

1 JEFFREY M. COHON, ESQ. (CSBN 131431)
HENRY NICHOLLS, ESQ. (CSBN 126129)
2 JOHN T. McDOWELL, ESQ. (CSBN 130372)
COHON & POLLAK, LLP
3 1999 Avenue of the Stars, Suite 1100
Los Angeles, California 90067
4 Tel: 310/231-4470
Fax: 310/231-4610
5 Attorneys for Plaintiff
6 THIRD LAGUNA HILLS MUTUAL

ELECTRONICALLY FILED
Superior Court of California,
County of Orange
12/22/2010 at 11:12:00 AM
Clerk of the Superior Court
By Rachelle Vavra, Deputy Clerk

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

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

Date: January 13, 2011
Time: 2:00 p.m.
Dept.: C-8

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

21
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") to Third Mutual's First Amended
26 Complaint.

27 ///

28 ///

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The fifth cause of action for Elder Abuse is the sole subject of Defendants Professional
4 Community Management, Inc.’s (“PCM”) and Janet Price’s (“Price”) demurrer to Plaintiff Third
5 Laguna Hills Mutual’s (“Third Mutual”) First Amended Complaint (“FAC”). Moreover, separate and
6 apart from the issues related to the claim being brought by Third Mutual, rather than individual
7 members, Defendants do not contest that, in all other respects, Plaintiff has properly pleaded violations
8 of the Financial Elder Abuse statute as set forth in *Welfare & Institutions Code* Section 15610.30.
9 Contrary to Defendants’ contentions, and as more fully discussed below, Plaintiff Third Mutual has
10 standing to assert this financial elder abuse cause of action on behalf of its elderly members and the
11 Defendants’ most recent demurrer **must be overruled**.

12 **II. THIRD MUTUAL HAS ALLEGED SUFFICIENT FACTS TO STATE A CAUSE OF**
13 **ACTION FOR FINANCIAL ELDER ABUSE AND THE DEMURRER SHOULD BE**
14 **OVERRULED**

15 The requirements of a cause of action for financial elder abuse under California *Welfare &*
16 *Institutions Code* Section 15610.30(a) are: (1) that defendants took/hid/appropriated/retained plaintiff’s
17 property; (2) plaintiff was 65 years of age or older or was a dependent adult at the time of the conduct;
18 (3) defendants took/hid/appropriated/retained the property for a wrongful use or with the intent to
19 defraud; (4) plaintiff was harmed; and (5) defendants’ conduct was a substantial factor in causing
20 plaintiff’s harm. *California Civil Jury Instructions (CACI) - Financial Abuse - Essential Factual*
21 *Elements*.

22 As to element (1), plaintiff has clearly pleaded that defendants have taken plaintiff’s property,
23 i.e. the existence of the scheme by PCM and its agents, Price and Johns, to misappropriate the funds
24 of Third Mutual, which acts on behalf of and stands in the shoes of its elderly members. As set out in
25 the decision of *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 174, a wrongful use is defined as
26 taking, secreting, appropriating, or retaining property in bad faith. *Id.* Bad faith occurs where the
27 person or entity knew or should have known that the elder had the right to have the property transferred
28 or made readily available to the elder or to his or her representative. *Id.* California *Welfare &*

1 *Institutions Code* Section 15610.30 (a) sets forth a conclusive presumption of “financial abuse” and
2 provides that a person or entity “shall be deemed to have taken, secreted, appropriated, obtained, or
3 retained property for a wrongful use if, among other things, the person or entity knew or should have
4 known that this conduct is likely to be harmful to the elder or dependent adult.” California *Welfare &*
5 *Institutions Code* § 15610.30(b) (emphasis added). In the instant case, Plaintiff has pleaded that PCM,
6 Johns and Price devised a scheme, whereby PCM paid itself an incentive bonus of 30% of the “hard
7 dollar savings” which allegedly PCM achieved for each of the corporations through its own agents’
8 “ingenuity” and “extraordinary efforts.” Plaintiff has also asserted that it was unaware of the existence,
9 terms, criteria used or amount that PCM’s paid itself under the fraudulent incentive plan on an annual
10 basis. (Complaint ¶¶ 53, 8-23).

