PRICE  
 DEMURRER TO COMPLAINT**

Date: September 23, 2010  
 Time: 2:00 p.m.  
 Dept.: C-8

Complaint Filed: June 10, 2010  
 Trial Date: None Set

BY  
 FAX

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 22 TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

23 Plaintiff THIRD LAGUNA HILLS MUTUAL ("Third Mutual") presents the following  
 24 memorandum of points and authorities in opposition to the demurrer of Defendants Professional  
 25 Community Management, Inc. ("PCM") and Janet Price ("Price").

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This is a dispute between plaintiff Third Laguna Hills Mutual ("Third Mutual") one of the corporate homeowners associations at Laguna Woods Village, and the defendants, PCM, Inc. (its on-site management company) and two of PCM'S agents, Milt Johns and Janet Price.

In its Complaint, plaintiff alleges a case of serious and profound fraud and abuse by defendants PCM and its agents, Milt Johns and Janet Price. For the better part of four decades, PCM has managed the four non-profit corporations which make up Laguna Woods Village (formerly known as Leisure World). PCM has dominated each corporation's board of directors, its constituent members and the members of each association. In particular, PCM's former general manager, Milt Johns has proven to be a bully and has successfully exercised extraordinary control over the Third Mutual Board and its residents.

The corporate board members are typically made up of persons who are in their 70s, 80s and 90s. Some of the board members who might serve as witnesses in this case are actively associated with the current board, but many are retired, deceased or suffer from fading memories, a fact well known to the Defendants.

Keenly aware of the future "unavailability" of witnesses to testify against them, PCM devised a scheme in the mid 1990s, whereby PCM paid itself an incentive bonus of 30% of the "hard dollar savings" which allegedly PCM achieved for each of the corporations through its own agents' "ingenuity" and "extraordinary efforts."

However, the existence of PCM's incentive plan was not disclosed to the various corporate community associations, much less the terms of the so-called incentive plan, the criteria used by PCM to determine what "savings" measures qualified for payment under the plan, and how much PCM ultimately paid itself on an annual basis. PCM, Milt Johns and Janet Price actively concealed this information from Third Mutual.

Recently, Third Mutual began to uncover the mere existence of the incentive plan. During a meeting at which selected Third Mutual board members were reviewing the following year's budget and analyzing the renewal of PCM's five year agreement, they discovered for the first time that PCM

1 had some type of undefined incentive plan. When Third Mutual pressed PCM for more details about  
2 the existence of the plan and its details, PCM stunningly refused to answer the board's questions,  
3 claiming that it was intruding upon PCM's internal affairs and, in particular, invading the confidential  
4 domain of the employer-employee relationship.

5 Despite the fact that PCM was transferring money to itself from Third Mutual's account (as  
6 PCM was a signatory on Third Mutual's bank accounts and therefore a fiduciary of Third Mutual), and  
7 despite the fact that the money belonged to Third Mutual, PCM claimed that the questions about the  
8 incentive plan were of no concern to Third Mutual.

9 Third Mutual repeatedly demanded disclosure from PCM and, in response, PCM repeatedly  
10 denied and rejected Third Mutual's demands. Still, PCM would not disclose the details of its employee  
11 incentive plan, but would only reveal that one had existed since the mid-1990s.

12 Finally, and only in response to a rising tide of questions and criticism, Milt Johns on behalf of  
13 PCM circulated a short memorandum together with a series of highlighted board meeting minutes.  
14 However, instead of supporting PCM's claim that it had disclosed the existence of the incentive plan,  
15 the minutes only served to confirm that no such disclosures were ever made to Third Mutual.

16 The members of Third Mutual continued to press Milt Johns, Janet Price and PCM for more  
17 information about the incentive plan. To that end, members of Third Mutual's board of directors  
18 individually and in combination with each other asked for more information about the alleged incentive  
19 plan.

20 On March 7, 2007, PCM finally relented and disclosed for the first time the amount of money  
21 that it purportedly "saved" Third Mutual over the preceding six years. Starting in 2000 and ending in  
22 2006, PCM claims to have saved the various corporations at Laguna Woods Village a total of  
23 \$9,911,981. PCM then acknowledged that, of that sum, it had paid itself the sum of \$2,973,594. This  
24 discovery was shocking to Third Mutual's board of directors. Accordingly, Third Mutual's board of  
25 directors continued to demand that PCM make additional disclosures. Specifically, Third Mutual  
26 demanded to know how the sums were calculated, when the payments were made, the criteria used to  
27 determine whether or not a particular savings was eligible for the incentive program and how much  
28 money was paid to PCM on behalf of Third Mutual, and not just the other corporations.

