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8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER
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12 THIRD LAGUNA HILLS MUTUAL, a
California non profit corporation,
13

14 Plaintiff,

15 vs.

16 PROFESSIONAL COMMUNITY
MANAGEMENT, INC., a California
17 Corporation, also known as PCM; MILT
JOHNS, an individual; JANET PRICE, an
18 individual; and DOES 1 to 20, inclusive,
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20 Defendants.
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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JAN 06 2011

ALANN CARLSON, Clerk of the Court

A. Carlson
BY E. IBARRA

BY FAX

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 REPLY BRIEF IN
SUPPORT OF THEIR 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

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

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1 PROFESSIONAL COMMUNITY MANAGEMENT, INC. ("PCM") and JANET
2 PRICE ("Price") respectfully submit this Reply Brief in support of their Demurrer to the Fifth
3 Cause of Action in the First Amended Complaint ("FAC") filed by plaintiff THIRD LAGUNA
4 HILLS MUTUAL ("TLHM").

5 **I. INTRODUCTION.**

6 TLHM's Opposition does little more than recite the same arguments that this Court
7 already rejected when it sustained PCM's and Price's first demurrer to its elder abuse cause of
8 action. As to the elements of this claim, TLHM offers no explanation as to how it can be an
9 "elder." The answer is simple: there is no explanation. As this Court already ruled, TLHM is
10 a corporation and therefore cannot be an "elder" under the statutory scheme. (*See* Cal. Welf.
11 & Inst. Code, §§ 15610.27 ["elder" defined].)

12 Likewise, TLHM does not even respond to the controlling authority cited in PCM's
13 and Price's demurrer, which demonstrates that TLHM has not alleged any elder abuse against
14 any of its members. TLHM curiously claims that "separate and apart from the issues related to
15 the claim being brought by Third Mutual, rather than individual members, Defendants do not
16 contest that, in all other respects, Plaintiff has properly pleaded violations of the Financial
17 Elder Abuse statute" (Opposition at 1:5-8), but this is exactly what PCM and Price
18 demonstrated in their demurrer (*see* Demurrer at II.B.1). As a matter of law, TLHM must
19 allege that funds were appropriated directly from the individual elder members of TLHM in
20 order for there to be a viable elder abuse claim, not that funds were appropriated from the
21 corporation. (*See, e.g., Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 [an injury to a
22 corporation does not provide its members with individual causes of action].) TLHM's silence
23 is telling. Accordingly, because TLHM cannot satisfy the "elder" element of this cause of
24 action, and because no viable claim of any individual "elder" member of TLHM has been
25 alleged, the cause of action fails. (Cal. Code Civ. Proc., § 430.10(e).)

26 With respect to standing, TLHM's arguments also fall flat. It is axiomatic that TLHM
27 must allege actionable elder abuse against its members in order for it to pursue the cause of
28 action in a representative capacity. (*Property Owners of Whispering Palms, Inc. v. Newport*

1 *Pac., Inc.* (2005) 132 Cal.App.4th 666, 672-73 [homeowners association has standing to sue as
2 a representative only when its members have standing to sue in their own right].) No such
3 claim has been alleged, so TLHM cannot have standing as a “representative” when the facts
4 alleged do not provide its members with standing to sue themselves in the first place.

5 In addition, TLHM’s plea to this Court for reconsideration of its ruling concerning the
6 *Estate of Lowrie* case is procedurally improper, as TLHM did not timely move for
7 reconsideration or provide the Court with new or different facts or law justifying
8 reconsideration. (Cal. Code Civ. Proc., § 1008.) However, even if the Court is inclined to
9 entertain this argument yet again, the *Estate of Lowrie* case is certainly not instructive. The
10 holding in that case -- that a granddaughter had standing to bring an elder abuse lawsuit against
11 her uncle -- does not provide a basis for TLHM to be able to sue on behalf of its elderly
12 members as an “interested person.” (118 Cal.App.4th at 231.) Rather, consistent with the
13 *Estate of Lowrie* case, an “interested person” under the elder abuse act is one who can maintain
14 a probate action. (See, e.g., Cal. Prac. Guide Elder Abuse Ch. 2 at ¶ 2:26.) TLHM clearly
15 does not meet this requirement, and as the Court already aptly ruled in this case, “we have a
16 plaintiff HOA apparently representing the interests of living elders who could bring their own
17 Elder Abuse claims.”

