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8

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

11  
12 THIRD LAGUNA HILLS MUTUAL, a  
California non profit corporation,

13 Plaintiff,

14 vs.

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

18 Defendants.  
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CASE NO. 30-2010-00380231

[Assigned for all purposes to the Honorable  
Kirk H. Nakamura, Department C-8]

**DEFENDANTS PROFESSIONAL  
COMMUNITY MANAGEMENT, INC.'S  
AND JANET PRICE'S MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF DEMURRER TO  
PLAINTIFF THIRD LAGUNA HILLS  
MUTUAL'S FIRST AMENDED  
COMPLAINT**

[Cal. Code Civ. Proc., § 430.10]

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

[Request for Judicial Notice filed  
concurrently herewith]

Complaint Filed: June 10, 2010  
FAC Filed: October 12, 2010  
Trial Date: Not set.

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1 OPENING MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION.

3 In sustaining PCM's and Price's demurrer to TLHM's Elder Abuse Cause of Action in its  
4 original Complaint, the Court gave TLHM leave to amend "for individuals to make a claim."  
5 Tellingly, TLHM did not do so -- likely because it realizes it cannot add any such individual's  
6 claim in light of TLHM's allegation that all of the money at issue belonged to the corporation,  
7 not any individual "elder." Instead, TLHM only amended its pleading by alleging the existence  
8 of Covenants, Conditions and Restrictions ("**CC&Rs**") and Bylaws, and then stating as an *ipsi*  
9 *dixit* that PCM and Price "violated the Elder Abuse an d [sic] Dependent Adult Civil Protection  
10 Act through Third Mutual's CC&Rs, Bylaws and Management Agreements." (See FAC at 11:7-  
11 12:10 [emphasis added].) This allegation was made apparently in response to this Court's ruling  
12 on the first demurrer that TLHM did not have standing "Nothing about the financial elder abuse  
13 claim seeks enforcement of governing documents, or damage to property which are the types of  
14 actions where HOAs typically have standing." (See Notice of Ruling, attached as Exhibit E to  
15 PCM's Request for Judicial Notice, filed concurrently herewith [**Notice of Ruling**].)

16 Citation to the existence of CC&Rs and Bylaws, however, does not convert the defective  
17 elder abuse claim into one of governing document enforcement. Indeed, TLHM tacitly  
18 acknowledges this, as the FAC makes no request that this Court enforce any particular provision  
19 in either the CC&Rs or Bylaws. Nor is any cause of action even identified as one to enforce the  
20 governing documents -- the elder abuse cause of action is still alleged to have been brought under  
21 Welfare & Institutions Code Section 15610.30. (FAC, 10:22-25.) In the end, these new  
22 allegations in no way cure the deficiencies upon which this Court already sustained PCM's and  
23 Price's first demurrer to this cause of action:

24 TLHM has still not pleaded the requisite elements of Elder Abuse. TLHM alleges  
25 no new facts in its FAC curing its prior failure to plead the requisite elements of this claim, but  
26 just like in its original Complaint, again admits that the funds at issue belonged to TLHM, the  
27 corporation, not to any individual elders. (FAC at 1:25, 11:1-3 and 3:23.) As this Court already  
28 ruled, since TLHM is a corporation and cannot be a "person" that is 65 years of age or older,

1 “Nothing about the W&I Code sections definition of ‘elder’ would include the plaintiff.” (*See*,  
2 *e.g.*, Notice of Ruling, Cal. Welf. & Inst. Code, §§ 15610.27, 15610.30; Cal. Code Civ. Proc.,  
3 § 430.10(e).) In addition, because TLHM has only alleged that its funds (*i.e.*, the funds of the  
4 corporation) were appropriated, and because TLHM did not amend its allegations to allege that  
5 any funds have been appropriated from any individual person, no individual “elder” has a claim  
6 under these facts (as a matter of law, an injury to a corporation does not provide its members  
7 with individual causes of action) and TLHM has therefore failed to meet the requisite elements  
8 of elder abuse for this reason as well. (*See, e.g., Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d  
9 93, 107; Cal. Code Civ. Proc., § 430.10(e).) Governing documents or not, these allegations are  
10 fatal to any claim for elder abuse, because not even a “representative action” will lie when the  
11 members of an HOA cannot state a claim for the cause of action being advanced. (*See, e.g.,*  
12 *Property Owners of Whispering Palms, Inc. v. Newport Pac., Inc.* (2005) 132 Cal.App.4th 666,  
13 673; *Jones, supra*, 1 Cal.3d at 107; Cal. Code Civ. Proc., § 430.10(e).)

