

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAR 21 2011

ALAN CARLSON, Clerk of the Court

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BY F. IBARRA

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10 and PAUL VAN HOOMISSEN

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF ORANGE - CENTRAL JUSTICE CENTER**

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13 THIRD LAGUNA HILLS MUTUAL, a)
14 California non-profit corporation,)

15 Plaintiff,)

16 v.)

17 PROFESSIONAL COMMUNITY)
18 MANAGEMENT, INC., a California)
19 corporation, also known as PCM; MILT)
20 JOHNS, an individual; JANET PRICE, an)
21 individual and DOES 1 to 20, inclusive,)

22 Defendants.)

23 MILTON JOHNS, an individual,)

24 Cross-Complainant,)

25 v.)

26 PROFESSIONAL COMMUNITY)
27 MANAGEMENT OF CALIFORNIA, INC., a)
28 California corporation, also known as PCM;)
RUSS DISBRO, an individual; DONNY)
DISBRO, an individual; PAUL VAN)
HOOMISSEN, an individual; JACKSON)
DEMARCO, TIDUS PECKENPAUGH, a)
California Law Corporation; MUCH,)
SHELIST, FREED DENENBERG, AMENT)
& RUBENSTEIN, an Illinois Corporation)
doing business in California; THIRD)
LAGUNA HILLS MUTUAL, a California)
non-profit corporation; GOLDEN RAIN)
FOUNDATION OF LAGUNA WOODS, a)

Case No. 30-2010 00380231

[Assigned for All Purposes to the Hon.
Kirk H. Nakamura, Dept. C8]

**NOTICE OF DEMURRER AND
DEMURRER TO CROSS-
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Filed concurrently with Motion to Strike
Portions of Cross-Complaint]

Date: April 28, 2011
Time: 2:00 p.m.
Dept: C8

Complaint filed: June 10, 2010

Cross-Complaint filed: December 30, 2010

Trial Date: No Date Set

1 California non-profit corporation; ROBERT)
2 HATCH, an individual; JIM MATSON, an)
3 individual; and ROES 1 to 150, inclusive,)
4 Cross-Defendants.)

5
6 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

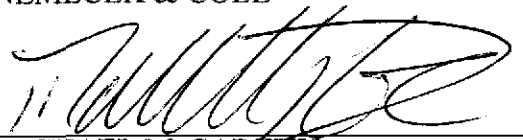
7 **PLEASE TAKE NOTICE THAT** on April 28, 2011, at 2:00 p.m. in Department C8 of the
8 above-entitled Court, located at 700 Civil Center Drive West, Santa Ana, California, 92701, Cross-
9 Defendants JACKSON DEMARCO, TIDUS and PECKENPAUGH (collectively, "The Firm") and
10 PAUL VAN HOOMISSEN ("Van Hoomissen") will, and hereby do, demur to the complaint filed by
11 Cross-complainant MILTON JOHNS ("Johns") on the ground that it fails to state facts sufficient to
12 constitute a cause of action against The Firm.

13 This Demurrer is brought pursuant to *Code of Civil Procedure* section 430.10(e) and (f) and is
14 based upon this Notice, the accompanying Demurrer, the attached memorandum of points and
15 authorities, the pleadings and records on file herein, and upon such other oral and documentary
16 evidence as may be presented hereinafter.

17 NEMECEK & COLE

18 Dated: March 18, 2011

19 By:

20 
21 MICHAEL McCARTHY
22 MARSHALL R. COLE
23 Attorneys for Cross-Defendants
24 JACKSON DeMARCO TIDUS PECKENPAUGH and
25 PAUL VAN HOOMISSEN
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1 **DEMURRER**

2 Cross-Defendants JACKSON DEMARCO, TIDUS & PECKENPAUGH and PAUL VAN
3 HOOMISSEN demur to Cross Complainant's Cross-Complaint as follows:

4 **DEMURRER TO FIFTH CAUSE OF ACTION**

5 1. The purported Fifth Cause of Action for Intentional Interference with Contractual
6 Relations is subject to general demurrer on the grounds that it fails to allege facts sufficient to state
7 any viable cause of action (Code Civ. Proc. § 430.10(e)).

