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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

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.

CASE NO. CV11-6666 PSG (Ex)

[Assigned to the Hon. Philip S. Gutierrez,
Courtroom 880]

**NOTICE OF MOTION AND MOTION
TO DISMISS FIRST AMENDED
COMPLAINT**

Date: October 24, 2011
Time: 1:30 p.m.
Place: Courtroom 880

21 TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE that on October 24, 2011 at 1:30 p.m., or as soon
23 thereafter as the matter may be heard, in Courtroom 880 of the Roybal Building, located
24 at 255 East Temple Street, Los Angeles, CA 90012, defendant McDermott Will & Emery
25 LLP will and hereby does move the court for an order dismissing the complaint of
26 plaintiff J-M Manufacturing Company, Inc.

27 This motion is made pursuant to Federal Rules of Civil Procedure 12(b)(6), 8(b),
28 9(b) and 10(b) and is made on the following grounds:

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1. The First Amended Complaint fails to plead sufficient facts to support the conclusions set forth therein and, for that reason, this court must disregard the unsupported conclusions set forth in the First Amended Complaint;
2. The First Amended Complaint fails to state a claim for relief for transactional malpractice;
3. The First Amended Complaint fails to state a claim for relief for litigation malpractice;
4. The First Amended Complaint fails to state a claim for relief for breach of fiduciary duty;
5. The First Amended Complaint fails to state a claim for relief for an accounting.

This motion is based on this notice, the attached memorandum of points and authorities, the concurrently filed request for judicial notice, the records, pleadings and files in this matter, such matters as may be judicially noticed, and such other and further matters as this court may consider at the time of hearing thereon.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which initially took place on August 15, 2011 and continued on August 18, 2011.

Dated: August 25, 2011

McLEOD, MOSCARINO, WITHAM &
FLYNN, LLP

By: 

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Plaintiff J-M Manufacturing Company, Inc. (“J-M”) filed this action against
5 defendant McDermott Will & Emery LLP (“MWE”) in state court. In its original
6 complaint, J-M alleged (1) that MWE failed to properly supervise contract attorneys and
7 outside vendors leading to the production of privileged and non-responsive documents in
8 the matter pending before this Court captioned United States ex. rel. Hendrix v. J-M
9 Manufacturing Co., Case No. CV 0600055 GW-PJWx, (“the qui tam case”); and (2)
10 improperly “marked up” vendor costs. J-M was forced to withdraw its highly
11 inflammatory “mark up” allegations because they were demonstrably false. Business
12 records disclosed that MWE had billed the contract lawyers to J-M at MWE’s cost and
13 that J-M had itself made payment directly to the other vendors mentioned in its complaint.

14 J-M could have simply withdrawn the false “mark-up” allegations. However, it
15 chose to expand its case by filing a First Amended Complaint (“FAC”) alleging a
16 somewhat vague and brand new claim of transactional malpractice. The FAC alleges that
17 J-M is “informed and believes” that MWE may have conducted due diligence in
18 connection with a merger between J-M and PW Eagle (“the merger”) and may have
19 negligently failed to discover that “some” of the patents to be acquired did not meet
20 required specifications and were therefore “worthless.” The new patent related
21 transactional claim created federal question jurisdiction under the Federal Circuit’s
22 seminal decision in Immunocept, LLC v. Fulbright & Jaworski LLP, 504 F.3d 1281 (Fed.
23 Cir. 2007) because whether a patent can be construed to comply with specifications is a
24 question of claim scope integral to J-M’s malpractice claim. Accordingly, on August 12,
25 2011, MWE timely removed this action to this Court. As set forth more fully below,
26 J-M’s FAC fails to state a claim for relief and must be dismissed.

27 J-M’s FAC actually presents two separate malpractice claims in one count: (1) a
28 malpractice claim based upon an alleged due diligence failure in connection with the PW

1 Eagle merger; and (2) a malpractice claim in connection with the qui tam case. Under
2 Federal Rule of Civil Procedure 10(b), “if doing so would promote clarity, each claim
3 founded on a separate transaction or occurrence – and each defense other than a denial –
4 must be stated in a separate count or defense.” (Federal Rule of Civil Procedure 10(b).)
5 See also *Bautista v. Los Angeles County*, 216 F.3d 837, 840-41 (9th Cir. 2000) (“Courts
6 have required separate counts where multiple claims are asserted, where they arise out of
7 separate transactions or occurrences, and where separate statements will facilitate a clear
8 presentation.”) Because there are two different claims for malpractice alleged in the FAC,
9 this motion addresses each claim separately.