14 TLHM’s amended allegations do not afford it standing to pursue its Elder Abuse  
15 claim. TLHM’s attempt to couch this matter as an enforcement of governing documents case  
16 defies both logic and well-settled California law. To begin with, TLHM does not allege, because  
17 it cannot, that PCM or Price are members of TLHM . Consequently, even if TLHM was seeking  
18 to enforce a particular covenant, condition, or restriction, it cannot do so against these non-  
19 member/non-owner defendants. (Cal. Civ. Code, § 1354 [governing documents “may be  
20 enforced by the association against an owner of a separate interest or by an owner of a separate  
21 interest against the association”]; TLHM CC&Rs at p. 2 [“The amended and restated restrictions  
22 set forth herein shall run with the real property . . . shall be binding upon all persons having or  
23 acquiring any interest in such Project . . . and be binding upon each successor in interest of each  
24 Owner . . . .”]; TLHM Bylaws § 2.4.20 [Definition of Member is limited to the legal owner of a  
25 condominium or a member of a housing mutual corporation].) As a result, the governing  
26 documents do not bestow standing upon TLHM to bring an elder abuse claim that is individual  
27 to individuals within the community, even if there was some specific provision within those  
28 documents addressing the situation at issue in this case, which there is not.

1 As a result, TLHM's amended allegations that it has authority under CC&Rs and Bylaws  
2 to hire a managing agent, operate as a Senior Citizen Housing Development (partially excepting  
3 the community from the discrimination prohibition under the Unruh Act), or enforce its  
4 governing rules against its members does not enable it to bring any private cause of action that  
5 an individual member or members may have against a non-member/non-owner.<sup>1</sup>

6 Similarly, there is nothing whatsoever in the management agreements that bestows upon  
7 TLHM standing to bring an individual member's possible claims against PCM. This is  
8 confirmed by TLHM's failure to cite any specific provision in the contracts. Instead, TLHM  
9 weakly alleges the "Management Agreements also contain implied covenants to comply with  
10 Third Mutual's governing documents . . . as well as local, state, and federal laws including the  
11 Elder Abuse and [sic] Dependent Adult Civil Protection Act." Of course, TLHM does not  
12 identify where those supposed covenants are found and this Court is not to accept conclusions in  
13 a pleading when determining its sufficiency.<sup>2</sup> (*Crystaplex Plastics, Ltd. v. Redevelopment*  
14 *Agency of the City of Barstow* (2000) 77 Cal.App.4th 990, 993.) Even if PCM had contractual  
15 obligations to follow the rules set forth in the CC&Rs, its failure to do so is a breach of contract,  
16 for which TLHM already has a cause of action. The agreements can only serve as a basis for a  
17 breach of contract claim and cannot be improperly transmuted into a tort. (*See, e.g., Applied*  
18 *Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510, 515.) Finally, the  
19 agreements attached to the FAC evidence no intention of the parties that TLHM will be granted  
20 standing to pursue possible claims of its individual members. (Civil Code § 1636.)

21 <sup>1</sup> It cannot be overstated that TLHM's FAC does not actually ask this Court to enforce any  
22 CC&R provision against anyone, much less PCM and Janet Price. Instead, it alleges only that  
23 these documents impose a responsibility and authority upon TLHM for the management of the  
community, but this does not convert TLHM to an elder, nor does it convert a statutory elder  
abuse claim to one that can be brought by the HOA.

24 <sup>2</sup> TLHM does allege that "Article I subsections (p) and (r) . . . require PCM to comply with, and  
25 to operate Third Mutual consistent with . . . the CC&Rs and Bylaws." TLHM probably meant  
26 Article 3, because there is no Article I subsections (p) and (r). Those provisions in Article 3,  
27 however, only instruct PCM to secure TLHM's members' compliance with rules promulgated by  
28 TLHM from time to time, and for PCM to carry out and perform all of the obligations as are  
reasonable, necessary and proper in the discharge of PCM's contractual duties. Nothing in these  
provisions even suggest TLHM's conclusion of law and cannot be used to defeat this demurrer.  
(Civil Code § 1636 [Contract must be interpreted to give effect to the mutual intention of the  
parties at the time of contracting].)