18 Finally, TLHM’s attempt to gain standing by arguing that its elder abuse claim is
19 derived from its governing documents is entirely misplaced. Although TLHM only amended
20 its original Complaint to add allegations concerning its governing documents, these amended
21 allegations have no substantive impact whatsoever on TLHM’s defective elder abuse cause of
22 action. While TLHM argues that it has standing to enforce elder abuse through its governing
23 documents, it does not cite even a single case in which a homeowners association was held to
24 have standing to maintain a tort action like elder abuse due to terms in the association’s
25 governing documents. (See Opposition at 6:7-8:13.) Just like its other vacuous contentions,
26 this is because no such authority exists.

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1 To the contrary, well-settled homeowners association legislation and contract law (to
2 which TLHM provides no opposition), as well as the governing documents themselves,
3 mandate that TLHM's argument be rejected. Neither PCM nor Price are members of TLHM,
4 and as such, they cannot be subject to TLHM's CC&Rs and Bylaws. (See Cal. Civ. Code, §
5 1354.) Similarly, there are no terms in any of the Management Agreements under which PCM
6 agreed to comply with the CC&Rs and to submit to an "enforcement" proceeding that grants
7 TLHM standing to assert its members' private claims. (See FAC at Exhs. "A" and "B.")
8 Enforcement of governing documents could at best only amount to a claim of breach of
9 contract, not provide a basis for a tort like elder abuse. (*Applied Equipment Corp. v. Litton*
10 *Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.)

11 In sum, TLHM was granted leave to amend its original complaint to add individual
12 claims of its individual elderly members, but did not do so. Instead, it only added allegations
13 concerning its governing documents, which have no impact on the numerous deficiencies in its
14 elder abuse cause of action. Because TLHM could not cure its pleading deficiencies, PCM and
15 Price respectfully request that the Court sustain their demurrer to this cause of action without
16 leave to amend. (Cal. Code Civ. Proc., § 430.10(e).)

17 **II. LEGAL DISCUSSION.**

18 **A. TLHM Tacitly Admits In Its Opposition That It Has Not Pleaded The** 19 **Requisite Elements Of Its Elder Abuse Claim.**

20 **1. TLHM cannot satisfy the "elder" element of this claim.**

21 In its Opposition, TLHM glosses over its defective allegations in its FAC and
22 completely ignores this Court's prior ruling. Indeed, TLHM is forced to admit that it "clearly
23 pleaded that defendants have taken *plaintiff's property*." (Opposition at 1:22 [emphasis
24 added].) However, this is the very same pleading deficiency that this Court recognized in
25 TLHM's original Complaint and upon which it sustained PCM's and Price's demurrer thereto.
26 That is, because TLHM only alleged that its funds -- *i.e.*, the funds of the corporation -- were
27 appropriated, this Court specifically ruled that "[n]othing about the W&I Code sections
28 definition of 'elder' would include the plaintiff." (See RJN at Exh. "E" [Notice of Ruling]; *see*

1 also, Cal. Welf. & Inst. Code, §§ 15610.27 ["elder" defined] and 15610.30 [financial abuse of
2 an elder].) As TLHM did not follow this Court's instructions and amend its original
3 Complaint "for individuals to make a claim" (because it realizes it cannot add any such
4 individual's claim in light of TLHM's allegation that all of the money at issue belonged to the
5 corporation), the very same deficiency still exists in TLHM's FAC: TLHM is admittedly a
6 corporation and cannot be a "person" that is 65 years of age or older. Thus, because TLHM
7 can never meet the required element of being an "elder," it cannot satisfy the elements of this
8 claim. (Cal. Code Civ. Proc., § 430.10(e).)

9 2. The individual members of TLHM do not, as a matter of law, have a cause of
10 action for elder abuse based on funds allegedly appropriated from TLHM.