11 As to element (2), plaintiff has clearly pleaded that the residents of Third Mutual, who were
12 over the age of 65 at the time of the misconduct, were the ultimate victims of Defendants' malfeasance.
13 Third Mutual is an interested person and by this action protects the victims of Defendants' abuse. Third
14 Mutual has properly alleged financial elder abuse on behalf of its members, who are over 65.
15 (Complaint ¶¶ 8-23, 53-66). The standing issue is comprehensively briefed in the subsequent sections
16 below.

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

20 As to element (4), plaintiff has clearly pleaded that defendants knew or should have known that
21 their conduct would be or was likely to be harmful to plaintiff. Specifically, that PCM, Milt Johns and
22 Janet Price knew or should have known that their conduct would be or was likely to be harmful to the
23 protected population of Third Mutual. (Complaint ¶¶ 64, 8-23).

24 As to element (5), plaintiff has clearly pleaded that the actions of defendants harmed plaintiff.
25 Specifically, that defendants harmed plaintiff by instituting an incentive plan to pay itself undisclosed
26 sums pursuant to an undisclosed set of criteria in undisclosed amounts on an annual basis. (Complaint
27 ¶¶ 65, 8-23).

28 ///

1 A. **The Standing Provisions and Legislative Purpose of the Elder Abuse Act Supports**
2 **Third Mutual’s Cause of Action for Financial Elder Abuse Against Defendants on**
3 **Behalf of its Members**

4 Trial courts are discouraged from entertaining *a defense* based on the asserted lack of standing
5 to prosecute the elder abuse action. The Rutter Group, *California Practice Guide: Elder Abuse*
6 *Litigation*, “Standing To Claim Relief For Abduction, Protective Orders, Financial Abuse Or Physical
7 Abuse Or Neglect: Who Is The Plaintiff?,” § 2.26. Standing issues should be resolved in favor of
8 allowing an elder abuse action to proceed. *Estate of Lowrie* (2004) 118 CA4th 220, 230. “Given the
9 broad standing provisions at California *Welfare & Institutions Code* § 15610.30(c), (d) and
10 § 15657.3(d), **the policy of the law is that lack of standing is no defense to an elder abuse action;**
11 **standing problems are left for resolution among those with competing claims in the elder abuse**
12 **action.**” The Rutter Group, *California Practice Guide: Elder Abuse Litigation*, “Standing”, § 2.26
13 [emphasis added].

14 “The purpose of the Elder Abuse Act, Welfare & Institutions Code Section 15600 et seq. is
15 essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the
16 form of abuse and custodial neglect.” *Estate of Lowrie* (2004) 118 Cal.App. 4th 220, 226, quoting
17 *Delaney v. Baker* (1999) 20 Cal.4th 23, 33. The statutory scheme of the elder abuse statutes has been
18 modified to provide incentives for private, civil enforcement through lawsuits against elder abuse and
19 neglect. *Id.*

20 The Court in the case of *Estate of Lowrie, supra*, reviewed the issue of standing and discussed
21 the broad reach and scope of the standing provisions of the elder abuse statutes set forth in the Welfare
22 and Institutions Code. *Id.*, at 227. The *Lowrie* Court concluded that the California Legislature did not
23 define the operative words in Welfare and Institutions Code section 15657.3. *Id.* However, when
24 Welfare and Institutions Code section 15657.3 was added to the statutory scheme (Stats.1991, ch. 774,
25 § 3, p. 3477, enacting Sen. Bill No. 679 (1991-1992 Reg.Sess.)) the Legislature specified that the Elder
26 Abuse Act was intended to “enable interested persons to engage attorneys to take up the cause of abused
27 elderly persons and dependent adults.” California *Welfare & Institutions Code* § 15600, subd. (j), added
28 by Stats.1991, ch. 774, § 2, p. 3476 (emphasis added.) The court noted that this statement of legislative

