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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

JUL 28 2011

John A. Clarke, Executive Officer/Clerk
BY Rugena Juliano, Deputy

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES - STANLEY MOSK COURTHOUSE**
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11 J-M MANUFACTURING COMPANY, INC., a)
12 Delaware Corporation,)

13 Plaintiff,)

14 vs.)

15 MCDERMOTT WILL & EMERY, a Business)
16 Entity, form unknown; and DOES 1 through 100,)
inclusive,)

17 Defendants.)

Case No. BC 462 832

**FIRST AMENDED COMPLAINT
FOR DAMAGES**

Dept. 33

[Assigned to the Honorable Charles F.
Palmer for All Purposes]

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21 **COMES NOW**, plaintiff J-M MANUFACTURING COMPANY, INC., a Delaware
22 Corporation doing business as JM Eagle ("JME" or "PLAINTIFF"), complaining of defendants
23 MCDERMOTT WILL & EMERY, a business entity, form unknown ("MWE" or "McDermott"),
24 and DOES 1 through 100, inclusive, and each of them, (collectively referred to herein as
25 "DEFENDANTS") as follows:
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1 **GENERAL ALLEGATIONS**

2 **A. Identity of the parties and venue.**

3 1. PLAINTIFF JME is now, and at all times herein was, a Delaware Corporation, in
4 good standing and licensed to do business in Los Angeles County, California. JME's corporate
5 headquarters is in the County of Los Angeles, City of Los Angeles. The factual events set forth
6 herein occurred within Los Angeles County, State of California; accordingly, venue is proper in
7 the above-entitled court.

8 2. PW Eagle, Inc. was a leading extruder of PVC pipe products and its
9 wholly-owned subsidiary, USPoly Company, LLC, was a leading manufacturer of polyethylene
10 pipe and fittings. Together, PW Eagle and USPoly operated 12 manufacturing facilities across
11 the United States.

12 3. In January of 2007, JME and PW Eagle, Inc. signed a definitive merger agreement
13 under which JME acquired all of the outstanding common shares of PW Eagle, Inc. for \$33.50
14 per share in cash which represented an implied total equity value of approximately \$400 million.
15 One of the main reasons that JME entered into this transaction was to acquire the ownership of
16 patents that were then owned by PW Eagle, Inc.

17 4. Defendant McDermott is now, and at all times herein was, a business entity, form
18 unknown. PLAINTIFF is informed and believes and thereon alleges that this defendant resides
19 in Los Angeles County, California, and has been doing business in Los Angeles County,
20 California.

21 5. The true names or capacities, whether individual, corporate, associate, or
22 otherwise of defendants named in this action as Does 1-100 ("DOES") are unknown to
23 PLAINTIFF, who therefore sues such defendants by such fictitious names. PLAINTIFF will
24 seek leave of this Honorable Court to amend this Complaint when the true names and/or
25 capacities of said defendants have been ascertained. Said fictitiously named defendants are in
26 some manner proximately responsible for the damages suffered by PLAINTIFF herein.

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1 **B. Agency allegations.**

2 6. Each of the defendants, including the fictitiously named DOE defendants, was the
3 agent, or employee, partner or officer, director or joint venturer of defendants herein, and in
4 doing the things herein alleged acted within the course and scope of said agency, employment,
5 partnership, joint venture, or association and under the direction of, and with the consent and
6 permission, advance knowledge and/or ratification of the other defendants.

7 7. At all times relevant, defendants including the fictitiously named DOE
8 defendants, and each of them, formed and operated under a common plan and agreement, with
9 the resulting injuries and damages to PLAINTIFF arising from acts done in furtherance of the
10 common design.

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12 **C. Venue.**

13 8. Venue is proper in Los Angeles County pursuant to California *Code of Civil*
14 *Procedure* section 395(a) because PLAINTIFF entered into a contract with defendants in Los
15 Angeles County; and because defendants were to perform legal services for PLAINTIFF herein
16 in "the *Underlying Action*."

