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8 DENENBERG AMENT & RUBENSTEIN,  
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

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

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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

298127.1

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 STRIKE  
PORTIONS OF THE CROSS-  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES**

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., in Department  
15 C-8 of the above-entitled Court located at 700 Civic Center Drive West, Santa Ana, CA  
16 92701, or as soon thereafter as the matter may be heard, cross-defendants Paul Van  
17 Hoomissen and Much Shelist Denenberg Ament & Rubenstein, P.C. (collectively referred  
18 to as "Much Shelist") will move and hereby do move to strike from the Cross-Complaint,  
19 filed by defendant and cross-complainant Milt Johns ("Johns") on December 30, 2010, the  
20 following allegations and prayers for relief:

- 21 • Paragraph 89, page 15, line 26 through page 16, line 7; and
- 22 • Paragraph 97, page 17, lines 6 through 13;
- 23 • Prayer for Relief, paragraph 6, page 18, line 24; and
- 24 • Prayer for Relief, paragraph 9, page 19, line 9.

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1 This motion is based on California Code of Civil Procedure §§ 435-437, this  
2 Notice, the attached memorandum of points and authorities, the files and records of this  
3 case, any opposition or reply papers filed concerning this motion, and such matters as will  
4 be considered by the Court at the time of the hearing on the motion.  
5

6 DATED: March 21, 2011

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

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10 By:   
11 Mitchell A. Kamin  
12 Attorneys for Cross-Defendants PAUL VAN  
13 HOOMISSEN and MUCH SHELIST  
14 DENENBERG AMENT & RUBENSTEIN, P.C.  
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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”). Johns’ Cross-Complaint contains a variety of sensational  
7 allegations, but the claims against Cross-Defendants Paul Van Hoomissen and his law  
8 firm, Much Shelist Much Shelist Denenberg Ament & Rubenstein, P.C. (collectively  
9 referred to as “Much Shelist”) are much more tame, and center upon Van Hoomissen’s  
10 representation of Johns in the pre-litigation phase of the underlying lawsuit. Nevertheless,  
11 Johns seeks punitive damages against all Cross-Defendants, and specifically asks for them  
12 in the only two causes of action against Much Shelist: the Fifth, for Interference with  
13 Contractual Relations and, the Sixth, Breach of Fiduciary Duty. (Cross-Comp. at pp. 15-  
14 17.)

15 The bare bones pleading in the Cross-Complaint reflects the fact that the actions  
16 attributed to Much Shelist, even if true (which they are not), do not rise anywhere near the  
17 level required for punitive damages. Accordingly, the allegations and prayers for punitive  
18 damages must be stricken because the Cross-Complaint fails to set forth specific factual  
19 allegations of malice, oppression or fraud, which are statutorily required to support a  
20 request for exemplary damages under Civil Code § 3294.

21 II

22 DISCUSSION

23 A. Standard for Motion to Strike.

24 Defendants may bring a motion to strike specific portions of a complaint that are  
25 “irrelevant, false or improper” or are not “in conformity with the laws of this state.” Cal.  
26 Code Civ. Proc. §§ 436(a), (b). Additionally, a motion to strike is proper to strike damage  
27 allegations that are not in conformity with the law. Robert I. Weil et al., *Civil Procedure*

1 *Before Trial* ¶ § 7:182 (Rutter Group 2010) (hereafter “Weil, *Civil Procedure*”); *see, e.g.*,  
2 *McMahon v. Craig*, 176 Cal. App. 4th 1502, 1518 (2009) (affirming trial court’s order  
3 striking emotional distress damage claims not authorized by law).

4       When a material portion of a cause of action is defective, a court should grant a  
5 motion to strike because “the defendant should not have to suffer discovery and navigate  
6 the often dense thicket of proceedings in summary adjudication” to dispose of non-  
7 meritorious elements. *PH II, Inc. v. Sup. Ct.*, 33 Cal. App. 4th 1680, 1682 (1995). A  
8 motion to strike is particularly appropriate when, as here, a plaintiff requests relief that he  
9 may not recover as a matter of law. *See Id.* (“when a substantive defect is clear from the  
10 face of a complaint, . . . a defendant may attack that portion of the cause of action by filing  
11 a motion to strike”).

