

MAR 21 2011

ALAN CARLSON, Clerk of the Court

F. Ibarra
BY F. IBARRA

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8 Attorneys for Cross-Defendant
9 JACKSON DeMARCO TIDUS PECKENPAUGH

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

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.

Case No. 30-2010 00380231

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

**NOTICE OF MOTION AND MOTION
TO SEVER CROSS-COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: April 28, 2011
Time: 2:00p.m.
Dept: C-8

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
BISBRO, an individual; PAUL VAN
HOOMISEN, 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

Complaint filed: June 10, 2010

Cross-Complaint filed: December 30, 2010

Trial Date: No Date Set

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

6 **PLEASE TAKE NOTICE** that on April 28, 2011 at 2:00 p.m., or as soon thereafter as the
7 matter may be heard, in Department C8 of the above-entitled Court, located at 700 Civil Center Drive
8 West, Santa Ana, California 92701, Cross-Defendant JACKSON DEMARCO, TIDUS and
9 PECKENPAUGH (collectively, "The Firm") will, and hereby does, move this Court for an order
10 severing the Cross-Complaint filed by Cross-complainant MILTON JOHNS ("Johns") in this action
11 from the First Amended Complaint ("FAC"), and ordering that the Cross-Complaint be separately
12 tried pursuant to Code of Civil Procedure section 1048(b).

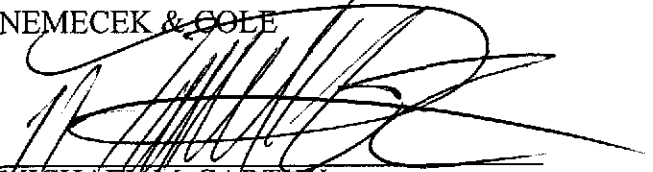
13 This motion is made pursuant to Code of Civil Procedure sections 1048(b), on the grounds
14 that the causes of action Johns asserted in the Cross-Complaint and the facts alleged in support of said
15 causes of action are wholly and completely unrelated to the causes of action alleged by Plaintiff Third
16 Laguna Hills Mutual in the underlying action. The Cross-Complaint is based upon an entirely
17 different set of facts, evidence, and testimony, such that severance of the pleadings would be
18 conducive to judicial expediency and economy.

19 The motion is based upon this notice of hearing, the attached memorandum of points and
20 authorities, the Cross-Complaint, all of the pleadings and records on file with the court, such
21 documentary evidence that may be submitted before or at the hearing on this matter, and the argument
22 of counsel at the hearing on this matter. It is also based upon the Motion for Severance by Cross-

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1 Defendants Professional Community Management of California, Inc., Russ Disbro, Donny Disbro;
2 and the Motion for Severance by Cross-Defendants Paul Van Hoomissen and Much, Shelist, Freed
3 Denenberg, Ament & Rubenstein.

4 NEMECEK & COLE



5
6 Dated: March 18, 2011

By:

MICHAEL McCARTHY
MARSHALL R. COLE
Attorneys for Cross-Defendant
JACKSON DeMARCO TIDUS PECKENPAUGH

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 Contained within the Cross-Complaint filed by largely focusing on wrongful termination
4 allegations lie two causes of action against Cross-Defendant JACKSON DEMARCO, TIDUS &
5 PECKENPAUGH ("The Firm"). Cross-complainant MILTON JOHNS ("Johns"), alleges intentional
6 interference with contractual relations and breach of fiduciary duties arising out of The Firm's
7 purported representation of Johns in PROFESSIONAL COMMUNITY MANAGEMENT OF
8 CALIFORNIA, INC.'s, ("PCM") dispute with Plaintiff Third Laguna Hills Mutual while Johns, his
9 employer PCM. The Firm was representing PCM, Johns and another PCM employee in pre-litigation
10 negotiation with Plaintiff which evolved into the Plaintiff's claim herein. As filed, the claims in the
11 Johns' Cross-Complaint are wholly unrelated to the lawsuit filed by Third Laguna Hills Mutual
12 ("Third") and appears purely aimed at gaining leverage in the wrongful termination suit against PCM.
13 Because there is no legitimate overlap between the two matters, this Court should sever the Cross-
14 Complaint and not permit Johns to cause undue burden to this Court and the parties by combining two
15 unrelated actions.

16 **2. STATEMENT OF RELEVANT FACTS**

17 The Plaintiff's lawsuit concerns Laguna Woods Village, a large "active adult" retirement
18 community in Orange County, California. PCM manages Laguna Woods, and previously employed
19 Milton Johns as on site General Manager. Third, one of four mutual benefit housing corporations that
20 governs Laguna Woods, alleges in its First Amended Complaint ("FAC") that PCM, Johns and
21 another PCM employee, Janet Price ("Price"), misappropriated funds through an undisclosed
22 employee incentive plan. (FAC, ¶¶ 10-13) The FAC contains causes of action against PCM, Johns
23 and Price for breach of contract, breach of fiduciary duty, fraudulent concealment, violation of
24 Business & Professions Code section 17200, elder abuse¹ and negligence.
25 Cross-Defendant Paul Van Hoomissen, at the time employed by The Firm, represented PCM, Johns
26 and Price in pre-litigation negotiations with Third, to try and resolve the alleged misappropriation
27 without resorting to litigation. Van Hoomissen since has joined the law firm Much Shelist Denenberg
28

¹ This Court sustained Defendants' Demurrer to an elder abuse cause of action without leave to amend.

