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7 VAN HOOMISSEN and MUCH SHELIST
DENENBERG AMENT & RUBENSTEIN,
8 P.C.

ELECTRONICALLY FILED
Superior Court of California,
County of Orange
03/21/2011 at 10:04:00 AM
Clerk of the Superior Court
By Rachelle Vavra, Deputy Clerk

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**
12

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

14 Plaintiff,

15 vs.

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

20 Defendants.

21 MILTON JOHNS, an individual,

22 Cross-Complainant,

23 vs.

24 PROFESSIONAL COMMUNITY
25 MANAGEMENT OF CALIFORNIA,
INC., a California corporation, also known
26 as PCM; RUSS DISBRO, an individual;
DONNY DISBRO, an individual; PAUL
27 VAN HOOMISSEN, an individual;
JACKSON, DEMARCO, TIDUS,
28 PECKENPAUGH, a California Law

CASE NO. 30-2010 00380231

**CROSS-DEFENDANTS PAUL VAN
HOOMISSEN AND MUCH SHELIST
DENENBERG AMENT &
RUBENSTEIN, P.C.'S NOTICE OF
MOTION AND MOTION TO SEVER
CROSS-COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
PAUL VAN HOOMISSEN**

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

Assigned to Hon. Kirk H. Nakamura,
Dept. C-8

Action Filed: June 10, 2010
Trial Date: Not Set

1 Corporation; MUCH, SHELIST, FREED,
2 DENENBERG, AMENT &
3 RUBENSTEIN, an Illinois Corporation
4 doing business in California; THIRD
5 LAGUNA HILLS MUTUAL, a California
6 non-profit corporation; GOLDEN RAIN
7 FOUNDATION OF LAGUNA WOODS, a
8 California non-profit corporation;
9 ROBERT HATCH, an individual; JIM
10 MATSON, an individual; and ROES 1
11 through 150, inclusive,

12 Cross-Defendants.

13 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

14 PLEASE TAKE NOTICE that on April 28, 2011, at 2:00 p.m., or as soon thereafter
15 as the matter may be heard, in Department C-8 of the above-entitled Court, located at 700
16 Civic Center Drive, Santa Ana, CA 92701, cross-defendants Paul Van Hoomissen and
17 Much Shelist Denenberg Ament & Rubenstein, P.C. will and hereby do move this Court
18 for an order severing the Cross-Complaint in this action from the Complaint, and ordering
19 that the Cross-Complaint be separately tried pursuant to Code of Civil Procedure
20 § 1048(b).

21 This motion is brought pursuant to Code of Civil Procedure § 1048(b), on the
22 grounds that the causes of action cross-complainant Milton Johns asserted in the Cross-
23 Complaint are unrelated to the causes of action alleged by Third Laguna Hills Mutual in
24 the underlying action, and because a joint trial will cause significant prejudice to Cross-
25 Defendants and will be inefficient.

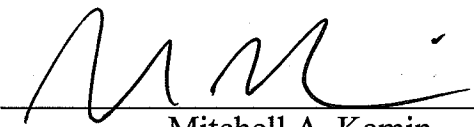
26 This Motion is based upon this Notice of Motion and Motion, the accompanying
27 Memorandum of Points and Authorities in support thereof, the Declaration of Paul Van
28 Hoomissen, all pleadings and papers on file in this action, and upon such other matters as
may be presented to the Court at the hearing. It is also based upon the Motion for
Severance by Cross-Defendants Professional Community Management of California, Inc.,
Russ Disbro, and Donny Disbro, and the Motion for Severance by Cross-Defendants
Jackson DeMarco Tidus Peckenpaugh and Paul Van Hoomissen, filed in this action and in

1 which Cross-Defendants Much Shelist Denenberg Ament & Rubenstein, P.C. and Paul
2 Van Hoomissen respectfully join.

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DATED: March 21, 2011

Joel E. Boxer
Mitchell A. Kamin
BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.

By: 

Mitchell A. Kamin
Attorneys for Cross-Defendants PAUL VAN
HOOMISSEN and MUCH SHELIST
DENENBERG AMENT & RUBENSTEIN, P.C.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **INTRODUCTION**

4 Cross-Complainant Milton Johns (“Johns”) seeks compensation for what he
5 contends was his wrongful termination by Cross-Defendant Professional Community
6 Management, Inc. (“PCM”). PCM terminated Johns while Cross-Defendant Paul Van
7 Hoomissen was representing PCM, Johns and another PCM employee in pre-litigation
8 negotiations with Plaintiff which evolved into the underlying suit. Van Hoomissen
9 currently represents PCM as counsel of record in the underlying case.

