

JUL 27 2011

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By A.E. LaFLEUR-CLAYTON, Deputy

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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

13 J-M MANUFACTURING COMPANY,  
14 INC. a Delaware corporation,

15 Plaintiff,

16 vs.

17 MCDERMOTT WILL & EMERY, a  
18 Business Entity, form unknown; and  
19 DOES 1 through 100, inclusive

20 Defendants.

21 **CASE NO. BC 462832**

[Assigned to the Hon. Charles F. Palmer,  
Dept. 33]

22 **CONSOLIDATED MEMORANDUM OF**  
23 **POINTS AND AUTHORITIES IN**  
24 **SUPPORT OF DEMURRERS AND**  
25 **MOTION TO STRIKE PORTIONS OF**  
26 **THE COMPLAINT BY DEFENDANT**  
27 **MCDERMOTT WILL & EMERY LLP**

28 Date: November 30, 2011  
Time: 8:30 a.m.  
Place: Department 33

Action Filed: June 2, 2011  
Discovery Cutoff: Not set  
Motion Cutoff: Not set  
Trial Date: Not set

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 It is unfortunate that plaintiff J-M Manufacturing Company, Inc. (“J-M”) has  
5 chosen to attack the integrity and reputation of defendant McDermott Will & Emery LLP  
6 (“MWE”) by making scandalous and irresponsible allegations that could not have been  
7 the result of a reasonable pre-filing inquiry. By filing this lawsuit, J-M has chosen to  
8 place at issue communications related to what the complaint erroneously describes as the  
9 negligent production of a large number of supposedly privileged documents. Although  
10 MWE is ready, willing and able to set the record straight, it has resisted the temptation to  
11 tell the full story without first giving J-M the opportunity to withdraw its Complaint. So  
12 that the record is perfectly clear, MWE hereby warns its former client that J-M’s interests  
13 could be seriously compromised by a full and complete airing of the facts which MWE  
14 will be forced to disclose in defending this ill-advised action.

15 J-M hired MWE after it received subpoenas from the United States, the State of  
16 California and the State of Tennessee in 2006 and 2007. (Complaint, ¶ 7.) **The subpoenas**  
17 **were issued in connection with the sealed qui tam action known as United States ex. rel.**  
18 **Hendrix v. J-M Manufacturing Co.** (“the qui tam case”) (Complaint, ¶ 7.)

19 In a qui tam case, a whistle blower (otherwise known as “the relator”) files a  
20 complaint under seal alleging that the defendant has made false claims to the government.  
21 The government then investigates the claim to decide if it wants to intervene and  
22 prosecute the case. In making that decision, the government subpoenas documents,  
23 interviews witnesses and interfaces with counsel for the relator and the defendant.

24 In representing J-M, MWE had numerous contacts with the relevant governmental  
25 authorities to arrive at agreed upon protocols for providing hard copy and electronic  
26 documents. According to the Complaint, MWE worked with J-M to collect electronic  
27 data from 160 custodians and ultimately produced 250,000 electronic documents in  
28 response to the subpoena. (Complaint, ¶¶ 8-9.) MWE also conducted an investigation

1 into the facts. In February 2010, MWE persuaded the United States that it should not  
2 intervene in the case.

3 The present case addresses just one of many different aspects of MWE's  
4 representation of J-M: the production of electronic documents pursuant to protocols  
5 which implemented search terms which J-M and the governmental entities had agreed  
6 upon.

7 Despite the successful outcome achieved, J-M chose to fire MWE and replace it  
8 with the law firm of Sheppard Mullin Richter & Hampton LLP ("Sheppard Mullin").  
9 Sheppard Mullin took over the case in March of 2010. (Complaint, ¶ 10.)

10 According to the Complaint, Sheppard Mullin learned that the relator possessed  
11 privileged documents "in or about" June of 2010. (Complaint, ¶ 10.) A year later, J-M  
12 filed its Complaint in this case alleging that MWE committed malpractice in connection  
13 with the production of electronic documents in response to the 2006 and 2007 subpoenas.  
14 Although J-M admits that its lawyers have known about the relator's possession of  
15 privileged documents for over a year, the best that it can do is to allege that it is "informed  
16 and believes" that "approximately" 3,900 unspecified privileged documents were  
17 produced. (Complaint, ¶ 10.) J-M provides no description whatsoever of the significance,  
18 if any, of those allegedly privileged documents. Indeed, J-M does not allege that there has  
19 ever been any judicial determination that the documents in question are, in fact,  
20 privileged.