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18 **D. "The Case Within The Case."**

19 9. JME retained McDermott, which held itself out as knowledgeable in the area of
20 Qui Tam actions and e-discovery, to represent it regarding subpoenas received in 2006 and 2007
21 from the federal, California, and Tennessee governments which called for production of copies of
22 paper documents as well as electronic documents. The subpoenas sought information regarding
23 the False Claims Act allegations made in the case of *United States ex rel. Hendrix v. J-M*
24 *Manufacturing Co.*, which was then a non-public complaint filed under seal. Each of the
25 subpoenas required JME to produce paper and electronic documents. During the course of its
26 representation of JME, McDermott billed JME on an hourly basis and at rates as high as \$925.00
27 an hour.

1 10. McDermott worked with JME to identify about 160 custodians who likely had
2 responsive electronic information. McDermott then made electronic copies of the custodians'
3 data and transferred the data to third-party electronic discovery vendors, Navigant Consulting,
4 Inc. ("Navigant") and Stratify, Inc. ("Stratify") to run a search term filter through the collected
5 documents. The search term filter, containing keywords, was negotiated with the federal
6 government and contained terms designed to produce documents relevant to the federal
7 government and State subpoenas. Additionally, Navigant and Stratify were supposed to run a
8 privilege filter through the collected documents in order to separate out privileged documents
9 including attorney-client privileged documents.

10 11. McDermott then produced documents containing the keywords to the federal
11 government; however, in addition to responsive documents, McDermott produced to the federal
12 government documents that were not responsive to the subpoenas and were also attorney-client
13 privileged. In response to the disclosure of attorney-client privileged documents to it, the federal
14 government requested McDermott to conduct a further privilege review and then re-submit a new
15 production to it. It is presently unknown to JME what further review was conducted by
16 McDermott, Navigant and/or Stratify, if any, and a second production was sent to the federal
17 government, which, in turn, disclosed this production to the real parties in interest (the
18 "Relators"). As in the first production, McDermott turned over attorney-client information, and
19 other privileged documents, which was also non-responsive to the subpoenas. In May and June
20 of 2011, JME through its new counsel, discovered that approximately 3,900 privileged and non-
21 responsive documents were turned over to the federal government in the second production, and
22 it was these documents which were then, in turn, disclosed to Relators.

23 12. Prior to the second production of privileged documents to the federal government,
24 McDermott retained Hudson Global Resources ("Hudson") which provided contract lawyers in
25 the New York area at the rate of \$61.00 an hour to review documents that were identified as
26 potentially privileged and to divide them into three categories: responsive but privileged;
27 responsive and not privileged; and, non-responsive. McDermott's lawyers participated in the
28 hiring of Hudson's contract lawyers and also assisted in their training. The contract lawyers

1 negligently performed their duties, and McDermott's lawyers, in turn, negligently performed
2 limited spot-checking of the contract attorneys' work. The combined efforts of the contract
3 lawyers, and the McDermott lawyers who supervised them, fell below the applicable standard of
4 care for lawyers because McDermott did not properly supervise the contract lawyers and failed to
5 thoroughly review the documents that they reviewed to determine whether any or a large number
6 of privileged documents were being disclosed.

7 13. About 250,000 electronic documents were produced to the governmental entities,
8 including many based on Hudson's assessment of responsiveness and privilege; and included in
9 the second production were approximately 3,900 privileged documents. Although the federal
10 government declined to intervene in *United States ex rel. Hendrix v. J-M Manufacturing Co.*, the
11 documents produced by McDermott were nonetheless turned over to the counsel for the Relators
12 in that case.

13 14. In March 2010, JME retained the law firm of Sheppard Mullin Richter &
14 Hampton, LLP ("Sheppard") to replace McDermott. In or about June 2010, counsel for the
15 Relators informed Sheppard that it had received JME's document production from the federal
16 government. Like the predecessor United States Attorney's Office, which represented the federal
17 government, Relators' counsel discovered that clearly privileged documents were contained in
18 McDermott's production of documents. However, unlike the predecessor United States
19 Attorney's Office, which immediately returned the privileged documents to McDermott, counsel
20 for the Realtor did not immediately return the privileged documents to JME. Thereafter,
21 Sheppard asked Relators' counsel to destroy or return the privileged documents. Relators'
22 counsel refused, alleging that JME waived the attorney-client privilege with respect to the subject
23 matter of the documents because McDermott twice conducted privilege reviews before producing
24 the documents to the federal government. JME is informed and believes and thereon alleges that
25 approximately 3,900 privileged documents were produced by McDermott without JME's
26 informed consent and that such 3,900 documents should not have been produced by McDermott.