1 In order for it to prevail against this demurrer, this Court would have to rule that the  
2 management agreements and the governing documents somehow abolish the legal separation  
3 between an entity and its members (which would be contrary to longstanding corporate law), as  
4 well as permit an association to essentially maintain any cause of action -- including personal  
5 torts like elder abuse -- on behalf of any of its members. There is certainly no authority nor facts  
6 to justify such a ruling. This case is not about elder abuse, but rather, is about whether an  
7 employee incentive plan was adequately disclosed and administered to a corporation: TLHM.  
8 (*See generally*, FAC.) Thus, since TLHM has not pleaded any new facts upon which an elder  
9 abuse claim may be maintained, the Court should sustain this Demurrer and do so without leave  
10 to amend. (Cal. Code Civ. Proc., § 430.10(e); *Lawrence v. Bank of America* (1985)163  
11 Cal.App.3d 431, 436; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

12 **II. BACKGROUND.**

13 **A. TLHM's Original Complaint.**

14 On June 10, 2010, TLHM filed its original Complaint in which it alleged causes of action  
15 for breach of contract, breach of fiduciary duty, fraudulent concealment, violation of Business &  
16 Professions Code section 17200, elder abuse and negligence. (*See* Request for Judicial Notice  
17 filed concurrently herewith [*RJN*] at Exh. "A" [Complaint].)

18 **B. The Court Sustains PCM's And Price's Demurrer To TLHM's Elder Abuse**  
19 **Claim.**

20 On July 28, 2010, PCM and Price filed a Demurrer to TLHM's Complaint in which they  
21 attacked the legal sufficiency of TLHM's Fifth Cause of Action for Elder Abuse. (RJN at Exh.  
22 "B" [Demurrer]; *see also, id.* at Exh. "C" [TLHM's Opposition to Demurrer] and Exh. "D"  
23 [Reply Brief in support of Demurrer].) On September 23, 2010, the Court sustained PCM's and  
24 Price's Demurrer to TLHM's Elder Abuse claim, in which it specifically stated as follows:

25  
26 "[D]emurrer to the 5th c/a for Elder Abuse is ***sustained with leave***  
27 ***to amend (for individuals to make a claim) for lack of standing.***  
28 Nothing about the financial elder abuse claim seeks enforcement of  
governing documents, or damage to the property which are the  
types of actions where HOAs typically have standing. Nothing  
about the W&I Code sections definition of "elder" would include

1 the plaintiff. See Cal. Welf. & Inst. Code § 15610.27. Finally, The  
2 Estate of Lowrie case discusses who has standing under Ca Welf &  
3 Inst. Code §15657.3, which is entirely inapplicable here because  
4 that statute and case involves standing once the decedent holding  
5 the Elder Abuse claim dies. That is not the case here. Here, we have  
6 a plaintiff HOA apparently representing the interests of living  
7 elders who could bring their own Elder Abuse claims. RJN  
8 granted.” (*Id.* at Exh. “E” [Notice of Ruling] [emphasis added].)

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18 **C. TLHM Files An Amended Complaint In Which It Bases Its Elder Abuse  
Claim On The Same Defective Allegations In Its Original Complaint.**

19 On October 12, 2010, TLHM filed its FAC in which it alleges the same causes of action  
20 as in its original Complaint. (RJN at Exh. “F” [FAC].) Notably, TLHM did not supplement its  
21 general allegations nor did it add any individual plaintiffs. Instead, at its Fifth Cause of Action  
22 for Elder Abuse, it only alleged the existence of its CC&Rs and Bylaws, and cited to various  
23 provisions within those documents that impose a responsibility and authority upon TLHM to  
24 manage the community and hire a managing agent to assist in doing so. These allegations,  
25 though, are just more specific facts of the very same allegations that this Court already rejected  
26 when it granted PCM’s and Price’s first demurrer. (*Id.*; *compare, id.* at Exh. “A” [Complaint].)  
27 Accordingly, as set forth in detail below, TLHM’s Elder Abuse claim in its FAC fails for the  
28 same reasons this Court sustained the demurrer to this claim in TLHM’s original Complaint.