10 **A. The Alleged Transactional Malpractice Relating To Patent Rights**

11 In January of 2007, J-M signed a definitive merger agreement with PW Eagle, Inc.
12 (“PW Eagle”). (FAC ¶ 3.) PW Eagle was an extruder of PVC pipe products and had a
13 subsidiary that manufactured polyethylene pipe and fittings. (FAC ¶ 2.) According to the
14 FAC, one of the main reasons that J-M entered into the transaction was to acquire
15 ownership of PW Eagle’s patents (FAC ¶ 3).

16 The FAC provides absolutely no factual detail about the precise role that MWE is
17 alleged to have played in the PW Eagle transaction. It states the conclusion that MWE
18 “represented” J-M in the PW Eagle transaction, but then qualifies that conclusion by
19 stating that J-M is “informed and believes” that MWE was “responsible for conducting
20 the due diligence in regard to this transaction.” (FAC ¶ 18.) The FAC does not identify
21 the due diligence activities that J-M claims MWE was to perform. Although the clear
22 implication of the FAC is that MWE’s role was to examine the patents J-M was acquiring
23 and evaluate the scope of the claims made in them, J-M does not provide any detail
24 whatsoever about what inquiry or inquiries J-M believes that MWE was to make about the
25 scope of the claims made in the patents during the alleged legal due diligence. Although
26 the FAC alleges that J-M discovered that “some of the patents it acquired” did not comply
27 with specifications and were “worthless,” it does not allege which patents were involved,
28 how those patents fail to comply with specifications, how it discovered that those patents

1 did not comply with specifications, or why J-M believes that any examination of the
2 patents by an attorney conducting “due diligence” should have revealed that these patents
3 did not meet the unidentified specifications.

4 J-M’s essential charging allegation is that it is “informed and believes” that MWE
5 “negligently represented” it in the PW Eagle Transaction because MWE “failed to
6 discover” that “some of the patents” did not meet specifications and were therefore
7 “worthless.” (FAC ¶ 22.) J-M does not disclose whether it believes that an earlier
8 discovery that “some” of the PW Eagle patents did not meet specifications would have
9 affected the 2007 transaction and, if so, how J-M believes the transaction would have been
10 affected. Indeed, there are just four paragraphs in the FAC, consisting of only seventeen
11 lines of text, which appear to be directly related to the claim of transactional malpractice.
12 (FAC ¶ 2, 3, 18, 22.)

13 The FAC does not identify any specific harm that J-M claims to have suffered as a
14 result of the patent related transactional malpractice. Indeed, the legal malpractice claim
15 in the FAC contains one sentence, which appears to relate both the alleged patent related
16 transactional malpractice and the alleged litigation malpractice. Without providing any
17 factual detail whatsoever, the FAC alleges that the alleged transactional malpractice
18 caused J-M “damages in an amount to be proven at trial.” (FAC ¶ 23.)

19 **B. The Alleged Litigation Malpractice Arising Out Of The Qui Tam Case**

20 J-M’s litigation malpractice claim arises out of the production of documents in the
21 qui tam case. (FAC ¶ 9.) J-M explains that it hired MWE after it received subpoenas in
22 the qui tam case from the United States, the State of California and the State of Tennessee
23 in 2006 and 2007. (FAC, ¶ 9.) The litigation malpractice claim addresses just one of
24 many different aspects of MWE’s representation of J-M in the qui tam case: the
25 production of electronic documents pursuant to protocols which implemented search
26 terms which J-M and the governmental entities had agreed upon.

27 In a qui tam case, a whistle blower (otherwise known as “the relator”) files a
28 complaint under seal alleging that the defendant has made false claims to the government.

1 The government then investigates the claim to decide if it wants to intervene and
2 prosecute the case. In making that decision, the government subpoenas documents,
3 interviews witnesses and interfaces with counsel for the relator and the defendant.

4 In representing J-M, MWE had numerous contacts with the relevant governmental
5 authorities to arrive at agreed upon protocols for providing hard copy and electronic
6 documents. MWE also conducted an investigation into the facts. In February 2010,
7 MWE persuaded the United States that it should not intervene in the case.

8 Despite the successful outcome achieved, J-M chose to fire MWE and replace it
9 with the law firm of Sheppard Mullin Richter & Hampton LLP (“Sheppard Mullin”).
10 Sheppard Mullin took over the case in March of 2010. (FAC, ¶ 14.)