27 15. On March 15, 2010, McDermott was substituted out of the case of *United States*
28 *ex rel. Hendrix v. J-M Manufacturing Co.*; however, McDermott continued to provide legal

1 services in regard to *United States ex rel. Hendrix v. J-M Manufacturing Co.* at least until
2 November 2010.

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4 ***E. The Intentional Delay in Turning Over JME's File.***

5 16. After March 15, 2010, and in violation of California *Rule of Professional Conduct*
6 3-700(D), McDermott refused to turn over JME's file until JME paid McDermott's outstanding
7 bill and, on information and belief, McDermott delayed turning over JME's file in order to hide
8 its negligent disclosure of privileged documents. McDermott's conduct was, in part, reflected in
9 the following emails:

10 (A.) On October 21, 2010, Joel Rubinstein, a partner with MWE, wrote the following
11 in an e-mail to Mr. Wang, the Chief Executive Officer and President of JME:

12 "Subject: RE: Qui Tam

13 Walter,

14 **I'm told that our firm policy is not to release all files until full**
15 **payment is made.**

16 **If you'd like all the files now, please send a check for the entire**
17 **\$530,477 and we'll get them all out to you promptly.** I think that's the
18 best course anyway, since this has taken so long already, and there's no
19 need to prolong it further." [Emphasis added.]

20 (B.) Shortly after receiving Mr. Rubinstein's e-mail, Mr. Wang responded in an e-mail
21 as follows:

22 "Subject: RE: Qui Tam

23 JOEL:

24 **SO YOU, AND YOUR FIRM IS HOLDING THESE FILES HOSTAGE WHEN WE**
25 **HAVE AGREED TO THESE PAYMENTS. WHY DO THIS WHEN YOU CAN GET**
26 **ALL THIS SETTLED?**

27 **WALTER WANG"** [Emphasis added.]
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1 ©.) Later, on December 27, 2010, Claudia Herrarte, of JME, sent the following e-mail
2 to Mr. Rubinstein:

3 "Subject: Invoices

4 Dear Joel,

5 Please advise as to when can we expect a release for JM Eagle's
6 liabilities.

7 Claudia"

8 (D.) McDermott then responded to the above e-mail from JME, also on December 27,
9 2010, as follows:

10 "From: Rubinstein, Joel jrubinstein@mwe.com
11 Subject: RE: Invoices

12 **Once we receive the final payment on the 31 st, we will be in touch to**
13 **coordinate sending all of the files to you and will confirm that JM does**
14 **not owe anything further.** Thanks.
15 Joel L. Rubinstein" [Emphasis added.]

16 17. Based in part on McDermott's conduct, which violated the California *Rules of*
17 *Professional Conduct*, JME paid McDermott's outstanding bills, which were greater than the
18 value of the negligent services it provided to JME. Additionally, the delay by McDermott in
19 turning over JME's file prevented and delayed JME from learning the true nature and extent of
20 the negligent disclosure of privileged information and materials by McDermott until shortly
21 before the filing of the complaint in this case.

22 18. McDermott represented JME in its acquisition of PW Eagle, Inc. and, on
23 information and belief, JME alleges that McDermott was responsible for conducting the due
24 diligence in regard to this transaction. After completion of the acquisition, JME discovered that
25 some of the patents it acquired did not comply with then-existing specifications.
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FIRST CAUSE OF ACTION
Legal Malpractice against all Defendants

19. JME refers to and incorporates paragraphs 1 through 18 of this Complaint as though fully set forth herein.

20. Defendants owed PLAINTIFF a duty to render legal services competently. Defendants breached that duty by, *inter alia*, producing privileged documents to parties adverse to JME in litigation without obtaining its informed consent, failing to supervise attorneys and vendors McDermott contracted with to perform the review and production of documents, charging JME fees and costs for performance of work not properly performed, or not performed at all, billing JME for work that was unnecessary, approving for payment third-party vendor billing for work not competently handled, and refusing to turn over JME's file until its outstanding and inflated bills were paid.