12 **B. The Court Should Strike Cross-Complainant’s Claim for Punitive Damages.**

13       Exemplary damages are allowed only where “it has been proven by clear and  
14 convincing evidence that the defendant has been guilty of oppression, fraud, or malice.”  
15 Cal. Civ. Code § 3294. “The law does not favor punitive damages and they should be  
16 granted with the greatest caution.” *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App.  
17 3d 347, 355 (1976). “The mere allegation [that] an intentional tort was committed is not  
18 sufficient to warrant an award of punitive damages.” *Grieves v. Superior Court*, 157 Cal.  
19 App. 3d 159, 166 (1984) (emphasis added) (granting motion to strike punitive damages).

20       California law does not allow for punitive damages based on allegations that are  
21 merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness;  
22 rather, some evidence that is inconsistent with the hypothesis that the tortious conduct was  
23 the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere  
24 negligence or other such noniniquitous human failing is required. *Food Pro Intern., Inc. v.*  
25 *Farmers Ins. Exch.*, 169 Cal. App. 4th 976 (2008). The mere characterization of the  
26 conduct challenged as willful, reckless, wrongful, and unlawful is not in itself sufficient to  
27 charge the malice in fact required to sustain a cause of action for punitive damages.

1 *Gombos v. Ashe*, 158 Cal. App. 2d 517 (1958), *disapproved of on other grounds by Taylor*  
2 *v. Superior Court*, 24 Cal. 3d 890 (1979).

3 The Cross-Complaint contains no facts to suggest Much Shelist is guilty of  
4 oppression, fraud or malice. Rather, it advances two causes of action related to Van  
5 Hoomissen's representation of Milton Johns in the pre-litigation stage of the underlying  
6 case. In the Fifth Cause of Action, Johns contends that Van Hoomissen and Much Shelist  
7 "interfered with Johns' employment contract by negotiating with Third for Johns'  
8 termination." (Cross-Compl. ¶ 86.) In his Sixth Cause of Action, Johns contends that Van  
9 Hoomissen and Much Shelist breached an attorney's fiduciary duties to him by failing to  
10 inform Johns of a tolling agreement extension proposed by Plaintiff TLHM (Cross-Compl.  
11 ¶¶ 93-94), and engaging in discussions regarding the termination in early 2010 of Johns'  
12 employment by PCM. (Cross-Compl. ¶¶ 93-94.)

13 Both of these causes of action concern conduct in the course of legal representation  
14 and neither contains facts demonstrating oppression, fraud or malice. Nevertheless, in an  
15 effort to seek punitive damages where none are warranted, Johns styles the Cross-  
16 Complaint in precisely the manner California courts expressly prohibit: by re-asserting the  
17 basic facts underlying both causes of action and baldly stating that this conduct was  
18 "willful, malicious and in conscious disregard of Johns' rights:"

19 "The conduct by [Much Shelist] in requesting and negotiating with regard to  
20 Johns' termination because he told the entities and individuals that they were  
21 violating California law was willful and malicious and in conscious disregard  
22 of Johns' rights with the intent to vex, injure and annoy him, such as to  
23 constitute oppression, fraud and/or malice under California Civil Code  
24 § 3294. Cross-Defendants' conduct, as described above, was carried out by  
25 its officers, directors and/or managing agents, or by lower level employees,  
26 whose conduct was knowingly authorized and ratified by the officers,  
27 directors and/or managing agents of Cross-Defendants. Accordingly, Johns

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1 is entitled to punitive damages in an amount appropriate to punish and make  
2 and example of Cross-Defendants.” (Cross-Compl ¶ 89.)