11 Apparently recognizing that its allegations are defective, TLHM attempts to argue that
12 it can somehow satisfy the elements of elder abuse because it alleged that "the residents of
13 Third Mutual...were the ultimate victims of Defendants' malfeasance" and TLHM "stands in
14 the shoes of its elderly members." (Opposition at 1:24, 2:11-12.) TLHM provides absolutely
15 no authority for this conclusion (because there is none), and tellingly fails to even address the
16 any of the authority cited by PCM and Price in their moving papers on this front. (See
17 generally, Opposition at 1:15-2:27; compare, Demurrer at 6:24-8:5.) As discussed in detail in
18 PCM's and Price's demurrer, TLHM's argument is precluded as a matter of law. (*Id.*)

19 It is well settled in California that members of a corporation do not have individual
20 causes of action for a wrong or injury to the company. (*Jones v. H.F. Ahmanson & Co.* (1969)
21 1 Cal.3d 93, 107 ["a stockholder of a corporation has no personal or individual right of action
22 against third persons...for a wrong or injury to the corporation"]; see also, *Grosset v. Wenaas*
23 (2008) 42 Cal.4th 1100, 1108; *PacLink Communications Int'l, Inc. v. Superior Court* (2001)
24 90 Cal.App.4th 958, 964.) Importantly, this very same authority has been specifically applied
25 to members of homeowners associations and mutual benefit corporations like TLHM. (See,
26 e.g., *ECC Const., Inc. v. Ganson* (2000) 82 Cal.App.4th 572, 576 ["Members of mutual benefit
27 corporations, like shareholders, have no personal liability for the debts of the corporation"];
28 *Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1567 ["A member of a

1 nonprofit corporation is prohibited from instituting or maintaining an action in the right of the
2 corporation unless the action is a derivative suit”].) As such, the law is clear that the members
3 of TLHM do not hold any individual causes of action for the alleged appropriation of funds
4 from the corporation, and there consequently cannot be any elder abuse when there are no
5 allegations that any individual elder’s funds were appropriated. (Cal. Code Civ. Proc., §
6 430.10(e).) TLHM’s failure to even attempt to respond to this controlling authority in its
7 Opposition is glaring.

8 **B. TLHM’s Opposition Sheds No New Light On Its Lack Of Standing For Its**
9 **Elder Abuse Claim.**

- 10 1. TLHM cannot have standing to sue in a representative capacity when
11 none of the individual members of TLHM have standing to sue for
12 elder abuse under the alleged facts.

13 TLHM admits in its Opposition that a homeowners association has standing to sue in a
14 representative capacity when “[i]ts members (or some of them) would have standing to sue in
15 their own right.” (Opposition at 5:10-17 [citing *Property Owners of Whispering Palms, Inc. v.*
16 *Newport Pac., Inc.* (2005) 132 Cal.App.4th 666, 672-73].) Here, TLHM is again forced to
17 admit that only “homeowner association funds have been misappropriated by Defendants.”
18 (Opposition at 6:3.) As a matter of law, though, such allegations cannot serve as a basis for
19 any individual claim of any of TLHM’s members. (See Section II.A.2. of this Reply Brief,
20 *supra* [citing, *inter alia*, *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93].) Moreover, the
21 only other authority cited by TLHM, *Raven’s Cove Townhomes, Inc. v. Knuppe Development*
22 *Co.* (1981) 114 Cal.App.3d 783, involved damage to individual units where – unlike here --
23 each individual owner had standing to sue in his or her own right. Therefore, TLHM clearly
24 has no standing to sue in a representative capacity in this case, as TLHM has failed to allege
25 any actionable underlying claim of individual “elders” for TLHM to “represent.” (See
26 *Property Owners of Whispering Palms, Inc., supra*, 132 Cal.App.4th at 673; Cal. Civ. Code, §
27 1368.3 [standing of associations].)

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1 2. In addition to its improper motion for reconsideration, the *Estate*
2 of *Lowrie* case nevertheless does not confer TLHM with standing to
3 pursue elder abuse.