1 Finally, on April 20, 2007, Janet Price informed Third Mutual board member John Paulus in  
2 writing that Third Mutual's share of the savings amounted to \$1,414,071 and that PCM paid itself  
3 \$424,233 for the period 2000 through 2006. It is this amount, at a minimum, that must be disgorged  
4 from PCM and returned to Third Mutual. But this disclosure still did not answer the remaining mystery:  
5 what were the criteria used to determine whether – in the minds of the decision makers at PCM – a  
6 savings was eligible for the incentive plan or whether it was simply part and parcel of the management  
7 company's contractual obligation to Third Mutual.

8 In or about June, 2007, PCM finally disclosed the "2006 Incentive Plan Results" for Third  
9 Mutual. The one-page Incentive Plan Results sheet identifies those areas where PCM believed it had  
10 used its ingenuity and extraordinary efforts to save money for Third Mutual. In 2006 alone, PCM  
11 claims to have saved a total of \$397,793. According to the report, the eligible savings activities  
12 included "centralized irrigation system cost avoidances," "changes in systems and procedures resulting  
13 in labor savings in paint program, gutter cleaning and street sweeping," as well as "changes in the meter  
14 designations for laundry rooms." For these "efforts," and without informing Third Mutual, PCM  
15 secretly paid itself an extra \$119,338.

16 From Third Mutual's perspective, these activities were naturally part of PCM's management  
17 responsibility to supervise and manage the association in the most cost-efficient way possible. PCM,  
18 which had control over much of the finances, had a fiduciary obligation to avoid waste and to spend  
19 Third Mutual's money in a reasonable and cost effective manner. Granting to itself, in accordance with  
20 an unwritten and undisclosed incentive plan, monies over and above its fees for work which should  
21 have been embraced as part of its management responsibilities in the first place, is unconscionable.

22 PCM took advantage of Third Mutual's older board members by formulating an incentive plan  
23 to pay itself undisclosed sums pursuant to an undisclosed set of criteria in undisclosed amounts on an  
24 annual basis. PCM's incentive plan lived in darkness and could only survive in the darkest shadows,  
25 where no one would detect PCM's activities. By July, 2008, and within a few months of the foregoing  
26 revelations, no further incentive payments were made to PCM, which allegedly abandoned its so-called  
27 incentive plan altogether. When subject to scrutiny in the light of day, the incentive plan could not be

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1 defended and PCM's conduct of concealing the plan brought down any hope of working out some  
2 compromise arrangement even with those most sympathetic to PCM.

3 **II. SUMMARY OF ARGUMENT**

4 Plaintiff has set forth each required element to state a claim for elder abuse under California  
5 Welfare & Institutions Code Section 15610.30(a). Specifically, that (1) defendants  
6 took/hid/appropriated/retained plaintiff's property; (2) plaintiff was 65 years of age or older or was a  
7 dependent adult at the time of the conduct; (3) defendants took/hid/appropriated/retained the property  
8 for a wrongful use or with the intent to defraud; (4) plaintiff was harmed; and (5) defendants' conduct  
9 was a substantial factor in causing plaintiff's harm. *California Civil Jury Instructions (CACI) -*  
10 *Financial Abuse - Essential Factual Elements.*

11 As to element (1), plaintiff has clearly pleaded that defendants have taken plaintiff's property,  
12 i.e. the existence of the scheme by PCM and its agents, Price and Johns, to misappropriate the funds  
13 of Third Mutual, which acts on behalf of and stands in the shoes of its elderly members. As to element  
14 (2), plaintiff has clearly pleaded that the residents of Third Mutual, who were over the age of 65 at the  
15 time of the misconduct, were the ultimate victims of Defendants' malfeasance. As to element (3),  
16 plaintiff has clearly pleaded that defendants actively concealed this information from plaintiff. Lastly,  
17 as to elements (4) and (5), plaintiff has clearly pled that defendants knew or should have known that  
18 their conduct would be or was likely to be harmful to the protected population of Third Mutual and that  
19 harm is reflected in the amounts taken by defendants. As such, it has standing to protect the finances  
20 of those members by asserting a cause of action for financial elder abuse.