3  
4 “The conduct by [Much Shelist] in failing to properly represent Johns and  
5 failing to inform him of the developments pertaining to his livelihood was  
6 willful and malicious and in conscious disregard of Johns’ rights with the  
7 intent to vex, injure and annoy him, such as to constitute oppression, fraud  
8 and/or malice under California Civil Code § 3294. Cross-Defendants’  
9 conduct, as described above, was carried out by its officers, directors and/or  
10 managing agents, or by lower level employees, whose conduct was  
11 knowingly authorized and ratified by the officers, directors and/or managing  
12 agents of Cross-Defendants. Accordingly, Johns is entitled to punitive  
13 damages in an amount appropriate to punish and make and example of  
14 Cross-Defendants.” (Cross-Compl. ¶ 97.)

15 A “conclusory characterization of defendant’s conduct as intentional, wilful [sic]  
16 and fraudulent” is “patently insufficient” to state a cause of action supporting recovery of  
17 punitive damages. *Brousseau v. Jarrett*, 73 Cal. App. 3d 864, 872 (1977). In *Smith v.*  
18 *Superior Court*, 10 Cal.App.4th 1033 (1992), the plaintiff sought punitive damages by re-  
19 stating the allegations of her malpractice claim and contending that the underlying actions  
20 were intentional, willful and fraudulent. The Court of Appeals held that the trial court  
21 should have granted defendant’s motion to strike the prayer for punitive damages:  
22 “Plaintiff’s amended complaint alleges petitioner failed to adequately represent her  
23 property interests in the dissolution proceeding thereby resulting in economic injury. The  
24 sole basis for seeking punitive damages are the conclusory allegations of paragraph 14. As  
25 noted above, that paragraph is devoid of any factual assertions supporting a conclusion  
26 petitioners acted with oppression, fraud or malice.” *Id.* at 1042.

27 In his Cross-Complaint, Johns seeks punitive damages in exactly the manner  
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1 repeatedly rejected by California courts. Recognizing there are no facts to support the  
2 notion that Van Hoomissen's actions in the course of representing Johns were oppressive,  
3 fraudulent or malicious, Johns baldly asserts that they were, without any factual support.  
4 But simply saying something is willful and malicious does not make it so and, more  
5 importantly, is legally insufficient to sustain any claim for punitive damages against Much  
6 Shelist and Van Hoomissen.

7         Punitive damages are reserved for extreme cases where the defendant's actions are  
8 "reprehensible, fraudulent or in blatant violation of law or policy," and "the tortious  
9 conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent  
10 citizens should not have to tolerate." *Flyer's Body Shop Profit Sharing Plan v. Ticor Title*  
11 *Ins. Co.*, 185 Cal. App. 3d 1149, 1153 (1986). Cross-Complainant's bare and purely  
12 conclusory allegations of punitive damages are insufficient and should be stricken.

13 **C. The Court Should Strike Cross-Complainant's Prayer for Attorney's Fees.**

14         Code of Civil Procedure Section 1021 provides, "Except as attorney's fees are  
15 specifically provided for by statute, the measure and mode of compensation of attorneys  
16 and counselors at law is left to the agreement, express or implied, of the parties."  
17 Accordingly, attorney's fees are not recoverable as costs unless expressly authorized by  
18 statute or contract. *Real Property Services Corp. v. City of Pasadena*, 25 Cal.App.4th 375,  
19 379 (1994). The Cross-Complaint alleges no basis for the recovery of attorney's fees,  
20 whether in statute or any existing contract. As there is no basis for the recovery of  
21 attorney's fees, the prayer for attorney's fees should be stricken.

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III

CONCLUSION

For all the foregoing reasons, Much Shelist respectfully urges that this Court strike the above referenced portions of the Cross-Complaint.

DATED: March 21, 2011

Joel E. Boxer  
Mitchell A. Kamin  
BIRD, MARELLA, BOXER, WOLPERT,  
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By: \_\_\_\_\_



Mitchell A. Kamin

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

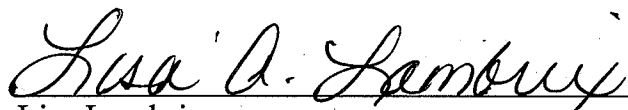
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

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 STRIKE PORTIONS OF THE CROSS-COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** 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

1 **SERVICE LIST**

2 **Third Laguna Hills Mutual v. Professional Community Management, et al.**  
3 **Case No. 30-2010 00380231**

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