10 By naming PCM’s counsel and his former and current law firms as Cross-
11 Defendants, Johns is seeking leverage in his wrongful termination case against PCM.
12 However, Johns’ claims against Van Hoomissen and his law firms – in addition to being
13 without merit – are unrelated to the substance of the underlying case. Most important for
14 this motion, Cross-Defendants will be severely prejudiced if the Cross-Complaint is tried
15 with the underlying case. California law strongly disfavors circumstances where third-
16 party claims jeopardize the attorney-client relationship by forcing an attorney to defend his
17 own interests while also trying to protect those of his client. Van Hoomissen and Much
18 Shelist respectfully urge the Court to avoid that situation in this case, and grant a separate
19 trial of the Cross-Complaint.

20 **II**

21 **BACKGROUND FACTS**

22 The lawsuit underlying this Cross-Complaint concerns Laguna Woods Village, a
23 large “active adult” retirement community in Orange County, California. PCM manages
24 Laguna Woods, and previously employed Milton Johns as on site General Manager.
25 Plaintiff Third Laguna Hills Mutual (“TLHM”), one of four mutual benefit housing
26 corporations that governs Laguna Woods, alleges in its First Amended Complaint (“FAC”)
27 that PCM, Johns and another PCM employee, Janet Price (“Price”), misappropriated funds
28 through an undisclosed employee incentive plan. (FAC, ¶¶ 10-13.) The FAC contains

1 causes of action against PCM, Johns and Price for breach of contract, breach of fiduciary
2 duty, fraudulent concealment, violation of Business & Professions Code § 17200,
3 negligence and elder abuse.¹

4 Cross-Defendant Paul Van Hoomissen represented PCM, Johns and Price in pre-
5 litigation negotiations with TLHM, and currently represents PCM and Price as lead trial
6 counsel in the underlying action. Van Hoomissen was a partner in the law firm Jackson
7 DeMarco Tidus & Peckenpaugh (“Jackson DeMarco”) and joined the law firm Much
8 Shelist Denenberg Ament & Rubenstein, P.C. (“Much Shelist”) on May 14, 2010.²

9 The gravamen of the Cross-Complaint is Johns’ contention that PCM denied him
10 promotions and, eventually, impermissibly fired him. (Cross-Complaint, ¶¶17, 21-32.)
11 The Cross-Complaint contains causes of action against PCM, its principals and executives,
12 and others for Breach of Contract, Breach of Implied-in-Fact Contract, Age-Based
13 Discrimination, Wrongful Termination, Interference with Contractual Relations, Breach of
14 Fiduciary Duty, and Intentional Infliction of Emotional Distress.

15 With respect to Van Hoomissen and Much Shelist, the Cross-Complaint’s Fifth
16 Cause of Action for Interference with Contractual Relations alleges they “interfered with
17 Johns’ employment contract by negotiating with Third for Johns’ termination.” (Cross-
18 Compl. ¶ 86.) The Sixth Cause of Action alleges Van Hoomissen and Much Shelist
19 breached an attorney’s fiduciary duty by (i) failing to inform Johns of a tolling agreement
20 extension proposed by TLHM. (Cross-Compl. ¶¶ 93-94.), which purportedly resulted in
21 him being sued by TLHM because he would have entered into the tolling agreement and
22 “thus avoided being sued by Third,” (Cross-Compl. ¶ 95.) and (ii) engaging in discussions

23
24 ¹ This Court sustained Defendants’ Demurrer to an elder abuse cause of action without
leave to amend.

25 ² Because he was at two separate law firms during the time period involved in this dispute,
26 Van Hoomissen is jointly represented in this Cross-Complaint by the undersigned and
27 Mike McCarthy, who also represents Jackson DeMarco. Undersigned counsel represents
28 Much Shelist and Van Hoomissen from the time he joined Much Shelist.

1 regarding the termination in early 2010 of Johns' employment by PCM. (Cross-Compl. ¶¶
2 93-94.) The harm alleged here is Johns' termination from PCM. (Cross-Compl. ¶ 95.)

3 **III**

4 **THE CROSS-COMPLAINT SHOULD BE SEVERED FROM THE COMPLAINT**
5 **AND TRIED SEPARATELY TO PREVENT PREJUDICE, PROMOTE JUDICIAL**
6 **ECONOMY AND AVOID JURY CONFUSION.**

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

9 The court, in furtherance of convenience or to avoid prejudice, or when
10 separate trials will be conducive to expedition and economy, may order
11 a separate trial of any cause of action, including a cause of action asserted
12 in a cross-complaint, or of any separate issue or of any number of causes of
13 action or issues[.]