1 intent clearly reveals a broad definition of standing in the context of elder abuse cases. As the *Lowrie*
2 Court held: “Any definition given to Welfare and Institutions Code section 15657.3, subdivision (d)
3 must be sufficiently elastic to fulfill the purposes of the Elder Abuse Act. A decision as to whether a
4 person has standing may be intertwined with other issues in elder abuse cases....” *Id.*

5 In its September 23, 2010 ruling, this Court determined that the *Lowrie* case is “inapplicable
6 here because that statute and case involves standing once the decedent holding the Elder Abuse Claim
7 dies.” (Defendants’ RJN, Exhibit “”). Third Mutual respectfully asks this Court to take a closer look
8 at the *Lowrie* case. The case is *all about fulfilling the purposes of the Elder Abuse Act*. *Estate of*
9 *Lowrie, supra*, 118 Cal.App.4th 220, 226-228, 230-231. It is incidental that the facts in *Lowrie*
10 pertained to a Section 15657.3 Elder Abuse claim rather than a Section 15610.30 claim as set forth in
11 the instant lawsuit. When analyzing the term “interested persons” under Section 15657.3(d) for the
12 purpose of standing, the *Lowrie* court noted that *“establishing a uniform definition of terms*
13 *throughout the codified laws is less important than effectuating the purpose of the legislative*
14 *scheme.”* *Id.*, at 228. Moreover, in adopting the plaintiff’s position on standing, the *Lowrie* court again
15 emphasized legislative intent by noting that the defendant’s argument against standing “ignores Probate
16 Code section 259 and the purpose of the Elder Abuse Act.” *Id.* Without limiting its comments to
17 Section 15657.3, the *Lowrie* court held that “Standing, for purposes of the Elder Abuse Act, must be
18 analyzed in a manner that induces interested persons to report elder abuse and to file lawsuits against
19 elder abuse and neglect. In this way, the victimized will be protected.” *Id.*, at 229. “Elders are unizuely
20 vulnerable to abuse because ... they face advancing frailty, deterioration of mental capacity, and
21 increasing reliance for assistance ...” *Id.*, at 230. “If abusers gain control of an estate, they may not use
22 a restrictive interpretation of standing as an escape hatch.” *Id.*, at 231.

23 The Legislative Declaration of Intent itself, set forth in Welfare & Institutions Code Section
24 15600, specifically states, “It is the further intent of the Legislature in adding Article 8.5 (commencing
25 with Section 15657) to this chapter to enable interested persons to engage attorneys to take up the
26 cause of abused elderly persons and dependent adults.” *California Welfare & Institutions Code* § 15600
27 (j) [emphasis added]. Accordingly, standing should not be allowed as a defense to an elder abuse
28 action. The Rutter Group, *California Practice Guide: Elder Abuse Litigation*, “Standing,” ¶ 2:29.

1 The broad scope of Section 15610.30 and the intent of the Legislatures support Third Mutual
2 in asserting the Financial Elder Abuse cause of action on behalf of its elderly members. Plaintiff Third
3 Mutual has properly asserted a cause of action for Financial Elder Abuse on behalf of its members, who
4 are specifically protected by Welfare & Institutions Code Section 15610.30. Defendants' narrow
5 interpretation of Welfare & Institutions Code Section 15610.30 and attempt to preclude Third Mutual
6 from suing on behalf of its elderly members is inconsistent with the stated purpose and intent of the
7 statute. Defendants' arguments should be rejected and the demurrer overruled.