21 J-M admits that in the course of producing electronic documents (a) MWE  
22 negotiated a keyword list with the United States Attorney; (b) a third party electronic  
23 discovery vendor used electronic filters to identify responsive documents and to screen  
24 out potentially privileged documents; and (c) contract attorneys provided by an outside  
25 vendor reviewed the pre-screened potentially privileged documents to determine if they  
26 were, in fact, privileged. (Complaint, ¶¶ 8-9.) J-M charges that MWE failed to properly  
27 supervise both the outside vendor, Stratify, who ran the electronic filters, and the outside  
28 contract lawyers who reviewed the filtered documents for privilege. (Complaint, ¶ 12.)

1 The Complaint does not state whether J-M believes that the allegedly privileged  
2 documents were produced because the Stratify filters did not work, because the contract  
3 lawyers made errors in judgment when deciding if documents were privileged, or because  
4 of some other unidentified reason.

5 Using language that appears in published decisions describing the method of proof  
6 applicable in legal malpractice cases, the Complaint accurately describes the qui tam  
7 action as “The Case Within The Case.” (Complaint, p. 3, line 7.) However, the  
8 Complaint never attempts to link the production of the approximately 3,900 allegedly  
9 privileged documents to any specific financial loss J-M claims to have suffered.

10 Instead, the Complaint vaguely pleads that the alleged violation of the standard of  
11 care caused J-M to suffer “damages in an amount to be proved according to proof at trial.”  
12 (Complaint, ¶ 14.) It makes no attempt to explain how J-M has been damaged, much less  
13 to either categorize or quantify the damages J-M claims to have suffered. Rather, it  
14 merely states a conclusion, unsupported by any facts whatsoever, that J-M has been  
15 damaged in an amount that is “no less than” this court’s jurisdictional minimum.  
16 (Complaint, ¶ 14.)

17 Similarly, the Complaint does not allege that the production of the allegedly  
18 privileged documents has affected the outcome of any portion of the qui tam case. There  
19 is no allegation that J-M has been aggrieved by either any pretrial order or adverse  
20 judgment in the year since counsel for the relator allegedly told Sheppard Mullin that he  
21 had the allegedly privileged documents. Indeed, the qui tam action has not yet been  
22 concluded and is not likely to be concluded for a substantial period of time. (Request for  
23 Judicial Notice, Ex. A.)

24 In addition to pleading a cause of action for legal malpractice, J-M attempts to  
25 plead a claim for breach of fiduciary duty and a prayer for punitive damages. However,  
26 the breach of fiduciary duty cause of action is premised on the same breaches of the  
27 standard of care as the legal malpractice cause of action. In paragraph 18 of the breach of  
28 fiduciary duty cause of action, J-M states a conclusion that MWE acted with fraud,

1 oppression and malice. However, it alleges no facts whatsoever to support those  
2 conclusions.

3 J-M's also takes a stab at asserting an accounting cause of action based on its  
4 purported "information and belief" that MWE's invoices somehow contained a mark-up  
5 of costs from contract attorneys and unnamed vendors. (Complaint, ¶ 20.) Although J-M  
6 received those invoices in the ordinary course of business, it makes no effort to describe  
7 how payments to contract attorneys and vendors were reflected on invoices; the amounts,  
8 if any, that were billed for contract lawyers and outside vendors; or the facts which  
9 underlie J-M's "information and belief" that these costs were "marked up."

10 To be perfectly clear, J-M has made reckless and irresponsible allegations in this  
11 case. The words "information and belief," as used in the pleading, are merely an excuse  
12 for J-M's utter speculation. Basic principles of fairness require that J-M be required to  
13 clearly state the *factual basis* for its allegations, if any, including the *factual basis* for  
14 J-M's alleged "information and belief" that MWE engaged in fraudulent mark-ups.