19 **III. LEGAL DISCUSSION.**

20 **A. The Court Has Authority To Grant This Demurrer.**

21 This Court is well aware of its authority under California Code of Civil Procedure section  
22 430.10 pertaining to demurrers. In this case, though, it is important to note that TLHM’s  
23 “contentions, deductions, or conclusions of law” are not to be assumed as true, and this Court  
24 “may disregard any allegations that are contrary to the law or to a fact of which judicial notice  
25 may be taken.” (*Crystaplex Plastics, Ltd.*, *supra*, 77 Cal.App.4th 990, 993.)

26 This Court has already granted TLHM leave to amend “for individuals to make a claim”  
27 and TLHM did not do so. Moreover, the amended allegations TLHM did make do not cure the  
28 fatal flaws in the elder abuse claim that TLHM had an opportunity to address. Consequently,  
leave should not be granted and the demurrer should be sustained without leave to amend.

1           **B. TLHM's Amended Elder Abuse Cause Of Action Fails For The Same**  
2           **Reasons This Court Sustained PCM's And Price's Original Demurrer.**

3           1.       TLHM has still not pleaded the requisite elements of Elder Abuse.

4           A cause of action for financial abuse of an “elder” under the Elder Abuse and Dependent  
5           Adult Civil Protection Act requires proof of the following elements: (1) the defendant took or  
6           appropriated an individual’s property; (2) the individual was 65 years of age or older, or a  
7           dependent adult, at the time of the defendant’s conduct; (3) the defendant took or appropriated  
8           the property for a wrongful use, with the intent to defraud or by undue influence; (4) the  
9           individual was harmed; and (5) the defendant’s conduct was a substantial factor in causing the  
10          individual’s harm. (*See, e.g.*, Cal. Welf. & Inst. Code, §§ 15610.27 [“elder” defined] and  
11          15610.30 [financial abuse of an elder]; *see also*, Cal. Judicial Council Civil Jury Instructions  
12          3100, Financial Abuse -- Essential Factual Elements (2008 Ed.).)

13          Here, TLHM alleges no new facts in its FAC curing its prior failure to plead the required  
14          elements of this claim. Just like in its original Complaint, TLHM again admits that (1) it is a  
15          “California non-profit corporation” (FAC at 1:25), and (2) the funds that PCM and Price  
16          purportedly took belonged to TLHM, the corporation, and not to any individual elders. (*Id.* at  
17          11:1-3 [“Defendants, and each of them, have taken, misappropriated, obtained and retained  
18          *Plaintiff’s money*”][emphasis added] and 3:23 [“the money belonged to Third Mutual”].) As this  
19          Court already ruled, “[n]othing about the W&I Code sections definition of ‘elder’ would include  
20          the plaintiff.” (RJN at Exh. “E” [Notice of Ruling].) Accordingly, since TLHM is a corporation  
21          and cannot be a “person” that is 65 years of age or older, it can never meet the required element  
22          of being an “elder” and therefore cannot satisfy the requisite elements of its Elder Abuse claim.  
23          (Cal. Code Civ. Proc., § 430.10(e).)

24          Similarly, no individual member of TLHM has a claim under TLHM’s own allegations,  
25          because an injury to TLHM does not provide its members with individual causes of action,  
26          whether or not they are “elders.” Regardless of their age, it is well settled that members of a  
27          corporation or limited liability company do not have individual causes of action for a wrong or  
28          injury to their company, and that any argument that they do as an “ultimate victim” fails as a

1 matter of law. (*See Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 [“a stockholder of a  
2 corporation has no personal or individual right of action against third persons, including the  
3 corporation’s officers and directors, for a wrong or injury to the corporation which results in the  
4 destruction or depreciation of the value of his stock, since the wrong thus suffered by the  
5 stockholder is merely incidental to the wrong suffered by the corporation and affects all  
6 stockholders alike”]; *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 [“Because a corporation  
7 exists as a separate legal entity, the shareholders have no direct cause of action or right of  
8 recovery against those who have harmed it”]; *PacLink Communications Int’l, Inc. v. Superior  
9 Court* (2001) 90 Cal.App.4th 958, 964 [“Because members of the LLC hold no direct ownership  
10 interest in the company’s assets (Corp. Code, § 17300), the members cannot be directly injured  
11 when the company is improperly deprived of those assets”].)