11 In the FAC, J-M sets forth its version of the sequence of events relating to the
12 production of electronic documents to the government in the qui tam case.¹ According to
13 the FAC, MWE worked with J-M to (a) identify 160 custodians of electronic data; and
14 (b) then turn over that data to third party vendors Navigant Consulting, Inc. (“Navigant”)
15 and Stratify, Inc. (“Stratify”). These third party vendors were supposed to run both a
16 “search term filter” which had been negotiated with the federal government and a
17 “privilege filter” which was intended to separate privileged documents from the other
18 documents that were collected. (FAC ¶ 10.)

19 According to the FAC, MWE produced the documents that had been filtered by the
20 electronic discovery vendors. However, the FAC avers that the document production
21 included documents that were “not responsive to the subpoena” and documents that were
22 “attorney-client privileged.” (FAC ¶ 11.) The FAC alleges that, at this juncture, the
23 federal government required that MWE “conduct a further privilege review and then
24 resubmit a new production to it.” (FAC ¶ 11.) The FAC freely admits that the federal
25

26 _____
27 ¹ Because this is a 12(b)(6) motion, MWE recites the facts as they are alleged in the FAC.
28 By doing so, MWE does not concede that this recitation of facts bears any resemblance to the
truth. Rather, at later stages of this case, MWE will demonstrate that J-M’s allegations are not
supported by the true facts.

1 government “immediately returned” the documents that had been produced by MWE.
2 (FAC ¶ 14.)

3 According to the FAC, MWE hired and trained contract lawyers from Hudson
4 Global Resources (“Hudson”) to conduct a review of documents prior to a planned
5 replacement production of documents to the federal government. (FAC ¶ 12.) J-M
6 alleges that it does not presently know what further review was conducted by Navigant,
7 Stratify or MWE before the second production (FAC ¶ 11), but somewhat inconsistently
8 avers that the Hudson contract lawyers reviewed documents that had been identified as
9 “potentially privileged” and that MWE attorneys conducted “limited spot checking” of the
10 Hudson contract attorneys’ work. (FAC ¶ 12.) The FAC criticizes MWE for (a) failing to
11 “properly supervise” the Hudson contract lawyers; and (b) failing to “thoroughly review”
12 documents that the Hudson contract lawyers had already reviewed. (FAC ¶ 12.)

13 After the federal government refused to intervene in the qui tam case, it provided
14 the documents that had been produced to the relator. Thereafter, “in or about June of
15 2010,” counsel for the relator informed Sheppard Mullin lawyers that he had unspecified
16 privileged documents. (FAC ¶ 14.) Unlike the United States Attorneys’ Office, counsel
17 for the relator refused to return the allegedly privileged documents. The relator’s counsel
18 took the position that J-M had waived the privilege with respect to the subject matter of
19 the documents disclosed, creating a live and existing controversy over whether the
20 allegedly privileged documents should be returned. (FAC ¶ 14.)

21 Although this controversy erupted as early as June of 2010, the best that J-M can
22 do in the July 28, 2011 FAC is to allege that it is “informed and believes” that
23 “approximately” 3,900 unspecified “privileged” or “non-responsive” documents were
24 produced. (FAC, ¶ 11.) J-M provides no description whatsoever of the significance, if
25 any, of those allegedly privileged documents. Indeed, J-M does not allege that there has
26 ever been any judicial determination that the documents in question are, in fact, privileged
27 or any other contested proceeding about the documents or the relator’s right to possess
28 them.

1 Using language that appears in published decisions describing the method of proof
2 applicable in legal malpractice cases, the FAC accurately describes the qui tam action as
3 “The Case Within The Case.” (FAC, p. 3, line 18.) However, the FAC never attempts to
4 link the production of the approximately 3,900 allegedly “non-responsive” or “privileged”
5 documents to any specific financial loss J-M claims to have suffered.

6 J-M asserts that it was unable to learn “of the true nature and extent” or the
7 disclosure of privileged and non-responsive documents until “shortly before the filing of
8 the complaint in this case.” (FAC ¶ 17.) The FAC asserts that some unidentified lawyers,
9 who are only described as J-M’s “new counsel” (and who appear to be different persons
10 than the Sheppard Mullin lawyers), ultimately “discovered that approximately 3,900
11 privileged and non-responsive documents were turned over to the federal government in
12 the second production” in May and June of 2011. (FAC ¶ 11.)