21. JME alleges, upon information and belief, that McDermott failed to inform PLAINTIFF that attorney-client privileged documents and other privileged documents had been disclosed, failed to disclose the scope of such release of privileged documents and failed to take any steps to obtain the return of such privileged documents.

22. JME alleges on information and belief that McDermott negligently represented JME in its acquisition of PW Eagle, Inc. because it failed to discover and inform JME that some of the patents it acquired did not comply with then-existing specifications which rendered the patents worthless.

23. Defendants' breach caused JME damages in an amount to be proven at trial, but in no event less than the jurisdictional minimum of this Court.

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SECOND CAUSE OF ACTION
Breach of Fiduciary Duty against all defendants

24. PLAINTIFF refers to and incorporates paragraphs 1 through 23 of this Complaint as though fully set forth herein.

25. Defendants owed PLAINTIFF a fiduciary duty. Defendants breached that duty by, *inter alia*, producing privileged documents to parties adverse to JME in several lawsuits, failing

1 to supervise attorneys and vendors McDermott contracted with to perform the review and
2 production of documents, charging JME fees and costs for performance of such work that was
3 not properly performed, or not performed at all, billing JME for work that was unnecessary,
4 approving for payment third-party vendor billing for work not competently handled, refusing to
5 turn over JME's file until its outstanding bills were paid and failing to inform JME that its
6 refusal to turn over JME's file until its outstanding bills were paid violated the California *Rules*
7 *of Professional Conduct*.

8 26. Defendants breach of their fiduciary duty to their client caused JME damages in
9 an amount to be proven at trial, but in no event less than the jurisdictional minimum of this
10 Court. On information and belief, PLAINTIFF alleges that McDermott's actions were
11 intentional, fraudulent, oppressive and malicious, and were committed with the specific intent of
12 causing PLAINTIFF injury and damage and/or were in conscious disregard of Plaintiffs' rights.
13 Accordingly, Plaintiffs are entitled to recover exemplary and punitive damages.

14 27. The actions of defendants were (1) fraudulent, meaning an intentional
15 misrepresentation, deceit, or concealment of a material fact known to the defendants with the
16 intention on the part of the defendant of thereby depriving a person of property or legal rights or
17 otherwise causing injury; (2) malicious, meaning conduct which is intended by the defendants to
18 cause injury to PLAINTIFF or despicable conduct which is carried on by the defendants with a
19 willful and conscious disregard of the rights or safety of others; (3) and/or oppressive, meaning
20 despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of
21 that person's rights; and done with the intention of depriving PLAINTIFF of substantial rights.
22 PLAINTIFF is therefore entitled to punitive damages in a sufficient amount to make an example
23 of, punish defendants, and deter future fraudulent, oppressive and malicious misconduct in an
24 amount according to proof at trial.

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THIRD CAUSE OF ACTION
(Accounting- Against All Defendants)

28. PLAINTIFF refers to and incorporates paragraphs 1 through 27 of this Complaint as though fully set forth herein.

29. JME is informed and believes and thereon alleges that Defendants billed JME for work not necessary, not done and not done competently, all of which was unlawful.

30. The amount of such billings is unknown to JME and cannot be ascertained without an accounting of the amounts paid for such billing.

WHEREFORE, PLAINTIFF prays for judgment against defendants, as follows:

ON THE FIRST CAUSE OF ACTION:

1. Damages according to proof at trial.

ON THE SECOND CAUSE OF ACTION:

1. Damages according to proof at trial.
2. Punitive damages in an amount according to proof at trial.

ON THE THIRD CAUSE OF ACTION:

1. An accounting of the fees and costs paid to Defendants.

ON ALL CAUSES OF ACTION:

1. For costs of suit incurred herein.
2. For a reasonable attorneys' fees.
3. Such other and further relief as the Court may deem just and proper.

1 Respectfully submitted,

2 Dated: July 20, 2011.

HOBSON, DUNGOG, BERNARDINO & DAVIS, LLP

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4 By: 
5 Rafael Bernardino, Jr.
6 Attorneys for PLAINTIFF
7 J-M MANUFACTURING COMPANY, INC.

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