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

16 A joint trial of this Cross-Complaint and the underlying case would place Van
17 Hoomissen in the impossible position of trying to represent his clients in the underlying
18 case at the same time he is forced to defend himself personally against the charges in the
19 Cross-Complaint. This conflict would severely prejudice Van Hoomissen, Much Shelist,
20 PCM and other Cross-Defendants, and jeopardize their right to a fair trial as well as their
21 right to full and effective representation by counsel of their choice. The Court can easily
22 avoid this untenable situation by ordering a separate trial of the Cross-Complaint pursuant
23 to CCP § 1048(b).

24 Courts regularly act to protect the attorney-client relationship and avoid
25 unnecessary conflicts of interest in situations like this. For example, California courts
26 have long recognized an exception to the general rule permitting equitable indemnity in
27 cases where predecessor attorneys sued for malpractice seek indemnity from successor
28 attorneys. *See, e.g., Shaffery v. Wilson, Elser*, 82 Cal.App.4th 768 (2000) (just as a lawyer

1 sued by a former client for professional negligence cannot seek indemnity from the lawyer
2 subsequently retained by the client on the same matter, a lawyer whose fees were paid by
3 his or her client's insurer is sued by the insurer for malpractice, the lawyer cannot seek
4 indemnity from lawyers hired by the insurer to monitor the same case).

5 There are several public policy reasons for this "predecessor-successor" rule,
6 foremost among them avoiding conflicts of interest between attorney and client: "The
7 threat of an indemnification action would arguably create a conflict of interest between the
8 successor attorney and the client because the greater the award the successor attorney
9 managed to obtain for the client in the malpractice action, the greater the exposure to the
10 predecessor attorney in the indemnification action." *Musser v. Provencher*, 28 Cal. 4th
11 274, 281, 48 P.3d 408, 412 (2002), *citing Held v. Arrant*, 67 Cal.App.3d 748, 752 (1977).
12 Additionally, suits against a successor attorney can (i) impinge on that attorney's loyalty to
13 their client, (ii) potentially preclude that attorney from trying the lawsuit depriving the
14 client of counsel of their choice, (iii) inject undesirable self-protective reservations into
15 their representation and (iv) jeopardize the policy of encouraging confidence and
16 preserving inviolate the attorney-client relationship. *See Shaffery*, 82 Cal.App.4th at 770-
17 778 (citing cases articulating multiple policy reasons for the predecessor-successor rule).

18 The California Rules of Professional Conduct recognize the problems inherent in
19 attorneys serving as counsel and witness in the same case, and prohibit it except under
20 extremely limited circumstances. Rule 5-210 states, in relevant part: "A member shall not
21 act as an advocate before a jury which will hear testimony from the member unless (A)
22 The testimony relates to an uncontested matter; or (B) The testimony relates to the nature
23 and value of legal services rendered in the case; or (C) The member has the informed
24 written consent of the client."

25 The same policy priorities behind the predecessor-successor rule and Rule 5-210
26 exist in the instant case, where the Cross-Complaint against Van Hoomissen (which
27 essentially accuses him of legal malpractice) could seriously impair his ability to represent
28 his clients in the underlying case. A joint trial would risk the perception that Van

1 Hoomissen's loyalty to his client is subservient to his own defense and his work for PCM
2 is influenced by his self-protective instincts. At minimum, opposing counsel could seek to
3 capitalize on Van Hoomissen's dual roles, and attacks on his credibility as Cross-
4 Defendant could also affect his credibility as trial counsel for PCM. (See Declaration of
5 Paul Van Hoomissen, attached hereto.) These risks are unacceptable and, fortunately,
6 unnecessary.

7 Courts have various means to deal with these situations that threaten the attorney-
8 client relationship, including their inherent authority to stay malpractice suits, *see Adams v.*
9 *Paul*, 11 Cal.4th 583, 593 (1995), and, where appropriate, the continuous representation
10 tolling provisions of CCP § 340.6. *See Crouse v. Brobeck, Phleger & Harrison*, 67 Cal.
11 App. 4th 1509, 1535, 80 Cal. Rptr. 2d 94, 109 (Cal. Ct. App. 1998) ("The continuing-
12 representation tolling provision has two purposes: to prevent the attorney from defeating a
13 malpractice action by continuing to represent the client until the statute of limitations has
14 run; and to avoid forcing the client to file a lawsuit that would disrupt the ongoing
15 attorney-client relationship and thereby prevent the negligent attorney from attempting to
16 correct or minimize the error.") Of course, Courts also have broad discretion pursuant to
17 CCP § 1048(b) to order separate trials in the interests of judicial economy and to avoid
18 prejudice. *Grappo v. Coventry Fin. Corp.*, 235 Cal. App. 3d 496, 503-504 (1991); *Nat'l*
19 *Electric Supply Co. v. Mt. Diablo Unified School Dist.*, 187 Cal. App. 2d 418, 422 (1960).
20 In this case, the most appropriate and straightforward means to avoid the prejudice and
21 conflicts inherent in a joint trial would be to sever the Cross-Complaint from the
22 underlying case pursuant to CCP § 1048(b).