21 Additionally, Third Mutual has pleaded its fraud by concealment cause of action with sufficient  
22 particularity. Defendants PCM and Price contend that plaintiff failed to state facts detailing the  
23 "means" by which PCM, Johns and Price concealed their scheme to defraud the plaintiff. However, that  
24 is one of the main points of the lawsuit. The way that the defendants were able to actively conceal their  
25 fraudulent scheme from the innocent elderly board members will be established through discovery.  
26 Defendants cannot hide behind their dishonesty, by claiming that plaintiff has not set forth a fact that  
27 is solely within their knowledge. Additionally, Defendants cited only misrepresentation cases and did  
28 not set forth the correct test for a cause of action for fraud by concealment. Plaintiff has alleged

1 sufficient facts to set forth a cause of action for fraudulent concealment and Defendant PCM's and  
2 Price's demurrer should be overruled.

3 Finally, Defendant Price's claim that she is entitled to "agent immunity" is simply inaccurate.  
4 Agents are liable for their own breaches of fiduciary duty, violations of Section 17200 et seq. of the  
5 Business & Professions Code and other tortious conduct. Defendants' demurrer should be denied in  
6 its entirety.

7 **III. ARGUMENT**

8 A. THE DEMURRER SHOULD BE OVERRULED IN ITS ENTIRETY BECAUSE THE  
9 COMPLAINT STATES FACTS SUFFICIENT TO PLEAD EACH CAUSE OF  
10 ACTION

11 A complaint is invulnerable to a general demurrer if it states a cause of action on any theory.  
12 *Truta v. Avis Rent A Car System, Inc.* (1987) 193 Cal.App.3d 802, 815. All that is necessary as against  
13 a general demurrer is to plead facts showing that the plaintiff may be entitled to some relief. *Richard*  
14 *H. v. Larry D.* (1988) 198 Cal.App.3d 591, 594. In the construction of a pleading, for the purpose of  
15 determining its effect, its allegations must be liberally construed, with a view to substantial justice  
16 between the parties. Cal. Code Civ. Proc. § 452; *Saxer Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 18.  
17 Moreover, the court is not limited to plaintiff's theory of recovery in testing the sufficiency of the  
18 complaint against a demurrer, but instead must determine whether the factual allegations of the  
19 complaint are adequate to state a cause of action under any legal theory. *Nguyen v. Scott* (1988) 206  
20 Cal.App.3d 725, 729-30. Furthermore, the sole issue involved in a hearing on a demurrer is whether  
21 the complaint, as it stands, unconnected with extraneous material, stated a cause of action. *Griffith v.*  
22 *Department of Public Works* (1956) 141 Cal.App. 2d 376, 381. In testing the legal sufficiency of a  
23 pleading against a general demurrer, all properly pleaded allegations, including those that arise by  
24 reasonable inference, are deemed admitted regardless of the possible difficulty of proof at trial. *Saxer,*  
25 *supra*, 54 Cal.App.3d at 18. Each of the causes of action that are the subject of PCM's and Price's  
26 demurrer has set forth sufficient facts to establish these causes of action and Defendants' demurrer  
27 should be overruled in its entirety.

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**B. THIRD MUTUAL HAS ALLEGED SUFFICIENT FACTS TO STATE A CAUSE OF ACTION FOR FINANCIAL ELDER ABUSE. THIRD MUTUAL HAS STANDING TO ASSERT THE FIFTH CAUSE OF ACTION FOR FINANCIAL ELDER ABUSE AND THE DEMURRER SHOULD BE OVERRULED**

**1. *Third Mutual Has Properly Alleged a Financial Elder Abuse Cause of Action***

Plaintiff Third Mutual has set forth each required element to state a claim for elder abuse under California Welfare & Institutions Code Section 15610.30(a). Specifically, those elements are (1) defendants took/hid/appropriated/retained plaintiff's property; (2) plaintiff was 65 years of age or older or was a dependent adult at the time of the conduct; (3) defendants took/hid/appropriated/retained the property for a wrongful use or with the intent to defraud; (4) plaintiff was harmed; and (5) defendants' conduct was a substantial factor in causing plaintiff's harm. *California Civil Jury Instructions (CACI) - Financial Abuse - Essential Factual Elements.*