8 **B. Homeowners' Associations Have Standing Generally to Assert Causes of Action on**
9 **Behalf of Their Members**

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

- 12
- 13 ● Its members (or some of them) would have standing to sue in their own right;
- 14 ● the interests the association seeks to protect are germane to the organization's purpose;
- 15 and
- 16 ● neither the claim asserted nor the relief requested requires the participation of individual
- 17 members in the lawsuit.
- 18

19 *Property Owners of Whispering Palms, Inc. v. Newport Pac., Inc.* (2005) 132 Cal.App.4th 666,
20 672-673; The Rutter Group, *California Practice Guide: Civil Procedure Before Trial*, "Parties to the
21 Action," § 2:15.10. One court concluded that an association of townhouse owners had standing to sue
22 the project developer in a representative capacity for damages to individual units. *Raven's Cove*
23 *Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783. The court reasoned that the
24 association had standing, insofar as the association had been formed for the purpose of providing
25 maintenance, preservation and architectural control of the lots and common area and to promote the
26 health, safety and welfare of the residents and had filed the action on behalf of its members who all had
27 a beneficial interest in the result. *Id.* at 795.

28 ///

1 The misappropriated funds at issue in this case are derived from the association fees of Third
2 Mutual's individual members. Third Mutual acts on behalf of and serves the interests of its individual
3 members. In the instant case, homeowner association funds have been misappropriated by Defendants
4 and the claim asserted does not require the participation of the individual members because Third
5 Mutual is acting on their behalf.

6 **C. Third Mutual Has Standing to Enforce Documents**

7 Of no less importance than the previous grounds for standing is Third Mutual's right to bring
8 this action under the provisions of California *Civil Code* § 1368.3 which states:

9
10 "An association established to manage a common interest development has standing to
11 institute, defend, settle, or intervene in litigation, arbitration, mediation, or
12 administrative proceedings in its own name as the real party in interest and without
13 joining with it the individual owners of the common interest development, in matters
14 pertaining to the following:

- 15
16 (a) Enforcement of governing documents.
17 (b) Damage to the common area.
18 (c) Damage to a separate interest that the association is obligated to maintain or repair.
19 (d) Damage to a separate interest that arises out of, or is integrally related to, damage to the
20 common area or a separate interest that the association is obligated to maintain or
21 repair." California *Civil Code* § 1368.3.
22

23 California *Civil Code* § 1368.3 takes away the defense of the defendant based on the
24 association's lack of standing to sue in all cases except where an alleged defect or damage is in an area
25 in which the association has no ownership and no obligation to maintain. However, in such cases, the
26 association may nevertheless be able to sustain a class action. *See Residents of Beverly Glen, Inc. v. City*
27 *of Los Angeles* (1973) 34 Cal. App. 3d 117; *Salton City etc. Owners Assn. v. M. Penn Phillips Co.*
28 (1977) 75 Cal. App. 3d 184; *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114

1 Cal. App. 3d 783. Civil Code § 1368.3 provides that associations have standing to sue in their own
2 names as real parties in interest for the types of claims listed in the statute, including causes of action
3 based on breach of implied warranty as well as **tort claims**. *Windham at Windham at Carmel Mountain*
4 *Ranch Assn. v. Superior Court* (2003) 109 Cal. App. 4th 1162 [reviewing former Code of Civil
5 Procedure § 383].

6 In this case, defendants’ improper payment of secret incentives constituted financial elder abuse
7 in violation of California *Welfare & Institutions Code* § 15610.30 which is prohibited under the three
8 governing documents of Third Mutual. The three governing documents are: (1) Third Mutual’s Bylaws;
9 (2) Third Mutual’s CC&Rs; and (3) the Management Agreements between Third Mutual and PCM.
10 (FAC, ¶¶ 55-57.) Third Mutual’s Bylaws specify that it is intended to operate as a Common Interest
11 Development in a portion of Laguna Wood’s Senior Citizen Housing Development. (FAC, ¶ 56, Exhibit
12 “D”.) The CC&Rs, including Article IV(2)(c) and (5), specifically allow Third Mutual to retain the
13 services of a “Managing Agent” for the efficient operation and maintenance of Third Mutual’s common
14 area, its related projects or to provide services to Third Mutual’s residents. (FAC, ¶ 55, Exhibit “C”.)
15 Pursuant to the terms of the CC&Rs, Third Mutual hired PCM as its “Managing Agent.” (FAC, ¶ 26,
16 Exhibits “A” and “B”.) Portions of the Management Agreements between Third Mutual and PCM set
17 forth:

18
19 “Under the personal and direct supervision of a General Manager, Agent shall render
20 services and perform duties as follows:

21

22 (h) Take such action as may be necessary to comply promptly with any and all orders
23 or requirements affecting the Property issued or imposed by any federal, state, county,
24 or municipal authority or other regulatory body having jurisdiction thereover.