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1 Ament & Rubenstein, P.C. ("Much Shelist") as of May 14, 2010.²

2 The gravamen of the Cross-Complaint is Johns' contention that PCM denied him promotions
3 and, eventually, impermissibly fired him. (Cross-Complaint, ¶¶17, 21-32.) The Cross-Complaint
4 contains causes of action against PCM, its principals and executives, The Firm, and others for Breach
5 of Contract, Breach of Implied-in-Fact Contract, Age-Based Discrimination, Wrongful Termination,
6 Interference with Contractual Relations, Breach of Fiduciary Duty, and Intentional Infliction of
7 Emotional Distress.

8 With respect to The Firm, the Cross-Complaint's Fifth Cause of Action for Interference with
9 Contractual Relations alleges The Firm through its employee Paul Van Hoomissen ("Van
10 Hoomissen") "interfered with Johns' employment contract by negotiating with Third for Johns'
11 termination." (Cross-Compl. ¶ 86) The Sixth Cause of Action alleges Van Hoomissen and The Firm
12 breached an attorney's fiduciary duty by (i) failing to inform Johns of a tolling agreement extension
13 proposed by Third. (Cross-Compl. ¶¶ 93-94), which purportedly resulted in him being sued by Third
14 because he would have entered into the tolling agreement and "thus avoided being sued by Third,"
15 (Cross-Compl. ¶ 93-95) and (ii) engaging in discussions regarding the termination in early 2010 of
16 Johns' employment with PCM. (Cross-Compl. ¶¶ 93-94) The harm alleged here is Johns' termination
17 from PCM. (Cross-Compl. ¶ 95)

18 **3. SEVERING THE CROSS-COMPLAINT FROM THE FAC WILL PREVENT**
19 **PREJUDICE TO THE CROSS-DEFENDANTS, PROMOTE JUDICIAL ECONOMY,**
20 **AND AVOID CONFUSION OF PERTINENT ISSUES**

21 Section 1048(b) of the California Code of Civil Procedure ("CCP") provides, in pertinent part:

22 The court, in furtherance of convenience or to avoid prejudice, or when
23 separate trials will be conducive to expedition and economy, may order
24 a separate trial of any cause of action, including a cause of action
25 asserted in a cross-complaint, or of any separate issue or of any number

26
27 ² Because he was at two separate law firms during the time period involved in this dispute, Van
28 Hoomissen is jointly represented as a cross-defendant by Nemecek & Cole, which also represents
Jackson DeMarco and Bird Marella, Boxer represents Much Shelist and Van Hoomissen from the
time he joined Much Shelist.

1 of causes of action or issues[.]

2 In addition, pursuant to CCP § 128(3), the Court has broad discretion to “provide for the
3 orderly conduct of proceedings before it.”

4 In interpreting these statutes, courts have broad discretion pursuant to these statutes to order
5 separate trials in the interests of judicial economy. (*Grappo v. Coventry Fin. Corp.* (1991) 235 Cal.
6 App. 3d 496, 503-504.) It is equally well established that where the complaint and cross-complaint
7 present separate and independent, severance is appropriate. (*Omnji Aviation Managers, Inc. v.*
8 *Municipal Court* (1976) Cal. App. 3d 682, 685.) In *Omni*, the court held that severance of the cross-
9 complaint from the FAC was proper when it was clear that the cross-complaint raised issues which
10 confused the issues raised by the FAC. (*Id.*)

11 Aside from whether the two cases present separate issues, Courts often look to other factors in
12 determining whether severance is appropriate. For instance, courts often consider the complexity of
13 the issues, the risk of jury confusion, judicial economy, and as mentioned whether the claims present
14 separate and independent issues. (*Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co.* (1987) 189 Cal.
15 App. 3d 1072, 1086.)

16 **A. A Joint Trial Will Prejudice Cross-Defendants Due To Issues Of Attorney-Client**
17 **Privilege**

18 Van Hoomissen currently represents PCM, Russ Disbro and Donny Disbro for an act arising
19 out of the FAC. At the same time, he is forced to defend himself against the charges in the Cross-
20 Complaint. This undoubtedly creates a conflict which prejudices all Cross-Defendants. As to The
21 Firm, Van Hoomissen was an attorney with The Firm during the time of the purported bad acts in the
22 FAC and Cross-Complaint as alleged in both.

23 The California Rules of Professional Conduct recognize the problems inherent in attorneys
24 serving as counsel and witness in the same case, and prohibit it except under extremely limited
25 circumstances. Rule 5-210 states, in relevant part:

26 "A member shall not act as an advocate before a jury which will hear testimony from
27 the member unless (A) The testimony relates to an uncontested matter; or (B) The
28 testimony relates to the nature and value of legal services rendered in the case; or (C)

1 The member has the informed written consent of the client."

2 It is undoubtedly certain that Van Hoomissen will be forced to testify with regards to the
3 actions asserted against The Firm in the Cross-Complaint. This will greatly prejudice The Firm and
4 all other Cross-Defendants. Therefore, severance is appropriate.