Again, as to element (1), plaintiff has clearly pleaded that defendants have taken plaintiff's property, i.e. the existence of the scheme by PCM and its agents, Price and Johns, to misappropriate the funds of Third Mutual, which acts on behalf of and stands in the shoes of its elderly members. As set out in the decision of *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 174, a wrongful use is defined as taking, secreting, appropriating, or retaining property in bad faith. *Id.* Bad faith occurs where the person or entity knew or should have known that the elder had the right to have the property transferred or made readily available to the elder or to his or her representative. *Id.* Welfare & Institutions Code Section 15610.30 (a) sets forth a conclusive presumption of "financial abuse" and provides that a person or entity "shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." Cal. Welf. & Inst. Code § 15610.30(b) (emphasis added). In the instant case, Plaintiff has pleaded that PCM, Johns and Price devised a scheme, whereby PCM paid itself an incentive bonus of 30% of the "hard dollar savings" which allegedly PCM achieved for each of the corporations through its own agents' "ingenuity" and "extraordinary efforts." Plaintiff has also asserted that it was unaware of the existence, terms, criteria used or amount that PCM's paid itself under the fraudulent incentive plan on an annual basis. (Complaint ¶¶ 53, 8-23).

1 As to element (2), plaintiff has clearly pleaded that the residents of Third Mutual, who were  
 2 over the age of 65 at the time of the misconduct, were the ultimate victims of Defendants' malfeasance.  
 3 Third Mutual is an interested person and by this action protects the victims of Defendants' abuse. Third  
 4 Mutual has properly alleged financial elder abuse on behalf of its members, who are over 65.  
 5 (Complaint ¶¶ 8-23).

6 As to element (3), plaintiff has clearly pleaded that defendants actively concealed this  
 7 information  
 8 from plaintiff. Specifically, plaintiff properly alleged that PCM, Milt Johns and Janet Price actively  
 9 concealed this information from Third Mutual. (Complaint ¶¶ 11-22).

10 As to element (4), plaintiff has clearly pleaded that defendants knew or should have known that  
 11 their conduct would be or was likely to be harmful to plaintiff. Specifically, that PCM, Milt Johns and  
 12 Janet Price knew or should have known that their conduct would be or was likely to be harmful to the  
 13 protected population of Third Mutual. (Complaint ¶¶ 55, 8-23).

14 As to element (5), plaintiff has clearly pleaded that the actions of defendants harmed plaintiff.  
 15 Specifically, that defendants harmed plaintiff by instituting an incentive plan to pay itself undisclosed  
 16 sums pursuant to an undisclosed set of criteria in undisclosed amounts on an annual basis. (Complaint  
 17 ¶¶ 56, 8-23).

18 Separate and apart from the issues related to the claim being brought by Third Mutual rather than  
 19 individual members, Defendants do not contest that, in all other respects, Plaintiff has properly pleaded  
 20 violations of the Financial Elder Abuse statute, as set forth in Welfare & Institutions Code Section  
 21 15610.30. However, contrary to Defendants' contentions, and as more fully discussed below, Plaintiff  
 22 Third Mutual has standing to assert this financial elder abuse cause of action on behalf of its elderly  
 23 members.

24 2. *Third Mutual Has Standing to Assert the Financial Elder Abuse Cause of Action*  
 25 *on Behalf of its Members*

26 Third Mutual has properly alleged standing to assert the violations of the Elder Abuse statutes  
 27 on behalf of its elderly members.

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a. Homeowners' Associations Have Standing Generally to Assert Causes of Action on Behalf of Their Members

It is settled law that an unincorporated association has broad standing to sue for injury to itself and it may also sue as a representative of its members where:

- Its members (or some of them) would have standing to sue in their own right;
- the interests the association seeks to protect are germane to the organization's purpose; and
- neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Property Owners of Whispering Palms, Inc. v. Newport Pac., Inc.* (2005) 132 Cal.App.4th 666, 672-673; California Practice Guide, Civil Procedure Before Trial, Parties to the Action, § 2:15.10. One court concluded that an association of townhouse owners had standing to sue the project developer in a representative capacity for damages to individual units. *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783. The court reasoned that the association had standing, insofar as the association had been formed for the purpose of providing maintenance, preservation and architectural control of the lots and common area and to promote the health, safety and welfare of the residents and had filed the action on behalf of its members who all had a beneficial interest in the result. *Id.* at 795. The misappropriated funds at issue in this case are derived from the association fees of Third Mutual's individual members. Third Mutual acts on behalf of and serves the interests of its individual members. In the instant case, homeowner association funds have been misappropriated by Defendants and the claim asserted does not require the participation of the individual members because Third Mutual is acting on their behalf.