4 Citing nothing more than the Rutter Group and the *Estate of Lowrie* case (the very
5 same authority TLHM cited in opposition to the first demurrer), TLHM brazenly asks this
6 Court to reconsider its prior ruling rejecting TLHM's argument that it is an "interested person"
7 for purposes of maintaining an elder abuse claim under the statutory scheme. (Opposition at
8 3:4-5:7; *see also*, RJN at Exh. "E" [Notice of Ruling].) This argument is procedurally
9 improper, though, as TLHM has not met any of the criteria necessary for reconsideration.
10 (Cal. Code Civ. Proc., § 1008.)

11 In order to seek reconsideration of a prior order, a party must (1) file a motion for
12 reconsideration within 10 days after service of notice of entry of the order, (2) set forth in the
13 motion new or different facts or law than those before the court at the time of the original
14 ruling, and (3) file a declaration in support of the motion stating the previous order and the new
15 or different facts or circumstances or law that are now claimed to justifying reconsideration.
16 (Cal. Code Civ. Proc., § 1008; *see also*, *Bennett v. Suncloud* (1997) 56 Cal.App.4th 91, 96 n. 1
17 [the name of the motion is not controlling; these requirements apply to any motion that asks
18 the judge to decide the same matter previously ruled upon].) Here, none of these requirements
19 are met. Not only is TLHM asking for reconsideration *months* after the original ruling, it has
20 offered no new facts or law whatsoever, let alone any declaration in support thereof.
21 (Opposition at 3:4-5:7.) Accordingly, the Court should disregard this argument in its entirety.

22 However, even if the Court is inclined to entertain the same argument yet again, the
23 *Estate of Lowrie* case is anything but dispositive. As the Court reasoned when it rejected this
24 argument the first time,

25 "The Estate of Lowrie case discusses who has standing under Ca
26 Welf & Inst. Code §15657.3, which is entirely inapplicable here
27 because that statute and case involves standing once the
28 decendent holding the Elder Abuse claim dies. That is not the case
 here. Here, we have a plaintiff HOA apparently representing the
 interests of living elders who could bring their own Elder Abuse
 claims." (RJN at Exh. "E" [Notice of Ruling] [emphasis added].)

1 The Court was absolutely correct then, and the same is true now. Contrary to TLHM's
2 argument, "interested persons" under the elder abuse act are to be viewed with the same eye as
3 those who can maintain a probate action. (Cal. Prac. Guide Elder Abuse Ch. 2 at ¶ 2:26 ["as
4 may an 'interested person' under Prob. C. § 48"]; *see also*, Cal. Prob. Code, § 48 ["interested
5 person' includes...[a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person
6 having a property right in or claim against a trust estate or the estate of a decedent"].) This is
7 exactly what was held in the *Estate of Lowrie* case, where the Court of Appeal ruled that a
8 granddaughter had standing to bring an elder abuse lawsuit against her uncle. (118
9 Cal.App.4th at 231.) The Court reasoned that "[i]n order to effectuate the purposes of the
10 Elder Abuse Act and Probate Code section 259, standing must be given to Lynelle, who is the
11 successor representative of decedent's estate." (*Id.*)

12 Simply put, there is no broad sweeping rule of law in *Estate of Lowrie* that permits
13 TLHM to maintain an elder abuse claim as an "interested person." (*See generally, Estate of*
14 *Lowrie, supra*, 118 Cal.App.4th at 229-31.) Rather, as this Court ruled, what we have here are
15 "living elders who could bring their own Elder Abuse claims." (RJN at Exh. "E" [Notice of
16 Ruling].) Indeed, TLHM was already given leave to amend to plead such individual claims if
17 it could, but it did not do so. (*Id.*; *see also*, FAC.) Thus, this argument fails for the very same
18 reasons it did the first time. (Cal. Code Civ. Proc., § 430.10(e).)

19 3. TLHM's "document enforcement" argument defies logic and fails as a
20 matter of law.