8 **DEMURRER TO SIXTH CAUSE OF ACTION**

9 2. The Purported Sixth Cause of Action for Breach of Fiduciary Duty Fails to State Facts
10 Sufficient to Constitute a Cause of Action, Because Plaintiff Has Not Alleged a Breach of Fiduciary
11 Duty or Cause of Action of Damages as a Matter of Law. (Code Civ. Proc. § 430.10, subd. (e).)

12 3. The Purported Sixth Cause of Action for Breach of Fiduciary Duty is Uncertain and
13 Unintelligible. (Code Civ. Proc. § 430.10, subd. (f).)

14
15 NEMECEK & COLE



16
17 Dated: March 18, 2011

18 By:

19 MICHAEL McCARTHY
20 MARSHALL R. COLE
21 Attorneys for Cross-Defendant
22 JACKSON DeMARCO TIDUS PECKENPAUGH and
23 PAUL VAN HOOMISSEN
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION AND STATEMENT OF FACTS**

3 Contained within a Cross-Complaint largely focusing on wrongful termination allegations lie
4 two causes of action against Cross-Defendants JACKSON DEMARCO, TIDUS & PECKENPAUGH
5 (“The Firm”) and PAUL VAN HOOMISSEN (“Van Hoomissen”)(collectively “Cross-Defendants”),
6 an employee of The Firm. Cross-complainant MILTON JOHNS (“Johns”), alleges intentional
7 interference with contractual relations and breach of fiduciary duties arising out of The Firm’s
8 purported representation of Johns while Johns was involved in the litigation matter initiated by
9 Plaintiff, Third, in an employment dispute with his employer PROFESSIONAL COMMUNITY
10 MANAGEMENT OF CALIFORNIA, INC., (“PCM”), prior to Johns’ termination, as general
11 manager. (Cross-Complaint ¶ 32.)

12 Johns had worked for PCM as general manager since 2000. (Cross-Complaint ¶ 17.) From the
13 time Johns became general manager through 2009, Johns was allegedly promised that he would
14 always maintain a senior executive position with PCM. Eventually Johns was approached by an
15 employee of PCM, Donny Disbro, to purchase PCM with Johns and Mr. Disbro being Co-CEO’s.
16 These discussions were memorialized into an offer to purchase on April 9, 2009. (Cross-Complaint ¶¶
17 17-20.)

18 Subsequently, in May or June of 2009, Johns was approached by PCM regarding the April
19 offer to purchase, and was informed that the offer would not be accepted. (Cross-Complaint ¶ 21.)
20 The reasoning behind this decision was that Johns engaged in certain acts which could be considered
21 insubordination within PCM, and as a result, Johns remained as general manager. (Cross-Complaint
22 ¶¶ 27-30.) Eventually, and culminating in February 2010, Johns was approached again by PCM and
23 informed that he would no longer have a position with PCM due to the fact that he was “burned out”.
24 (Cross-Complaint ¶ 32.) Although Johns had indicated that various promises had been made to him,
25 PCM indicated that said promises would not be honored and his employment was terminated. (Cross-
26 Complaint ¶ 32.)

27 According to the allegations of the Cross-Complaint, Johns asserts liability against The Firm
28 and Van Hoomissen because they knew there was an employment contract and interfered with the

1 employment contract by negotiating with THIRD LAGUNA HILLS MUTUAL ("Third"), Plaintiff in
2 this action, for Johns' termination. (Cross-Complaint ¶¶ 83, 86.) However, as pled, Third is not a
3 party to the alleged employment agreement. Nonetheless, Johns goes on to claim that The Firm
4 through Van Hoomissen engaged in these negotiations without Johns' knowledge or informed
5 consent. (Cross-Complaint ¶ 94.) However absent from the Cross-Complaint are any essential terms
6 of said employment contract, who in fact the parties are to the alleged employment contract and The
7 Firm's specific roll was in bringing about a breach of the alleged employment contract.

8 Johns also asserts liability against Van Hoomissen for failing to inform Johns of a tolling
9 agreement extension proposed by Third. (Cross-Complaint ¶ 94.) Johns claims that had he been
10 informed of the proposed tolling agreement, he would have entered into it and avoided being sued by
11 Third. (Cross-Complaint ¶ 95.) Such is gross speculation, at best.