13 J-M claims that it did not make this discovery until May and June of 2011 because
14 MWE somehow refused to turn over documents relating to the qui tam case until J-M paid
15 MWE’s bill. (FAC ¶ 16.) Nonetheless, the FAC is completely silent as to how Sheppard
16 Mullin could have defended the qui tam case for over a year if it did not have access to
17 relevant documents.² Significantly, the FAC does claim that either (1) MWE ever refused
18 to cooperate with Sheppard Mullin after Sheppard Mullin replaced MWE as J-M’s
19 counsel; or (2) that Sheppard Mullin’s access to relevant documents and information was
20 ever inhibited. Thus, it is unclear if J-M contends (a) that Sheppard Mullin did not
21 conduct an investigation into the nature and extent of the prior disclosure of privileged
22 and non-responsive documents after the relator refused to return the allegedly privileged
23 documents; or (b) that Sheppard Mullin – whose knowledge is chargeable to J-M in any
24 event – failed to disclose what it discovered in any investigation that J-M authorized.

25 The FAC vaguely pleads that MWE’s alleged negligence caused J-M to suffer
26 “damages in an amount to be proven at trial.” (FAC, ¶ 23.) It makes no attempt to
27 explain how J-M has been damaged, much less to either categorize or quantify the

28 ² Sheppard Mullin was recently disqualified in the qui tam case.

1 damages J-M claims to have suffered as a result of the alleged litigation malpractice.
2 Rather, it merely states a conclusion, unsupported by any facts whatsoever, that J-M has
3 been damaged in an amount that is “no less than” the Superior Court’s jurisdictional
4 minimum. (FAC, ¶ 23.)

5 The FAC does not allege that the production of the allegedly privileged documents
6 has affected the outcome of any portion of the qui tam case. For example, there is no
7 allegation that J-M was aggrieved by any pretrial order or adverse judgment. As a matter
8 of fact, the qui tam action has not yet been concluded. Nor is it likely to be concluded for
9 a substantial period of time. (Request for Judicial Notice (“RJN”), Ex. A.)

10 **C. The Other Claims**

11 In addition to pleading a cause of action for legal malpractice, J-M attempts to
12 plead a claim for breach of fiduciary duty. However, the breach of fiduciary duty claim is
13 premised on the same breaches of the standard of care as the legal malpractice claim.

14 In paragraphs 26 and 27 of the FAC, J-M states a conclusion, based on
15 “information and belief,” that MWE acted with fraud, oppression and malice. Based upon
16 these conclusions, J-M prays for punitive damages. However, absolutely no facts
17 whatsoever are alleged to support J-M’s conclusions that MWE acted with fraud,
18 oppression or malice.

19 J-M, which was previously forced to withdraw its claim for an “accounting” based
20 on the patently false allegations that MWE had somehow “marked up” vendor invoices,
21 now bases a claim for an accounting on its purported “information and belief” that MWE
22 somehow engaged in other forms of billing fraud. Absolutely no facts are alleged to
23 support this rife speculation.

24 **II.**

25 **THE COMPLAINT FAILS TO STATE A CLAIM**

26 **FOR RELIEF FOR LEGAL MALPRACTICE**

27 As set forth above, the FAC purports to plead that MWE committed malpractice in
28 two different settings: (1) in performing due diligence on patents in connection with a

1 merger; and (2) in producing documents in connection with the qui tam litigation. Both
2 malpractice claims must be dismissed because the FAC fails to state a sufficient facts to
3 support the conclusions it reaches.

4 **A. The Standards Applicable To A Motion To Dismiss**

5 To survive a motion to dismiss, a complaint must contain sufficient factual matter,
6 accepted as true, to state a claim that is plausible on its face. Ashcroft v. Iqbal, ____ U.S.
7 ____, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) citing Bell Atlantic Corp. v.
8 Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A plaintiff
9 “armed with nothing more than conclusions” may not proceed beyond the pleading stage.
10 Id. at 1950. In considering a motion to dismiss, this Court must “disregard ‘[t]hreadbare
11 recitals of elements of a cause of action, supported by mere conclusory statements.’”
12 Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010) (quoting Iqbal, 113 S.
13 Ct. at 1949). Legal conclusions in a complaint “must be supported by factual allegations.”
14 Id. at 1950. The factual allegations “must be enough to raise a right to relief above the
15 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955,
16 167 L.Ed.2d 929 (2007).