12 Indeed, this same authority has been specifically applied to homeowners’ associations  
13 and mutual benefit corporations. (*See, e.g., ECC Const., Inc. v. Ganson* (2000) 82 Cal.App.4th  
14 572, 576 [“Members of mutual benefit corporations, like shareholders, have no personal liability  
15 for the debts of the corporation except to the extent the alter ego doctrine applies or they owe  
16 money to the corporation”]; *Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560,  
17 1567 [“A member of a nonprofit corporation is prohibited from instituting or maintaining an  
18 action in the right of the corporation unless the action is a derivative suit”] [applying *Jones v.  
19 H.F. Ahmanson & Co., supra*, 1 Cal.3d at 106 to homeowners’ association].) As such, because  
20 TLHM has only alleged that its funds (*i.e.*, the funds of the corporation) were appropriated,  
21 TLHM has not alleged that any funds have been appropriated from any individual “elder” and  
22 has therefore failed to meet the requisite elements of elder abuse for this reason as well. (Cal.  
23 Code Civ. Proc., § 430.10(e).)

24 Under TLHM’s own allegations that the money taken belonged to it and was from its  
25 bank account establishes that its Elder Abuse claim cannot be sustained by either TLHM  
26 (because it is a corporation and not an elder) or an “elder” within the community (because the  
27 money supposedly taken was a corporation’s and not the elder member’s, and the claim the elder  
28 is an “ultimate victim” has been rejected in California). Since the individuals cannot even

1 maintain the claim, the whole cause of action fails regardless of TLHM's arguments for  
2 standing. (*Property Owners of Whispering Palms, Inc. v. Newport Pac., Inc.* (2005) 132  
3 Cal.App.4th 666, 673 ["an association has standing to bring suit on behalf of its members  
4 when...its members would otherwise have standing to sue in their own right"]; *see also*, Cal.  
5 Civ. Code, § 1368.3 [standing of associations].)

6 2. TLHM's amended allegations do not afford it standing to pursue its Elder  
7 Abuse claim.

8 Even if this Court were to look beyond the FAC's deficiencies relating to whose money  
9 was purportedly taken, TLHM still does not have standing to bring a claim for elder abuse on  
10 behalf of its members. The only changes TLHM made to its original Complaint are allegations  
11 of CC&Rs and Bylaws, including some of its provisions.<sup>3</sup> (*See* FAC at 11:7-12:10, Exh. "C"  
12 [CC&Rs] and Exh. "D" [Bylaws].) TLHM contends that its agreements with PCM "contain  
13 implied covenants to comply with Third Mutual's governing documents, including the CC&Rs  
14 and Bylaws, as well as local, state and federal laws, including the Elder Abuse and  
15 Dependent Adult Civil Protection Act." (*Id.* at 11:25-27.) From here, TLHM simply concludes  
16 that PCM and Price "violated the Elder Abuse and Dependent Adult Civil Protection Act  
17 through Third Mutual's CC&Rs, Bylaws and Management Agreements." (*Id.* at 12:8-10  
18 [emphasis].) TLHM is attempting to make an argument for standing by trying to contort its  
19 elder abuse claim into one of governing document enforcement to address the Court's prior  
20 ruling that this claim is not the type typically brought by homeowners' associations, as  
21 governance actions are. This argument, however, fails both under the weight of law and logic.

22 a. *The CC&Rs and Bylaws Do Not Provide TLHM With Standing.*

23 TLHM's allegations that its elder abuse claim is really one for enforcement of its CC&Rs  
24 and Bylaws does not even survive a cursory consideration. First, and most importantly, neither  
25 PCM nor Price are subject to TLHM's CC&Rs and Bylaws, as neither of them are members of  
26 TLHM. (*See generally*, FAC at Exh. "C" [CC&Rs] and Exh. "D" [Bylaws].) It is well settled

27 <sup>3</sup> As discussed, the FAC also has characterizations of various provisions and conclusions of the  
28 legal impact of those provisions, but these cannot be considered in determining of the FAC's  
sufficiency.