12 In this action, Johns is now attempting to blame The Firm and Van Hoomissen for losing his
13 employment with PCM and subsequently being sued by Third, despite the fact that there are no facts
14 pled establishing any liability against The Firm or Van Hoomissen. As pled, it is entirely uncertain as
15 to how Cross-Defendants engaged in any wrongdoing, especially since no essential terms of the
16 employment agreement are identified. Aside from bold conclusory allegations, there are no facts
17 alleged establishing any liability as to the Cross-Defendants. As a result, this Court should sustain
18 Cross-Defendants' demurrer without leave to amend.

19 **2. AN ORDER SUSTAINING A DEMURRER WITHOUT LEAVE TO AMEND IS**
20 **PROPER WHERE THE CROSS-COMPLAINT CANNOT STATE FACTS**
21 **SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION**

22 The purpose of a demurrer is to test the sufficiency of a complaint by raising questions of law.
23 *Seidler v. Municipal Court* (1993) 12 Cal.App.4th 1229, 1233; *Johnson v. County of Los Angeles*
24 (1983) 143 Cal.App.3d 298, 306. A complaint [or cross-complaint] which fails to state facts
25 sufficient to constitute a cause of action is subject to a demurrer. *Code of Civil Procedure* § 430.10
26 subd. (e); *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269 275; *Jenkins v.*
27 *Pope* (1990) 217 Cal.App.3d 1292, 1297. Indeed, the question of whether a complaint [or cross-
28 complaint] is factually sufficient to state a cause of action should be resolved by general demurrer

1 rather than wasting valuable judicial resources by unnecessarily delaying the resolution of a purely
2 legal issue. *Bowden v. Robinson* (1997) 67 Cal.App.3d 705, 710.

3 If, based on the law, the complaint [or cross-complaint] fails to state facts sufficient to
4 constitute a cause of action, the demurrer must be sustained. *Code of Civil Procedure* § 430.10,
5 subds. (a) and (e); *Stevenson, supra* 24 Cal.App.4th at 275. Furthermore, leave to amend the
6 complaint [or cross-complaint] should be denied where the facts are undisputed, and the nature of the
7 claim is clear that there is no liability under substantive law. *Johnson, supra* 143 Cal.App.3d at 306;
8 *Sackett v. Wyatt* (1973) 32 Cal.App.3d 592, 603. Courts should sustain a demurrer without leave to
9 amend where plaintiff has alleged facts in the original complaint [or cross-complaint] that preclude
10 the relief sought in an amended pleading. "Permitting plaintiff to amend the complaint would serve
11 no useful purpose given the fact that the actions of petitioner, as set forth in plaintiff's original
12 complaint, cannot give rise to a cause of action." *Mercury Gas Co. v. Sup.Ct.* (1986) 179 Cal.App.3d
13 1027, 1035.

14 In this case, as set forth below, aside from bold conclusory allegations, Johns' Cross-
15 Complaint is completely devoid of any charging allegations for the simple reason that neither The
16 Firm's nor Van Hoomissen's conduct forms the basis for any liability. Granting leave to amend will
17 only allow Johns to draw more conclusions despite not having facts to support them. Since Johns
18 cannot possibly plead facts sufficient to constitute a cause of action, the demurrer must be sustained
19 **without leave to amend.**

20 **3. JOHNS HAS NOT PLED THE ESSENTIAL ELEMENTS TO ESTABLISH AN**
21 **INTERFERENCE WITH CONTRACTUAL RELATIONS CAUSE OF ACTION**

22 In California there is no cause of action for negligent interference with contractual relations.
23 (*Davis v. Nadrich* (2009) 174 Cal. App. 4th 1, 14.) Thus, the only possible cause of action is
24 intentional interference with contractual relations. In order to establish liability for interference with
25 contract, Johns must plead: (1) a valid contract existed between plaintiff and a third party; (2) the
26 defendant had knowledge of the contract and intended to induce a breach thereof; (3) the contract was
27 breached by the other party thereto; (4) the breach was caused by defendant's wrongful or unjustified
28 conduct ; and (5) resulting damage. (*Quelimane Co. v. Stewart Title Co.* (1998) 19 Cal.4th 26, 55;

1 *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600-601.) As explained in detail below, Johns has failed
2 to plead three of the essential elements to establish a cause of action for intentional interference with
3 contractual relations.