Moreover, it is well settled law that a person or entity may sue on behalf of the real parties in interest where justified by "considerations of necessity, convenience and justice." *Salton City Area Prop. Owners Ass'n v. M. Penn Phillips Co.* (1977) 75 Cal.App.3d 184, 191. In *Salton City*, the Court reversed the Trial Court's demurrer and permitted the Salton City Area Property Owners Association to bring suit as representative of its members for damages or rescission and restitution of land sale contracts.

1 Furthermore, a right to sue in a representative capacity may be recognized where the question  
2 is one of public interest. *See Tenants Ass'n of Park Santa Anita v. Southers* (1990) 222 Cal.App.3d  
3 1293, 1299-1300. "The participation of incorporated and unincorporated associations ... has become  
4 common and accepted in public interest-oriented litigation... [Associations] are thus pursuing more than  
5 privately held rights, and are asserting more than privately held grievances: they are acting as members  
6 of the public and in the public interest." *Farm Sanctuary, Inc. v. Department of Food & Agriculture*  
7 (1998) 63 Cal.App.4th 495, 503. In an early case addressing the issue of homeowners association  
8 standing, the Court held that a homeowners association had standing to sue to challenge governmental  
9 action because its complaint alleged that its members lived in the affected area of the challenged project  
10 and would suffer injury if the project was allowed to proceed. *Residents of Beverly Glen, Inc. v. City*  
11 *of Los Angeles*, (1973) 34 Cal.App.3d 117, 122. The court looked to the public nature of the question  
12 involved, noting that the right to sue is greatly relaxed where the question is of public interest. *Id.* at 127

13 In the instant case, Third Mutual is fighting for the protection of its elderly members and is  
14 supported by the California public interest in protecting the elderly from financial abuse. Specifically,  
15 Third Mutual has sued to protect its elderly members' association fees from being misused through the  
16 fraudulent conduct of the Defendants and, as discussed in more detail below, is supported by the  
17 California public policy permitting interested persons to sue to prevent elder abuse. *See Id.*; Cal. Welf.  
18 & Inst. Code § 15600(j).

19 It is also important to note that a homeowner's association is the real party in interest and may  
20 sue in its own name, without joining the individual homeowners, with respect to claims relating to:

- 21 ● enforcement of governing documents ("CC & Rs");
- 22 ● damage to common areas;
- 23 ● damage to separate areas the association is obligated to maintain or repair; or
- 24 ● damage to a separate interest that "arises out of or is integrally related to" the above  
25 damages.

26 *See* Cal. Civ. Code § 1368.3; California Practice Guide, Civil Procedure Before Trial, *Parties to the*  
27 *Action*, § 2:15.10. In this case, Third Mutual is suing PCM, Johns and Price with respect to tortious  
28 conduct of PCM and the individual defendants through the improper payment of secret incentives. This

1 unlawful conduct affects all of the elderly members of Third Mutual. Consequently, Third Mutual has  
2 standing to assert the Fifth Cause of Action for Financial Elder Abuse.

3 b. The Standing Provisions and Legislative Purpose of the Elder Abuse Act  
4 Supports Third Mutual's Cause of Action for Financial Elder Abuse  
Against Defendants on Behalf of its Members

5 The standing provisions and legislative purpose of the elder abuse statutes support Third  
6 Mutual's contention that it has standing to assert the fifth cause of action for financial elder abuse on  
7 behalf of its members. "The purpose of the Elder Abuse Act, Welfare & Institutions Code Section  
8 15600 et seq. is essentially to protect a particularly vulnerable portion of the population from gross  
9 mistreatment in the form of abuse and custodial neglect." *Estate of Lowrie* (2004) 118 Cal.App. 4<sup>th</sup> 220,  
10 226, quoting *Delaney v. Baker* (1999) 20 Cal.4th 23, 33. The statutory scheme of the elder abuse  
11 statutes has been modified to provide incentives for private, civil enforcement through lawsuits against  
12 elder abuse and neglect. *Id.*