1 that a homeowners' association can enforce its governing documents, but not against those who  
2 are not members of the association, nor owners of land subject to those governing documents.  
3 (*See, e.g.*, 12 Witkin, Summary of California Law 10th (2005) Real Prop., § 105 [“association  
4 and homeowner may enforce governing documents against each other”]; Cal. Civ. Code, § 1354  
5 [governing documents “may be enforced by the association against an owner of a separate  
6 interest or by an owner of a separate interest against the association”]; Cal. Judicial Council Civil  
7 Jury Instructions 300, Breach of Contract (2008 Ed.) [a defendant must be a party to a contract to  
8 be subject to its terms].) By its very nature, enforcement of governing documents lies only  
9 between the association and its members -- not between an association and a third party. (*Id.*)

10 Here, there is nothing in the CC&Rs and Bylaws that alter these rules. Indeed, a review  
11 of the actual documents, rather than TLHM mischaracterizations of them, clearly identify those  
12 to whom they apply: TLHM CC&Rs at p. 2 [“The amended and restated restrictions set forth  
13 herein shall run with the real property . . . shall be binding upon all persons having or acquiring  
14 any interest in such Project . . . and be binding upon each successor in interest of each  
15 Owner . . . .”]; TLHM Bylaws § 2.4.20 [Definition of Member is limited to the legal owner of a  
16 condominium or a member of a housing mutual corporation].) TLHM does not allege, because it  
17 cannot, that PCM or Price are either members of TLHM or own property within TLHM's  
18 boundaries, or that provisions within these documents state the managing agent shall be subject  
19 to their terms. Consequently, the whole idea that the elder abuse claim is actually one for  
20 enforcement of CC&Rs and Bylaws falls flat.

21 Even if this Court were to assume somehow that the governing documents applied to  
22 PCM and an employee that does not even live in the community, TLHM is not asking that any  
23 CC&R or Bylaw provision actually be enforced! The FAC only generally references the powers  
24 and obligations of TLHM under the governing documents. The Fifth Cause of Action for Elder  
25 Abuse is still expressly brought only under the Welfare & Institutions Code Section 15610.30  
26 and the prayer for relief for that cause of action seeks only damages, exemplary damages, and  
27 attorneys' fees. Because of this, TLHM cannot in good faith, claim this cause of action is one to  
28 enforce governing documents.

1 affected persons are informed with respect thereto.” (See, FAC, Exhs. A and B.) This term only  
2 states that PCM shall make sure TLHM’s members follow the community’s rules in the use of  
3 common areas. It simply cannot be read to mean PCM agreed to comply with the CC&Rs and to  
4 submit to an “enforcement” proceeding that grants TLHM standing to assert its members’  
5 private claims.

6 Article 3 subsection (r) provides only that PCM shall “Carry out and perform all of the  
7 obligations as are reasonable, necessary and proper in the discharge of [PCM’s] duties under this  
8 agreement.” Again, this language, as a matter of law, cannot be read to mean that PCM agreed it  
9 would comply with CC&Rs and would submit to an “enforcement” proceeding that grants  
10 TLHM standing to assert its members’ private claims.<sup>5</sup>

11 Amazingly, TLHM’s elder abuse claim still fails, even if one were to accept the premise  
12 that the Management Agreements do obligate PCM and its employees to comply with the terms  
13 set forth in CC&Rs and Bylaws, and that those terms contained some sort of prohibition against  
14 an incentive plan. This is because a failure by PCM to discharge its contractual duties under the  
15 Management Agreements is only a breach of contract. TLHM cannot use a breach of the  
16 agreements to gain standing for elder abuse, as that would improperly transmute a breach of  
17 contract action into a tort. California courts have routinely rejected attempts to “obliterate vital  
18 established distinctions between contract and tort theories.” (*Applied Equipment Corp. v. Litton*  
19 *Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510; see also, *Copesky v. Superior Court* (1991) 229  
20 Cal.App.3d 678, 690 [“there is only one category of business transactions which definitionally is  
21 amenable to tort actions for contract breaches, and that is insurance”].) Rather, “[c]onduct  
22 amounting to a breach of contract becomes tortious only when it also violates an independent  
23 duty arising from principles of tort law.” (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*,  
24 *supra*, 7 Cal.4th at 515.) Thus, although the individual members of TLHM might have standing