4 **A. Johns Failed To Sufficiently Plead That The Firm Had The Requisite Intent To**
5 **Carry Out The Alleged Tortious Conduct.**

6 Perhaps the most crucial element to establish a claim for intentional interference with
7 contractual relations is that plaintiff plead and prove that the defendant intended to induce a breach of
8 the contract. (*Augustine v. Trucco* (1954) 124 Cal. App. 2d 229, 244.) In fact, proof of the requisite
9 intent requires more than a showing that the actor intended the act which caused the interference; it
10 requires evidence that the actor intended to cause the interference itself. (*Ramona Manor*
11 *Convalescent Hosp. v. Care Enters.* 177 Cal. App. 3d 1120, 1130.) Thus, the essential thing is the
12 purpose to cause the result. If the actor does not have this purpose, his conduct does not subject him
13 to liability under the rule even if it has the unintended effect of causing a breach of the contract. (*Id.* at
14 1130.) Therefore, if the actor had no knowledge of the existence of the contract or his actions were
15 not intended to induce a breach of the contract, he cannot be held liable even though an actual breach
16 results from his lawful and proper conduct. (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 37)

17 Here, Johns alleges that “[i]n October and November 2009, Third GRF, Hatch, Matson, and
18 each of them, interfered with the employment contract between Johns and PCM with the intention to
19 disrupt the performance of this contract by PCM, among other things, requesting that PCM terminate
20 Johns’ employment.” (Cross-Complaint ¶ 84.) Absent from this allegation is any facts stating that
21 The Firm, or as pled in the Cross-Complaint “JDTP,” or Van Hoomissen intended to disrupt the
22 performance of Johns’ employment contract, all that is mentioned is other Cross-Defendants in this
23 lawsuit.

24 However, assuming *arguendo* that Johns did plead that Cross-Defendants intended to disrupt
25 the performance of Johns’ employment contract, that allegation is insufficient to establish the
26 requisite intent under the law. In order to sufficiently plead that Cross-Defendants had the requisite
27 intent to meet the standard under the law, Johns must establish more than the fact that Van
28 Hoomissen’s negotiating, which was an intentional act, caused the termination. Johns must plead that

1 The Firm through Van Hoomissen intentionally caused the termination of the employment contract
2 through its negotiations, and it was Van Hoomissen's purpose to do so through these negotiations.
3 (*Ramona Manor Convalescent Hosp. Supra* 177 Cal. App. 3d 1120, 1130.)

4 As pled, the Cross-Complaint does not even state that Cross-Defendants acted intentionally,
5 and even if it did, Johns fails to establish that it was Cross-Defendants purpose to cause Johns'
6 termination. As a result of this insufficient pleading, this demurrer as to the fifth cause of action for
7 intentional interference with contractual relations should be sustained without leave to amend.

8 **B. Johns Has Failed To Establish That The Firm's Alleged Interference Was The**
9 **Proximate Cause of The Injury Sustained.**

10 Even if Johns pled facts sufficient to establish that The Firm had the requisite intent, which he
11 did not, Johns has also failed to sufficiently plead that The Firm and Van Hoomissen were the
12 proximate cause of the termination. Based upon the well established law, a plaintiff, seeking to hold
13 one liable for unjustifiably inducing another to break a contract, must allege that the contract would
14 otherwise have been performed, and that it was breached and abandoned by reason of the defendant's
15 wrongful act and that such act was the moving cause thereof. (*Augustinev. Trucco, supra* (1954) 124
16 Cal. App. 2d 229, 246.) Unless the act complained of was the proximate cause of the injury, there is
17 no liability. (*Id.*) In reaching its holding in *Augustine*, and finding that the cause of action was
18 insufficiently pled, the court noted that there was no allegation in plaintiff's complaint that the
19 contract would have been performed but for defendants conduct. (*Id.*)

20 Here, Johns has failed to plead that but for Cross-Defendants' actions, Johns would have
21 maintained his employment with PCM. No facts are pled because there is simply no causal link
22 between Johns' termination and any actions of The Firm or Van Hoomissen. After all, Johns only
23 alleges that The Firm and Van Hoomissen negotiated with Third, who is not even a party to the
24 alleged employment agreement. (Cross-Complaint ¶ 86.) Johns' failure to allege that Cross-
25 Defendants interfered with a party to the alleged employment contract is fatal to the cause of action.
26 Johns completely disregards his own actions which are the actual result of his termination at PCM.
27 The mere fact that Cross-Defendants may or may not have negotiated with Third with respect to
28 certain issues regarding Johns' employment, does not establish that but for Cross-Defendants' actions