25

26 (p) Secure full compliance with such rules and regulations as may be promulgated by
27 Third from time to time with respect to the use of Third and the common area and the
28 services provided in connection therewith and, to this end, see that all members and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

other affected persons are informed with respect thereto.

.

(r) Carry out and perform all of the obligations as are reasonable, necessary and proper in the discharge of Agent’s duties under this agreement.” (FAC, Exhibits “A” and “B” - Management Agreements, Article III, subsections (p) and (r).)

These governing documents require PCM and its agents to act within the law and prohibit violations of local, state and federal laws, including the Elder Abuse and Dependent Adult Civil Protection Act. (FAC, ¶¶ 57-60.) The same governing documents authorize Third Mutual to enforce them. (FAC, ¶ 61.) Through their actions, PCM and its agents violated the Elder Abuse and Dependent Adult Civil Protection Act as enforced through Third Mutual’s governing documents. (FAC, ¶ 63.) Consequently, Third Mutual is entitled to pursue its Elder Abuse cause of action against PCM, Johns and Price.

III. LEAVE TO AMEND

If for any reason the Court is inclined to sustain the Defendants’ demurrer to Third Mutual’s First Amended Complaint, Third Mutual requests leave to amend to further address how the individual members of Third Mutual, as the ultimate victims, were harmed by Defendants’ misconduct. Third Mutual will allege additional facts establishing that injury to Third Mutual is ultimately injury to its over 65 year old members who are the ones who pay owner fees and who run the board of directors of Third Mutual. Third Mutual will allege facts tracing its funds and losses to its individual members.

//
//
//
//
//
//
//
//
//

1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff Third Laguna Hills Mutual respectfully requests that the
3 Demurrer of Defendants PCM and Price to the Fifth Cause of Action in Third Mutual's First Amended
4 Complaint be overruled in their entirety. If for any reason this Court is inclined to sustain the demurrer,
5 Third Mutual requests leave to amend.

6

7 DATED: December 22, 2010

COHON & POLLAK, LLP

8

9

By: 

JOHN T. MCDOWELL
Attorneys for Plaintiff
THIRD LAGUNA HILLS MUTUAL

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

5 On December 22, 2010, I served the foregoing document described as: **PLAINTIFF**
6 **THIRD LAGUNA HILLS MUTUAL'S MEMORANDUM OF POINTS AND AUTHORITIES**
7 **IN OPPOSITION TO DEFENDANTS PCM AND PRICE DEMURRER TO FIRST**
8 **AMENDED COMPLAINT** on the interested parties in this action:

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

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

13 Paul E. Van Hoomissen, Esq.
14 MUCH SHELIST DENENBERG AMENT &
RUBENSTEIN, P.C.
8001 Irvine Center Drive, Suite 400
Irvine, CA 92618
Tel: (949) 754-4400
Fax: (949) 754-4401

*Attorneys for Defendant Professional
Community Management*

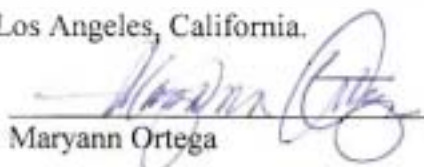
15 **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing
16 correspondence for mailing. Under that practice it would be deposited with U.S. postal service on
17 that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of
18 business. I am aware that on motion of the party served, service is presumed invalid if postal
19 cancellation date or postage meter date is more than one day after date of deposit for mailing in
20 affidavit.

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

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

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

Executed on December 22, 2010, at Los Angeles, California.


Maryann Ortega