23 Finally, in addition to the prejudice caused by a joint trial, the issues presented in
24 the Cross-Complaint are completely distinct from those of the underlying case, and failing
25 to sever these matters will cause jury confusion and impair judicial efficiency. The
26 underlying action is based upon the existence and administration of an employee incentive
27 plan at the Laguna Woods Village community between 1995 and 2008. (FAC ¶¶ 22-23.)
28 The Cross-Complaint, by contrast, centers upon an alleged wrongful termination that

1 occurred in February of 2010. (Cross-Compl. ¶ 32.) Consequently, the evidence and the
2 witnesses will generally not be the same. These and related points are more fully
3 described in Cross-Defendant PCM's Motion to Sever, in which Van Hoomissen and
4 Much Shelist join and incorporate by this reference.

5 IV

6 CONCLUSION

7 For the foregoing reasons, Cross-Defendants Paul Van Hoomissen and Much
8 Shelist respectfully requests that the Court sever the Cross-Complaint pursuant to Code of
9 Civil Procedure § 1048(b), and order that the Cross-Complaint be tried separately from the
10 Complaint.

11
12 DATED: March 21, 2011

13 Joel E. Boxer
14 Mitchell A. Kamin
15 BIRD, MARELLA, BOXER, WOLPERT,
16 NESSIM, DROOKS & LINCENBERG, P.C.

17 By: 

18 Mitchell A. Kamin
19 Attorneys for Cross-Defendants PAUL VAN
20 HOOMISSEN and MUCH SHELIST
21 DENENBERG AMENT & RUBENSTEIN, P.C.
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DECLARATION OF PAUL VAN HOOMISSEN

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DECLARATION OF PAUL VAN HOOMISSEN

I, Paul Van Hoomissen, declare as follows:

1. I am counsel of record for Defendants Professional Community Management, Inc. ("PCM") and Janet Price in *Third Laguna Hills Mutual v. Professional Community Management, Inc., et al.* I also am a Cross-Defendant in *Milton Johns v. Professional Community Management, Inc., et al.*, Orange County Superior Court Case No. 30-2010 00380231, brought by Cross-Complainant Milton Johns. I have personal knowledge of the facts set forth herein, which are known by me to be true and correct, and if called as a witness, I could and would competently testify thereto.

2. I am concerned the dual roles I now occupy in these cases – as counsel of record in the underlying case and as Cross-Defendant and possible witness in the Cross-Complaint – could become a "sword" for opposing counsel and negatively impact my clients in the underlying case. At minimum, counsel for Cross-Complainant would seek to attack my credibility as Cross-Defendant, which would also potentially affect my credibility as counsel for PCM. Moreover, certain evidence, such as purported settlement communications between Third Laguna Hills Mutual and PCM, might be admissible in the trial of the Cross-Complaint but would not be admissible in the underlying case.

3. To avoid any risk or perception that my ability to defend my clients in the underlying suit will be compromised if I am forced to concurrently as a party defend myself against the allegations of the Cross-Complaint, the Court should order a separate trial of the Cross-Complaint.

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

Executed March 18, 2011, at Irvine, California.



Paul Van Hoomissen

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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 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

On March 21, 2011, I served the following document(s) described as **CROSS-DEFENDANTS PAUL VAN HOOMISSEN AND MUCH SHELIST DENENBERG AMENT & RUBENSTEIN, P.C.'S NOTICE OF MOTION AND MOTION TO SEVER CROSS-COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF PAUL VAN HOOMISSEN** on the interested parties in this action as follows:

BY MAIL: By placing a true copy thereof in sealed envelopes addressed to the parties listed on the attached Service List and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with our firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of 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 affidavit.

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

Executed on March 21, 2011, at Los Angeles, California.



Lisa Lambrix

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SERVICE LIST
Third Laguna Hills Mutual v. Professional Community Management, et al.
Case No. 30-2010 00380231

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