1 PCM would have continued to employ Johns.

2 In fact, a plain reading of Johns' Cross-Complaint establishes the contrary. Johns states that
3 beginning "...in 2009, R. Disbro's promises to Johns began to unravel and PCM through R. Disbro
4 and D. Disbro began to discriminate against Johns based on his age and retaliate against Johns for
5 complaints he made concerning violations of state and federal law." (Cross-Complaint ¶ 21.) If the
6 relationship with the CEO of PCM began to unravel in early 2009, surely any negotiations regarding
7 Johns' employment in "October and November 2009" were not the proximate cause of Johns'
8 termination, especially since the negotiations, as pled, did not take place between parties to the
9 contract. Rather, Johns' actions led to his own termination irrespective of anyone's involvement in
10 the matter. As a result of Johns' failure to plead that the employment contract with PCM would have
11 been performed had Cross-Defendants not engaged in its conduct, the demurrer as to the fifth cause of
12 action for intentional interference with contractual relations should be sustained without leave to
13 amend.

14 **C. The Firm's Conduct Is Not Actionable as a Matter of Law**

15 A person who intentionally causes a third party not to continue with an existing contract does
16 not interfere improperly if: (1) the relation concerns a matter involved in the competition between the
17 actor and the other; (2) the actor does not employ wrongful means; (3) the action does not create or
18 continue an unlawful restraint of trade; and (4) the purpose is a least in part to advance the actor's
19 interest in competing with the other. (*A-Mark Coin Co. v. General Mills, Inc.* (1983) 148 Cal.App.3d
20 312.) "one may advise a friend in all honesty, and without ill-will to the other contracting party, to
21 abide the risks of breaking an onerous or mischievous contract, rather than those of performing it."
22 (*Boyson v. Thorn* (1893) 98 Cal. 578, 583.) Merely persuading a person to break a contract may not
23 be wrongful in law or fact. (*Id.*)

24 Here, Johns merely alleges that Cross-Defendants "negotiated" with Third for Johns'
25 termination and nothing more. Cross-Defendants in negotiating with Third did not negotiate with a
26 party to the contract and even further, did not employ any wrongful means, as none are alleged. For
27 instance, in *Augustine* the court looked to numerous opinions from several states before reaching its
28 holding that there were no allegations that the third party actors acted intentionally or actively induced

1 or persuaded the defendants to breach any contract with plaintiff. (*Augustinev. Trucco, supra* (1954)
2 124 Cal. App. 2d 229, 246. In reaching this holding the court looked to a Pennsylvania decision
3 wherein the court held that merely alleging that the defendant “unlawfully, wantonly, maliciously, and
4 without justifiable cause, advised, requested, and persuaded the employer to discharge plaintiff,
5 without alleging any unlawful means resorted to by the defendant or intentional or wilful acts
6 committed by him, was insufficient,” requiring judgment for the defendant. (*Id.*)

7 Therefore, even if Johns had alleged that The Firm or Van Hoomissen acted maliciously in its
8 negotiations, which he did not, or that Cross-Defendants requested that or persuaded that Third or
9 PCM terminate Johns, which he did not, these negotiations alone do not constitute wrongful acts. At
10 best, Johns’ pleading establishes that Cross-Defendants persuaded the alleged employment agreement
11 to be breached. Especially since this persuasion was not even directed at a party to the alleged
12 employment agreement. (Cross-Complaint ¶ 86.) Johns’ fails to allege that Cross-Defendants
13 engaged in any unlawful conduct with respect to the alleged negotiations as he fails to even allege that
14 The Firm or Van Hoomissen negotiated with a party to the alleged employment agreement, and absent
15 that, Johns’ fifth cause of action for intentional interference with contractual relations should be
16 sustained by this Court without leave to amend.