17 In passing upon a motion to dismiss, the Court is to engage in a two step analysis.
18 First, the Court is not bound to accept the truth of any legal conclusion that is couched as
19 a factual allegation. Rather, it must evaluate whether a complaint contains “sufficient
20 allegations of underlying facts to give fair notice and to enable the opposing party to
21 defend itself effectively.” Starr v. Baca, ___ F.3d ___, 2011 U.S.App. LEXIS 15283 (9th
22 Cir. July 25, 2011). Second, assuming that there are any well-pleaded factual allegations,
23 the Court must decide if any facts which must be taken as true “plausibly suggest an
24 entitlement to relief, such that it is not unfair to require the opposing party to be subjected
25 to the expense of discovery and continued litigation.” Id. In assessing plausibility, the
26 Court may “draw upon its judicial experience and common sense.” Iqbal, 129 S.Ct. at
27 1249-50. Given the substantial burdens associated with modern litigation , the pleadings
28 must “provide a defendant with some indication of the loss and the causal connection that

1 the plaintiff has in mind.” Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 125 S.Ct.
2 1627, 1634, 161 L.Ed.2d 577 (2005).

3 **B. The Elements Of A Legal Malpractice Claim Under California Law, Including**
4 **The “Case Within A Case” Doctrine**

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

14 California cases have intermittently used the terms “trial within a trial,” “suit
15 within a suit” and “case within a case” to describe the burden applicable to proving
16 causation and damages in a legal malpractice case. Mattco Forge, Inc. v. Arthur Young &
17 Co., Inc., 52 Cal.App.4th 820, 832-33 (1997). Plaintiff is apparently aware of the burden
18 imposed on it in a legal malpractice case and uses the words “case within a case” to
19 describe the qui tam case and its relationship to this one. (FAC, p. 3, line 18.)

20 The case within a case doctrine developed in cases arising out of litigation matters.
21 In that context, it requires that a legal malpractice plaintiff “establish that *but for* the
22 alleged negligence of the defendant attorneys, the plaintiff would have obtained a more
23 favorable judgment or settlement in the action in which the malpractice allegedly
24 occurred.” Viner, 30 Cal.4th at 1241. This burden has persisted for more than 120 years
25 because “it is the most effective safeguard yet devised against speculative and conjectural
26 claims in this era of ever expanding litigation. It is a standard of proof designed to limit
27 damages to those actually *caused* by a professional’s malfeasance.” Mattco Forge, 52
28 Cal.App.4th at 834. See also, Blain v. Doctor’s Co., 222 Cal.App.3d 1048, 1063 (1990)

1 (“There is no cognizable harm attributable to the mere exposure to liability. The exposure
2 must result in compensable detriment.”); Orrick Herrington & Sutcliffe v. Superior Court,
3 107 Cal.App.4th 1052, 1060 (2003) (“an overpayment for services is contract damages . . .
4 were the law otherwise, tort damages would exist in every instance in which an attorney
5 collected a fee.”).

6 In Viner, the California Supreme Court determined that a plaintiff alleging
7 transactional malpractice is held to the same burden of proving causation and damages
8 that applies in litigation malpractice cases. The Viner court observed that “[o]n both
9 litigation malpractice and transactional malpractice cases, the critical inquiry is *what*
10 *would have happened* if the defendant attorney had not been negligent. This is so because
11 the very idea of causation necessarily involves comparing historical events to a
12 hypothetical alternative.” Viner, 30 Cal.4th at 1242. See also, Dang v. Smith, 190
13 Cal.App.4th 646, 666 (2010) (“Plaintiff has made no attempt to specify how she would
14 have fared better had the bakery sale been handled in what she views as the proper
15 manner.”)

16 **C. The Claim Of Transactional Malpractice Fails To Satisfy Federal Pleading**
17 **Standards**

18 J-M’s claim of transactional malpractice relating to the PW Eagle transaction fails
19 because it does no more than plead “[t]hreadbare recitals of the elements of a cause of
20 action, supported by mere conclusory statements.” Iqbal, 129 S.Ct. at 1949. Although
21 J-M alleges that MWE represented it is the PW Eagle transaction, it only avers on
22 “information and belief,” that MWE performed some unidentified due diligence for J-M.
23 J-M makes no attempt to explain why it cannot identify the services MWE allegedly
24 performed for it. Indeed, J-M makes no attempt to describe the due diligence that MWE
25 was supposed to have undertaken. The FAC does not specifically allege that MWE’s due
26 diligence on the PW Eagle Transaction had anything whatsoever to do with patents.
27 While J-M alleges that it “discovered” that “some” of the patents it acquired from PW
28 Eagle did not comply with some undefined specifications, the FAC never states how J-M

1 made this discovery or defines the relationship, if any, between J-M's discovery and its
2 alleged "information and belief" that MWE was negligent.