## 15 II.

### 16 THE COMPLAINT FAILS TO STATE A CAUSE 17 OF ACTION FOR LEGAL MALPRACTICE

18 The elements of a claim for legal malpractice are (1) the duty of the attorney to use  
19 such skill, prudence and diligence as members of his profession commonly possess and  
20 exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach  
21 and the resulting injury; and (4) actual loss or damage resulting from the attorney's  
22 negligence. Hall v. Kalfayan (2010) 190 Cal.App.4th 927, 933, citing Coscia v. McKenna  
23 & Cuneo (2001) 25 Cal.4th 1194, 1199. Turning to the third and fourth elements, the  
24 California Supreme Court has recognized that the plaintiff bears the burden of proving  
25 that "the attorney's negligent acts or omissions caused the client to suffer some financial  
26 harm or loss." Viner v. Sweet (2003) 30 Cal.4th 1232, 1235.

27 Here, the Complaint is deficient because it fails to allege causation and damages.  
28 While the Complaint alleges the mere conclusion that J-M suffered damage, it does not

1 identify any financial harm or loss that J-M suffered. Nor does it make any effort to  
2 explain how any actual, compensable loss was proximately caused by the alleged breach  
3 of the standard of care.

4 Plaintiff is apparently aware of the burden imposed on it in a legal malpractice case  
5 and uses the words “case within a case” to describe the qui tam case and its relationship to  
6 this one. (Complaint, p. 3, line 7.) California cases have intermittently used the terms  
7 “trial within a trial,” “suit within a suit” and “case within a case” to describe the burden  
8 applicable to proving causation and damages in a legal malpractice case. Mattco Forge,  
9 Inc. v. Arthur Young & Co., Inc. (1997) 52 Cal.App.4th 820, 832-33. The case within a  
10 case doctrine requires that a legal malpractice plaintiff “establish that *but for* the alleged  
11 negligence of the defendant attorneys, the plaintiff would have obtained a more favorable  
12 judgment or settlement in the action in which the malpractice allegedly occurred.” Viner,  
13 30 Cal.4th at 1241. This burden has persisted for more than 120 years because “it is the  
14 most effective safeguard yet devised against speculative and conjectural claims in this era  
15 of ever expanding litigation. It is a standard of proof designed to limit damages to those  
16 actually *caused* by a professional’s malfeasance.” Mattco Forge, 52 Cal.App.4th at 834.  
17 See also, Blain v. Doctor’s Co. (1990) 222 Cal.App.3d 1048, 1063 (“There is no  
18 cognizable harm attributable to the mere exposure to liability. The exposure must result  
19 in compensable detriment.”).

20 Here, the Complaint makes no attempt to allege that the plaintiff suffered any  
21 ascertainable financial loss as a result of the alleged breach of the standard of care.  
22 Rather, it merely states the conclusion that plaintiff suffered some undescribed type of  
23 damages and concludes that the undescribed damages are in a sum not less than this  
24 court’s jurisdictional minimum.

25 Code of Civil Procedure § 425.10(a) requires that a plaintiff’s complaint provide a  
26 “statement of the facts constituting the cause of action, in ordinary and concise language.”  
27 As the court recognized in Ameron International Corp. v. Insurance Co. of the State of  
28 Pennsylvania (2010) 50 Cal.4th 1370, 1384, “this requirement forces parties to give fair

1 notice of their claims to opposing parties so that they can defend.” A statement that a  
2 plaintiff has suffered undescribed damages in an amount in excess of the court’s  
3 jurisdictional minimum is not fair notice of anything. On demurrer, this court must  
4 disregard a factually unsupported conclusion that plaintiff has suffered damages. See,  
5 e.g., Brown v. Professional Community Management, Inc. (2005) 127 Cal.App.4th 532,  
6 537 (courts treat demurrer as admitting “all material facts properly pleaded, but not  
7 contentions, deductions, or conclusion of fact or law”); Wolfe v. State Farm Fire &  
8 Casualty Ins. Co. (1996) 46 Cal.App.4th 554, 560 (“We will not, however, assume the  
9 truth of contentions, deductions, or conclusions of fact or law”). Because no facts are  
10 alleged to support the conclusion that plaintiff suffered any financial loss as a result of the  
11 alleged malpractice, these demurrers must be sustained.