17 **4. ANY NEGOTIATIONS WHICH TOOK PLACE ARE ABSOLUTELY PROTECTED**
18 **UNDER THE LITIGATION PRIVILEGE**

19 Johns alleges that Cross-Defendants were negotiating for his termination with Third on behalf
20 of PCM, however, these negotiations took place as part of a judicial proceeding under the law. The
21 litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a “publication or
22 broadcast” made as part of a “judicial proceeding” is privileged. This privilege is absolute in nature,
23 applying “to all publications, irrespective of their maliciousness.” (*Silberg v. Anderson* (1990) 50
24 Cal.3d 205, 216.) “The usual formulation is that the privilege applies to any communication (1) made
25 in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to
26 achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the
27 action.” (*Id.* at p. 212.) Further, the privilege “is not limited to statements made during a trial or other
28 proceedings, but may extend to steps taken prior thereto, or afterwards.” (*Rusheen v. Cohen* (2006) 37

1 Cal.4th 1048, 1057.)

2 Johns alleges that Cross-Defendants negotiated with Third on behalf of PCM for Johns'
3 termination. However, these negotiations took place for the sole reason that Third was threatening a
4 lawsuit against PCM for conduct which directly involved Johns. In fact, the very tolling agreement
5 that Johns' claims he was not advised of, bears direct relation to the then potential lawsuit eventually
6 leading to Third filing a lawsuit and is the Plaintiff in this action. (Cross-Complaint ¶ 95.) Thus,
7 based upon the law, these negotiations and statements were made in a judicial proceeding, by litigants
8 authorized by law, to achieve objections of the potential litigation, namely to avoid litigation. These
9 negotiations beared directly on the potential lawsuit and as a result are absolutely protected by the
10 litigation privilege.

11 **5. JOHNS PLEADS NO FACTS TO ESTABLISH THAT THE FIRM OR VAN**
12 **HOOMISSEN BREACHED THEIR FIDUCIARY DUTY**

13 An attorney has a fiduciary duty to the client. (CACI § 605; *Cox v. Delmas* (1893) 99 Cal.
14 104, 123.) The scope of an attorney's fiduciary duty may be determined as a matter of law based on
15 the Rules of Professional Conduct that, "together with statutes and general principles relating to other
16 fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney
17 owes to his [or her] client." (*Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45.)

18 In order to properly plead a cause of action for breach of fiduciary duty, a plaintiff must plead
19 sufficient ultimate facts establishing that the defendant actually owed a fiduciary duty to the plaintiff,
20 that the duty was breached, and that plaintiff sustained damages which were proximately caused by
21 the breach. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070; *Pierce v Lyman* (1991) 1 Cal. App. 4th
22 1093, 1101; *Brown v California Pension Admin. & Consult., Inc.* (1996) 45 Cal. App. 4th 333;
23 *LaMonte v Sanwa Bank Cal.* (1996) 45 Cal. App. 4th 509). Additionally, the burden of proving each
24 of the requisite elements of breach of fiduciary duty is entirely upon the plaintiff. (See, e.g., *LaMonte*
25 at p. 517 [holding that "[t]he [plaintiff] has the initial burden of proving the existence of a fiduciary
26 duty and the [defendant's] failure to perform [under the duty]"]; *Van de Kamp v Bank of America*
27 (1988) 204 Cal. App.3d 819). Assuming a duty and a breach, a plaintiff still must prove that he or she
28 suffered damages as a result of an attorney's breach of fiduciary duty. (CACI § 605; *American*

1 *Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1044-1045
2 (plaintiff required to establish as an element of its case that it suffered damage as a result of
3 defendants' breach of fiduciary duty.) Finally, the absence of any of these elements is **fatal** to the
4 cause of action. (*Pierce*, 3 Cal. Rptr. 2d at 240; *Brown*, supra, at p. 348; *LaMonte*, supra, at p. 524).

5 A breach of fiduciary duty generally involves an attorney's breach of loyalty, breach of
6 confidence, or both. (See e.g., *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1143.) While it is
7 acknowledged that the relationship between an attorney and client is a fiduciary relationship of the
8 highest character, errors, omissions or mistakes made by the attorney do not constitute a separate
9 "breach" of the attorney's fiduciary obligation. (*Smith v. Lewis* (1975) 13 Cal.3d 349, disapproved on
10 other grounds in *In Re Marriage of Brown* (1976) 15 Cal.3d 838, 851 fn. 14). Stated otherwise,
11 allegations or acts of professional negligence, by themselves, are insufficient to support a claim for
12 breach of fiduciary duty. (*Stanley*, 35 Cal.App.4th at 1086).