13 The Court in the case of *Estate of Lowrie, supra*, reviewed the issue of standing and discussed  
14 the broad reach and scope of the standing provisions of the elder abuse statutes set forth in the Welfare  
15 and Institutions Code. The *Lowrie* Court concluded that the California Legislature did not define the  
16 operative words in Welfare and Institutions Code section 15657.3, subdivision (d). However, when  
17 Welfare and Institutions Code section 15657.3 was added to the statutory scheme (Stats.1991, ch. 774,  
18 § 3, p. 3477, enacting Sen. Bill No. 679 (1991-1992 Reg.Sess.)) the Legislature specified that the Elder  
19 Abuse Act was intended to "enable interested persons to engage attorneys to take up the cause of abused  
20 elderly persons and dependent adults." Welf. & Inst. Code § 15600, subd. (j), added by Stats.1991, ch.  
21 774, § 2, p. 3476 (emphasis added.) This statement of legislative intent suggests the Legislature  
22 intended a broad definition of standing in the context of elder abuse cases. *Estate of Lowrie* (2004) 118  
23 Cal.App. 4<sup>th</sup> 220, 227. The Court in *Estate of Lowrie* concluded that: "Standing, for purposes of the  
24 Elder Abuse Act, must be analyzed in a manner that induces interested persons to report elder abuse and  
25 to file lawsuits against elder abuse and neglect." *Id.* at 230. As the *Lowrie* Court held:

26 "Any definition given to Welfare and Institutions Code section 15657.3, subdivision (d)  
27 must be sufficiently elastic to fulfill the purposes of the Elder Abuse Act. A decision as to  
28 whether a person has standing may be intertwined with other issues in elder abuse cases...."

1 *Id.*

2 The Legislative Declaration of Intent, set forth in Welfare & Institutions Code Section 15600,  
3 specifically states, "It is the further intent of the Legislature in adding Article 8.5 (commencing with  
4 Section 15657) to this chapter to enable interested persons to engage attorneys to take up the cause of  
5 abused elderly persons and dependent adults." Cal. Welf. & Inst. Code § 15600 (j). Accordingly,  
6 standing should not be allowed as a defense to an elder abuse action. California Practice Guide, Elder  
7 Abuse Litigation, *Standing* ¶ 2:29. Such is the case here. The intent of the Legislatures supports Third  
8 Mutual in asserting the Financial Elder Abuse cause of action on behalf of its elderly members.

9 Plaintiff Third Mutual has properly asserted a cause of action for Financial Elder Abuse on  
10 behalf of its members, who are specifically protected by Welfare & Institutions Code Section 15610.30.  
11 Defendants' narrow interpretation of Welfare & Institutions Code Section 15610.30 and attempt to  
12 preclude Third Mutual from suing on behalf of its elderly members is inconsistent with the stated  
13 purpose and intent of the statute. Defendants' arguments should be rejected and the demurrer overruled.

14 C. THIRD MUTUAL HAS PLEADED SUFFICIENT FACTS TO SUPPORT A CAUSE  
15 OF ACTION FOR FRAUDULENT CONCEALMENT

16 In their demurrer, Defendants claim that Plaintiff is required to show the "means" by which  
17 Defendants were able to conceal their fraudulent scheme from the Plaintiff. However, the cases cited  
18 by Defendants are typical fraudulent inducement cases, in which the means by which the fraud was  
19 committed would be known by the plaintiff. *See, e.g., Lazar v. Superior Court* (1996) 12 Cal.4th 631,  
20 645. It is not appropriate to require a Plaintiff who has been scammed by a Defendant though active  
21 concealment to set forth facts detailed facts that cannot be known until discovery is conducted. This is  
22 a fraudulent concealment case and Plaintiff has adequately pleaded the required elements.

23 It is undisputed that "intentional concealment of a material fact is an alternative form of fraud  
24 and deceit equivalent to direct affirmative misrepresentation." *Lovejoy v. AT & T Corp.* (2001) 92  
25 Cal.App.4th 85, 97. The active concealment or suppression of facts is the equivalent of a false  
26 representation. *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608. Generally speaking, "There  
27 are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when  
28 the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive

1 knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a  
2 material fact from the plaintiff; and (4) when the defendant makes partial representations but also  
3 suppresses some material facts. [Citations.] " *OCM Principal Opportunities Fund v. CIBC World*  
4 *Markets Fund* (2007) 157 Cal.App.4th 835, 859.