### 12 III.

#### 13 THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

#### 14 FOR BREACH FOR FIDUCIARY DUTY

15 A cause of action for breach of fiduciary duty is a “species of tort distinct from a  
16 cause of action for professional negligence.” Stanley v. Richmond (1995) 35 Cal.App.4th  
17 1070, 1086. Here, the breach of fiduciary duty cause of action is nothing more than a  
18 reiteration of the cause of action for legal malpractice. Moreover, because it does not  
19 allege that J-M suffered any financial loss as a result of the alleged breach of fiduciary  
20 duty, the cause of action for breach of fiduciary duty fails to plead the required elements  
21 of causation and damages.

### 22 IV.

#### 23 THE CAUSE OF ACTION FOR AN ACCOUNTING IS PREMISED

#### 24 UPON IMPROPER ALLEGATIONS WHICH ARE PURPORTEDLY

#### 25 MADE ON “INFORMATION AND BELIEF”

26 A plaintiff “may allege on information and belief any matters that are not within  
27 his personal knowledge, *if* he has information to believe that the allegations are true.”  
28 Pridonoff v. Balokovich (1951) 36 Cal.2d 788, 792 (emphasis added). As the Supreme

1 Court has noted, a complaint is not sufficient if it does no more than assert “boilerplate  
2 allegations” or if it makes allegations on information and belief which merely assert the  
3 facts so alleged “without alleging such information that ‘[I]lead(s) [the plaintiff] to believe  
4 the allegations are true.’” Doe v. City of Los Angeles (2007) 42 Cal.4th 531, 551 n.5  
5 (quoting Pridonoff, 36 Cal.3d at 792).

6 Without stating any facts whatsoever which form the basis for its alleged  
7 “information and belief,” plaintiff scandalously charges that it is “informed and believes  
8 and thereon alleges that Defendants ‘marked up’ fees and costs paid to contract attorneys  
9 and vendors and failed to disclose that such fees and costs were being ‘marked up.’”  
10 (Complaint, ¶ 20.)

11 Code of Civil Procedure § 436 authorizes this court to strike any pleading “not  
12 drawn or filed in conformity with the laws of this state.” (Code of Civil Procedure  
13 § 436(b).) Plaintiff’s third cause of action should be stricken because it contains serious  
14 charges of fraudulent conduct which are improperly premised on phantom “information  
15 and belief” which is not grounded in any facts disclosed in the Complaint.

16 The requirement that a plaintiff plead the facts that support its “information and  
17 belief” helps to ensure that a plaintiff and its counsel comply with Code of Civil  
18 Procedure § 128.7. Plaintiffs are not permitted to hide behind alleged “information and  
19 belief” as an excuse for filing reckless allegations that are based solely on speculation and  
20 conjecture.

21 The allegations that MWE “marked up” vendor and attorney fee costs is a serious  
22 attack on the firm’s character that was designed to sensationalize this dispute. J-M, which  
23 received MWE’s bills in the ordinary course of business, has not pointed to a single line  
24 item in the invoices which it believes to be the result of any “mark up.” This irresponsible  
25 allegation has no basis in fact. The true facts are that (1) MWE billed J M for contract  
26 lawyers at the amount they were billed by the outside vendor who supplied the contract  
27 lawyers; and (2) J M itself paid the other outside vendors who were involved in the  
28 document production. It appears quite obvious that J-M and its counsel did not make any

1 effort whatsoever to evaluate the invoices before it chose to attack MWE's character with  
2 what amounts to a claim of fraud. Even though J-M chose not to serve MWE with its  
3 complaint, MWE has confronted J-M with documentary evidence that proves that these  
4 allegations are false. Nonetheless, J-M has still not withdrawn its "markup" allegations.

5 For present purposes, this court need not concern itself with the long term legal  
6 consequences of J-M's failure to conduct a proper pre-filing inquiry – a subject that MWE  
7 will more fully address at a later time. At this stage of the process, this court must address  
8 the adequacy of the pleadings. The complete absence of any articulated factual basis for  
9 plaintiff's "information and belief" mandates that the third cause of action be stricken or,  
10 in the alternative, that MWE's demurrer be sustained.