5 **B. The FAC and Cross-Complaint Present Entirely Separate And Independent**
6 **Issues**

7 A plain reading of both the FAC and the Cross-Complaint establish that the issues presented
8 are completely independent, and in fact, have virtually no relation to each other whatsoever. The
9 FAC arises out of a business dispute between PCM and Third, whereas the Cross-Complaint arises
10 out of allegations stemming from Johns termination of employment at PCM. Although Johns alleges
11 that his termination stemmed from the negotiations that took place with Third, both the factual and
12 legal basis for the FAC and the Cross-Complaint differ dramatically. Both allege entirely different
13 causes
14 of action based upon an entirely different set of facts.

15 As a result of these differences, each case will involve different witnesses, completely separate
16 motion practice, different exhibits, and an entirely different set of facts. The FAC is based upon a
17 Management Agreement and the causes of action stem directly from it, namely breach of contract and
18 breach of fiduciary duty. In contrast, the Cross-Complaint revolves around conduct of parties not part
19 of the Management Agreement and circumstances separate and apart from the dispute between Third
20 and Johns. The Cross-Complaint regards activities of PCM, The Firm and others regarding Johns
21 employment with PCM. The only overlap is that The Firm allegedly negotiated with Third for Johns
22 termination, despite the fact that Third is not even a party to the alleged employment agreement.
23 Having to battle through these differences and apply various different legal principles throughout the
24 course of litigation will cause great undue prejudice to The Firm and, the other cross-defendants. As
25 severance is clearly possible under the law based upon the facts at hand, the Court should exercise its
26 discretion and sever the FAC from the Cross-Complaint.

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1 **C. A Jury Will Undoubtably Be Confused By The Differing Legal Principles And**
2 **Facts of Both The FAC and Cross-Complaint**

3 As noted above, the FAC and Cross-Complaint involve different facts, different parties, will
4 require different witnesses and experts to testify, and are based on entirely different events. With
5 these grave differences, a jury will be undoubtably be confused as they would virtually be sitting
6 through two entirely separate trials. A jury could equally be confused on the basis that the two cases
7 are somehow connected, when they are not, and base certain opinions and testimony on the merits of
8 one matter to the other matter. This confusion will lead to unfair prejudice to all parties and frustrate
9 the judicial process. As a result, severing the Cross-Complaint is proper and will avoid this very
10 confusion and prejudice.

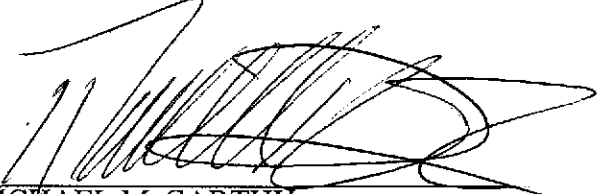
11 **D. Severance Of The Cross-Complaint Promotes Judicial Economy**

12 Based upon the well established principle as outlined in *Grappo*, severing the Cross-
13 Complaint will serve to promote judicial economy by allowing the issues of the Cross-Complaint to
14 be addressed separately from the FAC. The business dispute claims in the FAC have virtually
15 nothing to do with the termination of Johns employment with PCM. The Cross-Complaint, as it
16 stands completely separate from the FAC, will require an separate and apart discovery and motion
17 practice, confuse the jury with respect to Johns' claims against The Firm and lengthen the entire
18 litigation for all parties.

19 **4. CONCLUSION**

20 For the foregoing reasons, The Firm respectfully requests that the Court sever the Cross-
21 Complaint pursuant to Code of Civil Procedure section 1048(b), and order that the Cross-Complaint
22 be tried separately from the FAC.

23
24 Dated: March 18, 2011

By: 
MICHAEL McCARTHY
MARSHALL R. COLE
Attorneys for Cross-Defendants
JACKSON DeMARCO TIDUS PECKENPAUGH

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

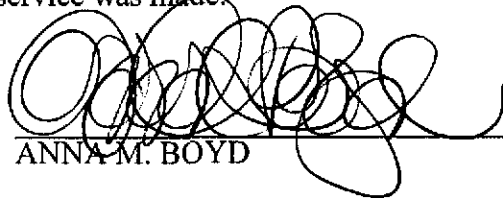
On March 21, 2011, I served the document described as **NOTICE OF MOTION AND MOTION TO SEVER CROSS-COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** upon the interested parties in this action in sealed envelopes addressed as follows:

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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<p>7 Darren J. Campbell, Esq. LAW OFFICES OF DARREN J. CAMPBELL, APC 2030 Main Street, Suite 1300 Irvine, CA 92614 Tel: (949) 260-4901 Fax: (949) 271-4046 djcampbell105@hotmail.com</p>	<p><i>Attorneys for Defendant and Cross-Complainant</i> MILTON JOHNS</p>
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