5 The elements of a cause of action for fraud and deceit based on concealment are (1) the  
6 defendant must have concealed or suppressed a material fact, (2) the defendant must have been under  
7 a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or  
8 suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of  
9 the fact and would not have acted as it did, if it had known of the concealed or suppressed fact and (5)  
10 as a result of the concealment or suppression of the fact, the plaintiff sustained damage. *Marketing West,*  
11 *Inc. v. Sanyo Fisher (USA) Corporation* (1992) 6 Cal.App. 4th 603, 612-13. The requirement of setting  
12 forth the "means" by which the concealment or suppression of material facts was accomplished, is  
13 simply not applicable to or required in a cause of action for fraudulent concealment. *See Hahn v. Mirda*  
14 (2007) 147 Cal.App.4th 740, 748.

15 In its Complaint, Plaintiff alleged that Defendants had exclusive knowledge of material facts not  
16 known to Plaintiff. Defendants had exclusive knowledge of their incentive plan under which they paid  
17 themselves at least thirty percent of all money purportedly "saved" on behalf of Third Mutual.  
18 Defendants also had exclusive knowledge about the criteria used to determine which "savings" were  
19 "eligible" to receive benefits under the incentive plan. Finally, Defendants had exclusive knowledge  
20 of how much they paid themselves under the secret incentive plan. Despite repeated demands for basic  
21 information, Defendants, including Milt Johns and Janet Price, rebuffed Plaintiff and actively concealed  
22 and suppressed the foregoing material facts from Plaintiff. (Complaint ¶¶ 39-40).

23 Plaintiff had no knowledge of the existence of Defendants' incentive plan, nor did Plaintiff have  
24 any knowledge of any of the details of the plan, except as detailed in this Complaint. By concealing  
25 the true facts, Defendants PCM, Milt Johns and Janet Price intended to induce Plaintiff to continue its  
26 contractual and fiduciary relationship with Defendants, while Defendants siphoned money from  
27 Plaintiff's accounts. Until Plaintiff became aware of the incentive plan as set forth in the Complaint,  
28 Plaintiff was unaware of the most basic concealed facts, including limited information about the

1 existence of the incentive plan, the criteria used by Defendants to determine whether they should be paid  
 2 under the incentive plan, and the amount of money Defendants paid themselves under the incentive plan.  
 3 (Complaint ¶¶ 41-43). Plaintiff still does not have all the details regarding how the fraudulent scheme  
 4 was conducted and intends to learn more facts through discovery. Plaintiff has pleaded sufficient facts  
 5 to set forth a cause of action for fraud by concealment and Defendants' Demurrer should be overruled.

6 D. DEFENDANT PRICE IS LIABLE TO PLAINTIFF FOR HER OWN TORTIOUS  
 7 CONDUCT AND IS NOT "IMMUNE" FROM LIABILITY

8 Defendant Price argues that she cannot be liable to Plaintiff because she is immune from  
 9 liability. However, it is black letter law that Defendants Price and Johns are liable in tort for their own  
 10 breaches of fiduciary duty, fraudulent acts, violations of Business & Professions Code Section 17200  
 11 et seq. and violations of Welfare & Institutions Code Section 15610.30. An agent or employee is always  
 12 liable for his or her own torts, whether the principal is liable or not, and in spite of the fact that the agent  
 13 acts in accordance with the principal's directions. 3 Witkin, Summary of California Law (10<sup>th</sup> ed),  
 14 *Agency and Employment*, Liability of Agent for Torts, Chapter 5 § 199; citing Cal. Civ. Code § 234 (3);  
 15 *Perkins v. Blauth* (1912) 163 Cal. 782, 787; *Bayuk v. Edson* (1965) 236 Cal.App.2d 309, 320; *Michaelis*  
 16 *v. Benavides* (1998) 61 Cal.App. 4<sup>th</sup> 681, 686.

17 An agent who commits an independent tort, such as fraud, remains liable despite the fact that  
 18 the principal, by ratification, also becomes liable. 3 Witkin, Summary of California Law, (10<sup>th</sup> ed),  
 19 *Agency and Employment*, Liability of Agent for Torts, Chapter 5 § 199, citing *Hansen v. California*  
 20 *Bank* (1936) 17 Cal.App.2d 80, 102; *see also Crawford v. Nastos* (1960) 182 Cal.App.2d 659, 665 (real  
 21 estate broker negotiated sale of ranch, fraudulently representing water supply); *Lingsch v. Savage* (1963)  
 22 213 Cal.App. 2d 729, 736 (real estate broker's liability to purchaser for fraudulent concealment of  
 23 defects in property); *McNeill v. State Farm Life Ins. Co.* (2004) 116 Cal.App.4th 597, 603 (insurance  
 24 agent misrepresented amount by which policy premiums would be reduced if insured quit smoking).