11 V.

12 **THE PUNITIVE DAMAGES ALLEGATIONS MUST BE STRICKEN**

13 Plaintiff's punitive damages allegations against MWE must be stricken because (1)  
14 plaintiffs do not allege any facts to support an allegation that any employee of MWE acted  
15 with fraud, oppression, or malice; and (2) plaintiffs do not allege facts to allege that a  
16 punitive damages claim would lie against MWE under Civil Code § 3294(b). To begin  
17 with, plaintiffs merely intone the statutory language of California Civil Code § 3294  
18 without alleging any facts to support a conclusion that any person affiliated with MWE  
19 acted with fraud, oppression or malice. (Complaint ¶ 18.) This is not enough. Brousseau  
20 v. Jarrett (1977) 73 Cal.App.3d 864, 872 (similar allegations held insufficient). Unless  
21 supported by facts found somewhere within the pleading, these words are mere legal  
22 conclusions. Perkins v. Superior Court (1981) 117 Cal.App.3d 1, 6-7.

23 Moreover, a punitive damages claim does not lie against the firm because plaintiffs  
24 fail to allege any facts establishing that any managing agent of MWE either committed  
25 malicious conduct or authorized or ratified it, as required by Civil Code section 3294 (b).  
26 This is a fatal omission. Weeks v. Baker & McKenzie (1998) 63 Cal.App.4th 1128, 1159.  
27 Ratification requires that a managing agent "had actual knowledge of the malicious

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1 conduct and its outrageous character.” Cruz v. Home Base (2000) 83 Cal.App.4th 160,  
2 168; College Hospital, Inc. v. Superior Court (1994) 8 Cal. 4th 704, 726.

3 A “managing agent” is someone who “exercises substantial discretionary authority  
4 over decisions that ultimately determine the policy” of the firm. White v. Ultramar, Inc.  
5 (1999) 21 Cal.4th 563, 566-67, 573; Cruz v. Home Base, *supra*, 83 Cal.App.4th at 163,  
6 167 (“Corporate policy” means “the broad principles and rules of general application  
7 which govern corporate conduct” and are “intended to be followed consistently over time  
8 in corporate operations”.)

9 Mere partnership does not automatically confer “managing agent” status. *See*,  
10 White v. Ultramar, Inc., *supra*, 21 Cal. 4th at pp. 566-67 (“[T]he Legislature intended the  
11 term ‘managing agent’ to include only those ... who exercise substantial independent  
12 authority and judgment ... so that their decisions ultimately determine ... policy”) Weeks  
13 v. Baker & McKenzie, *supra*, 63 Cal.App.4th at 1159, 1160-61 (distinguishing law firm  
14 partner guilty of sexual harassment from firm’s “managing agents” for purposes of  
15 punitive damages).

16 VI.

17 CONCLUSION

18 For all of the reasons set forth herein, the demurrers should be sustained and the  
19 motion to strike should be granted.

20  
21 Dated: July 27, 2011

McLEOD, MOSCARINO, WITHAM &  
FLYNN, LLP

22  
23  
24 By: \_\_\_\_\_

John M. Moscarino  
Attorneys for Defendant McDermott Will &  
Emery LLP

**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES ) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is 707 Wilshire Boulevard, Suite 5000, Los Angeles, CA 90017.

On July 27, 2011, I served the foregoing document described as **CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS AND MOTION TO STRIKE PORTIONS OF THE COMPLAINT BY DEFENDANT MCDERMOTT WILL & EMERY LLP** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

Rafael Bernardino, Jr.  
Stanley L. Friedman  
Hobson Dongog Bernardino & Davis, LLP  
333 S. Hope St., Suite 4000  
Los Angeles, CA 90071

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with United States postal service on that same day with postage thereon fully prepaid at Los Angeles, 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 day after date of deposit for mailing in affidavit.

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

Executed on July 27, 2011, at Los Angeles, California.



Tunizia Abdur-Raheem