21 TLHM attempts to argue that it has standing for elder abuse under Civil Code section
22 1368.3, because that statute permits an HOA to enforce its governing documents and the
23 governing documents here somehow grant TLHM the right to enforce elder abuse purportedly
24 committed against its members. (Opposition at 6:7-8:13.) Notwithstanding TLHM having
25 failed to allege any actionable elder abuse claim against its members in the first place (*see*
26 Section II.A. of this Reply Brief, *supra*), there is no authority permitting TLHM to contort its
27 elder abuse claim into one of governing document enforcement.

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1 TLHM begins by citing cases that discuss homeowners associations suing in a
2 representative capacity. (Opposition at 6:23-7:5.) However, none of these cases come even
3 remotely close to authorizing a homeowners association to maintain a tort action based on
4 governing document enforcement. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles*
5 (1973) 34 Cal.App.3d 117 [association had standing where members lived in effected area and
6 would suffer injury if challenged project was allowed to proceed, not because of governing
7 documents]; *Salton City etc. Owners Assn. v. M. Penn Phillips Co.* (1977) 75 Cal.App.3d 184
8 [fact that the association itself was not a member of the class was held to not preclude it from
9 representing the class; again, not a governing document enforcement case]; *Raven's Cove*
10 *Townhomes, Inc. v. Kruppe Development Co.* (1981) 114 Cal.App.3d 783 [association had
11 standing to sue in representative capacity for damages to individual units, but not because of
12 governing documents]; *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003)
13 109 Cal.App.4th 1162 [statute, not the governing documents, provided association with basis
14 to state a cause of action for breach of implied warranty with respect to the common areas of
15 the association].) Thus, TLHM has not -- because it cannot -- cited any authority under which
16 an association was granted standing to pursue a tort cause of action like elder abuse on the
17 grounds that it is authorized to do so through its governing documents. (*Id.*) Should TLHM
18 desire to bring this claim as a class action, it must first allege actionable elder abuse against its
19 individual members (not just funds allegedly appropriated from the company) and then comply
20 with the well-established class action requirements.

21 Furthermore, TLHM did not even respond to the legal and logical deficiencies in this
22 argument raised by PCM and Price in their demurrer, each of which preclude this argument:
23 (1) neither PCM nor Price are subject to TLHM's CC&Rs and Bylaws, as neither of them are
24 members of TLHM (*see* Cal. Civ. Code, § 1354 [governing documents "may be enforced by
25 the association against an owner of a separate interest or by an owner of a separate interest
26 against the association"]); (2) TLHM is not even seeking that any CC&R or Bylaw provision
27 actually be enforced, so its argument that the elder abuse claim is actually one for enforcement
28 of CC&Rs and Bylaws is nothing more than a ruse (*see generally*, FAC); (3) there are no terms

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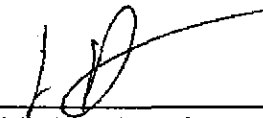
in any of the Management Agreements under which PCM agreed to comply with the CC&Rs and to submit to an "enforcement" proceeding that grants TLHM standing to assert its members' private claims, so the Management Agreements confer no such right (*id.* at Exhs. "A" and "B"); and (4) at best, enforcement of governing documents by its very nature could only amount to a claim of breach of contract, not a tort like elder abuse (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515 ["Conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law"]). Accordingly, TLHM's argument is doomed on several fronts.

III. CONCLUSION.

TLHM was granted leave to amend to add claims of its individual members, but did not do so. Instead, it only added allegations concerning governing documents, which have no bearing on its defective elder abuse claim. Therefore, since TLHM was not able to cure the infirmities in its cause of action, PCM and Price respectfully request that the Court sustain this demurrer without leave to amend.

DATED: January 6, 2010

MUCH SHELIST DENENBERG
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By: 
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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 2 Park Plaza, Suite 1075, Irvine, California 92614.

On January 6, 2011, I served the foregoing document described as **DEFENDANTS PROFESSIONAL COMMUNITY MANAGEMENT, INC.'S AND JANET PRICE'S REPLY BRIEF IN SUPPORT OF THEIR 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 January 6, 2011, at Irvine, California.



Lisa Romines

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