13 Here, Johns has failed to allege sufficient ultimate facts reflecting a breach of fiduciary duty.
14 Johns alleges that Van Hoomissen, an employee of The Firm, breached his duties by failing to inform
15 Johns of a proposed tolling agreement extension and engaging in discussions with Third on behalf of
16 PCM for termination of Johns' employment. These allegations, alone, are wholly insufficient to
17 allege a claim for breach of fiduciary duty. *This assertion does not involve a purported breach of the*
18 *duties of loyalty or confidentiality, or both.* In regards to the negotiations that took place, how did
19 these negotiations lead to Johns' termination? And in what manner do the alleged negotiations
20 involve a breach of fiduciary duty, a violation of a duty of loyalty or confidentiality? The Cross-
21 Defendants submit they do not. At best, these allegations might be mere errors or omissions, but as
22 pled, the allegations fall well short of establishing any breach of a fiduciary duty.

23 With respect to the tolling agreement, Johns merely alleges that had he been informed of the
24 agreement, he would have entered into it and avoided being sued by Third. (Cross-Complaint ¶ 95.)
25 Again, no facts are pled establishing that this conduct amounts to *a breach of duties of loyalty or*
26 *confidentiality, or both.* What would at best be an error or omission, cannot transform into a separate
27 cause of action for breach of fiduciary duty based solely on conclusory statements.

28 These defects render the sixth cause of action subject to demurrer, for failure to state facts

1 sufficient to constitute a cause of action, pursuant to CCP §430.10(e).

2 The sixth cause of action is also vague, uncertain, and unintelligible, as it cannot be
3 ascertained what acts or omissions Johns contends constitute a "breach" of Defendants' fiduciary
4 duties, or how such could possibly have caused Johns' damage. This Demurrer should likewise be
5 sustained to this cause of action pursuant to CCP §430.10(f).

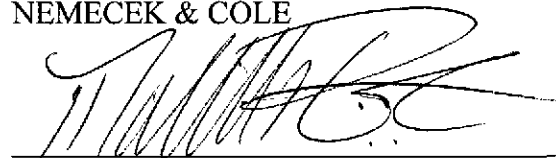
6 **6. CONCLUSION**

7 In light of the above, demurrer should be sustained to the Cross-Complaint without leave to
8 amend.

9
10 Dated: March 18, 2011

NEMECEK & COLE

11
12 By:



MICHAEL McCARTHY
MARSHALL R. COLE
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15260 VENTURA BOULEVARD, SUITE 920, SHERMAN OAKS, CALIFORNIA 91403-5344
TELEPHONE (818) 788-9500 FACSIMILE (818) 501-0328

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 15260 Ventura Blvd., Suite 920, Sherman Oaks, CA 91403.

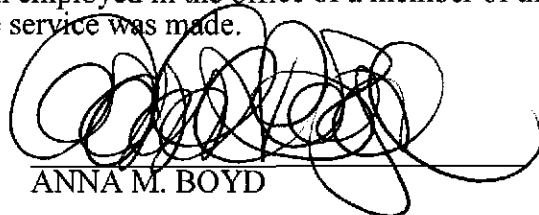
On March 21, 2011, I served the document described as **NOTICE OF DEMURRER AND DEMURRER TO CROSS-COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** upon the interested parties in this action in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

- (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 Sherman Oaks, 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 day of deposit for mailing contained in affidavit.
- (By Overnight Delivery) I deposited this document in the box or other facility located at 15260 Ventura Blvd., Suite 920, Sherman Oaks, CA 91403 regularly maintained by Overnite Express, in an envelope designated by Overnite Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served, for guaranteed next business day delivery.
- (By Facsimile Transmission) I caused the foregoing document to be served by facsimile transmission to each of the interested parties at the facsimile machine telecopy number shown above.
- (By Personal Service) I caused the delivery of such envelope by hand to the offices of the addressee.

Executed on March 21, 2011, at Sherman Oaks, California.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


ANNA M. BOYD

Service List
Orange County Superior Court Case No. 30-2010 00380231

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