25 This case is clearly distinguishable from the cases cited by Defendant, which do not stand for  
 26 the broad immunity asserted. For example, *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*  
 27 (1994) 7 Cal.4th 503, 507-08, cited by Defendants, simply held that agents or employees of a  
 28 corporation cannot be held liable in tort for conspiracy to interfere with the corporation's contract, where

1 they act in their official capacities on behalf of the corporation and not as individuals for their individual  
 2 advantage. Furthermore, *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249,  
 3 255, simply holds that an independent adjuster engaged by an insurer owes no duty of care to the  
 4 insurance carrier's insured, with whom the adjuster has no contract. *Id.* In the instant case, by contrast,  
 5 Defendants Johns and Price owed a duty of care, committed independent tortious conduct and they are  
 6 liable to Plaintiff in their individual capacities. And, of course, they had directed contact with Plaintiff.

7 Plus, individuals may be held personally liable for breaches of their fiduciary duties. *See, e.g.,*  
 8 *Montoya v. McLeod* (1985) 176 Cal.App. 3d 57, 64 (real estate agent was liable to investors in real  
 9 estate transaction for breach of fiduciary duty and constructive fraud).

10 Moreover, Business & Professions Code Section 17200 specifically provides for actions against  
 11 "persons" which is defined to mean and include "natural persons" in addition to corporations, firms  
 12 partnerships and other such entities. *See, e.g.,* Cal. Bus. & Prof. Code §§ 17201, 17203, 17206, 17206.1,  
 13 17500 et seq. Additionally, the liability of each individual defendant under Business & Professions  
 14 Code Section 17200 et seq. and 17500 et seq. may be predicated on his or her personal participation in  
 15 the unlawful practices. *People v. Toomey* (1985) 157 Cal.App.3d 1, 14. Also, liability may be imposed  
 16 on anyone who knowingly aids and abets fraud or furnishes the means for its accomplishment. *Id.*  
 17 Plaintiff's causes of action against Defendant Price for breach of fiduciary duty, fraud by concealment,  
 18 violation of Business & Professions Code Section 17200 et seq. and violation of the Elder Abuse Act,  
 19 Welfare & Institutions Code § 15610.3 are all properly asserted against Defendant Price and the  
 20 demurrer should be overruled.

21 **IV. CONCLUSION**

22 For the foregoing reasons, Plaintiff Third Mutual respectfully requests that the Demurrers of  
 23 Defendants PCM and Price be overruled in their entirety.

24 DATED: September 10, 2010

COHON & POLLAK, LLP

25  
 26 BY:   
 27 JOHN T. MCDOWELL  
 Attorneys for Plaintiff  
 28 THIRD LAGUNA HILLS MUTUAL

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**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1999 Avenue of the Stars, Suite 1100, Los Angeles, California 90067.

On September 10, 2010, I served the foregoing document described as: **PLAINTIFF THIRD LAGUNA HILLS MUTUAL'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS PCM AND PRICE DEMURRER TO COMPLAINT** on the interested parties in this action:

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

by placing  the original  a true copy thereof enclosed in sealed envelopes addressed as follows:

Paul E. Van Hoomissen, Esq. *Attorneys for Defendant Professional*  
MUCH SHELIST DENENBERG AMENT & Community Management  
RUBENSTEIN, P.C.  
8001 Irvine Center Drive, Suite 400  
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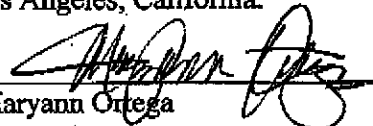
**BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

**BY FACSIMILE:** I declare that the above-entitled document was transmitted by facsimile transmission to the facsimile telephone numbers last given and maintained by each person as indicated above, and that each transmission was reported as complete and without error pursuant to the transmission report, which I declare was properly issued by the transmitting facsimile machine.

**BY FEDERAL EXPRESS:** I am "readily familiar" with the firm's practice of collection and processing correspondence for sending documents by Federal Express for overnight delivery. Under that practice, I personally deposited the such envelope with Federal Express on that same day with postage thereon fully prepaid at Century City, California in the ordinary course of business.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 10, 2010, at Los Angeles, California.

  
Maryann Ortega