25  
26 <sup>5</sup> In a different paragraph, TLHM cites Article 3 subsection (h) in support of its claim its Eder  
27 Abuse claim is really one for enforcement, but that provision deals with complying with “orders  
28 or requirements” issued by the government affecting the physical property “in connection with  
repairs and replacements.” Again, it cannot by any stretch of the imagination be seen as PCM’s  
agreement to be bound by CC&Rs and grant TLHM standing to advance its members’ private  
claims.

1 to sue for elder abuse if any of them were parties to this action and alleged facts satisfying the  
2 requisite elements of this claim, TLHM -- as a matter of law -- cannot gain standing for elder  
3 abuse simply because it had entered into management agreements with PCM.

4 **IV. CONCLUSION.**

5 Nothing in the management agreements or the governing documents can circumvent the  
6 requirements of the Elder Abuse Act and longstanding California corporate law. In order for  
7 TLHM's position to be accepted, this Court would have to rule that the management agreements  
8 and the governing documents somehow abolish the legal separation between an entity and its  
9 members (*i.e.*, such that the association's separate property is actually the property of its  
10 individual members), as well as permit an association to essentially maintain any cause of action  
11 on behalf of any of its members. This is certainly not the law in California, and it appears that  
12 TLHM's counsel is only pressing this issue in hopes of somehow making new law "on its  
13 client's dime." As such, because there is no authority permitting TLHM to maintain an elder  
14 abuse claim under the facts alleged, and since TLHM has failed to amend its Complaint to add  
15 any new facts entitling it to maintain this cause of action, this Demurrer should be sustained  
16 without leave to amend. (Cal. Code Civ. Proc., § 430.10(e); *see also*, *Lawrence v. Bank of*  
17 *America, supra*, 163 Cal.App.3d at 436; *Goodman v. Kennedy, supra*, 18 Cal.3d at 349.) Based  
18 on the foregoing, PCM and Price respectfully request that the Court sustain this demurrer to  
19 TLHM's Fifth Cause of Action for Elder Abuse without leave to amend.

20  
21 DATED: November 11, 2010

Respectfully submitted,  
MUCH SHELIST DENENBERG  
AMENT & RUBENSTEIN, P.C.

22  
23  
24 By: 

Paul E. Van Hoomissen  
Jeff J. Astarabadi

Attorneys for Defendants PROFESSIONAL  
COMMUNITY MANAGEMENT, INC. and  
JANET PRICE

**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I declare that I am over the age of eighteen (18) and not a party to the within action. My business address is 8001 Irvine Center Drive, Suite 400, Irvine, California 92618.

On November 12, 2010, I served the foregoing document described as **DEFENDANTS PROFESSIONAL COMMUNITY MANAGEMENT, INC.'S AND JANET PRICE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFF THIRD LAGUNA HILLS MUTUAL'S FIRST AMENDED COMPLAINT**, on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as stated on the attached service list.

**BY MAIL** - I deposited such envelope in the mail at Irvine, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice it would be deposited with the United Postal Service on that same day with postage thereon fully prepaid at Irvine, 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 (1) day after date of deposit for mailing in affidavit.

**BY ELECTRONIC TRANSMISSION** - I transmitted a .pdf version of this document by electronic mail to the interested parties at the email addresses identified on the attached service list.

**BY PERSONAL SERVICE** - I caused such envelope to be delivered by hand to the addressee(s) identified on the attached service list.

**BY OVERNIGHT DELIVERY** - I deposited such envelope for collection and delivery by a well-known overnight delivery service, i.e., Federal Express or Overnite Express with delivery fees paid or provided for in accordance with ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing packages for overnight delivery by Federal Express and Overnite Express for receipt on the same day in the ordinary course of business.

**(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.

Executed on November 12, 2010, at Irvine, California.

  
\_\_\_\_\_  
Lisa Romines

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