3 At bottom, the claim of duty and breach boils down to this: because J-M allegedly
4 discovered that certain unidentified PW Eagle patents failed to comply with certain
5 unidentified specifications after the transaction closed, J-M has concluded that MWE must
6 have somehow failed to comport with the standard of care in conducting yet unidentified
7 due diligence activities in connection with the transaction. These conclusions, based on
8 alleged information and belief, do not provide sufficient allegations of underlying facts to
9 give MWE fair notice and so as to enable MWE to defend itself effectively. Starr v. Baca,
10 2011 U.S.App. LEXIS 15283 (9th Cir. July 25, 2011). At the very least, J-M must
11 identify the scope of MWE's representation in the PW Eagle transaction, describe the type
12 of due diligence MWE was supposed to perform, explain how the performance of these
13 due diligence activities would have led to discovery of problems with some of the patents
14 it purchased, identify which patents did not meet specifications, identify the specifications
15 to which J-M refers, and explain how J-M itself learned that the unidentified patents did
16 not comply with these yet unidentified specifications. Since the FAC lacks these facts,
17 MWE is left to its own devices to divine the basis for this claim. Because the FAC is
18 utterly lacking in factual detail, it does not plead duty or breach with respect to the
19 transactional malpractice. See, e.g., Iqbal, 129 S.Ct. at 1949 (Complaint must show
20 "more than a sheer possibility that a defendant has acted unlawfully"); Twombly, 550
21 U.S. at 570 (Complaint dismissed because "plaintiffs here have not nudged their claims
22 across the line from conceivable to plausible").

23 Turning to causation and damages, J-M's allegations are likewise insufficient
24 because they are not based on facts. The statement that MWE somehow "caused" J-M to
25 suffer damages in an amount to be proven at trial is nothing more than a legal conclusion
26 that must be disregarded under Iqbal. J-M provides no factual basis for the required
27 conclusion that it would have achieved a better result in the PW Eagle transaction if MWE
28 had somehow discovered that "some" of PW Eagle's patents did not meet specifications.

1 Viner, 30 Cal.4th at 1242. Thus, the transactional malpractice claim fails to adequately
2 plead causation and damages.

3 **D. The Claim Of Litigation Malpractice Fails to Satisfy Federal Pleading**
4 **Standards**

5 Turning to the claim of litigation malpractice arising out of the qui tam case, J-M
6 sets forth its version of the facts which supposedly support its contention that MWE failed
7 to supervise the contract lawyers who participated in the “second review” of documents.
8 However, the FAC makes no effort to explain how it suffered any financial loss as a result
9 of the production of the allegedly “non-responsive” or “privileged” documents. See, e.g.,
10 Dura Pharmaceuticals, 125 S.Ct. at 1634 (requiring a plaintiff to “provide a defendant
11 with some indication of the loss and the causal connection that the plaintiff has in mind.”)

12 J-M appears to recognize that the qui tam case is the “case within a case” within
13 the meaning of California malpractice law. (FAC, p. 3, line 18.) Nonetheless, the FAC
14 does not allege that the production of alleged “non-responsive” and “privileged”
15 documents has had any effect whatsoever on the qui tam case.

16 As a matter of fact, the qui tam case remains pending as of this date (RJN, Ex. A).
17 Because the qui tam case is still pending, J-M has no basis for alleging that it had an
18 unfavorable outcome in the case. Nor can J-M allege that the production of “privileged”
19 or “non-responsive” documents contributed, in any way, to an unfavorable outcome in the
20 qui tam case. Because J-M cannot allege that it would have had a better outcome in the
21 absence of the alleged malpractice, the litigation malpractice claim must be dismissed.
22 See also, Blain v. Doctors Co., 222 Cal.App.3d 1048, 1063 (1990) (potential exposure is
23 not cognizable form of damages) and Orrick Herrington & Sutcliffe v. Superior Court,
24 107 Cal.App.4th 1052, 1060 (2003) (an alleged overpayment of fees not considered tort
25 damages).

26 In sum, the claim for litigation malpractice is deficient because it fails to allege
27 causation and damages. This court must disregard the mere conclusion that J-M suffered
28 damage. The litigation malpractice claim neither identifies any financial loss that J-M

1 suffered nor makes any effort to explain how any actual, compensable loss was
2 proximately caused by the alleged negligence. Accordingly, the litigation malpractice
3 claim must be dismissed.

4 **III.**

5 **THE FAC FAILS TO STATE A CLAIM FOR RELIEF**
6 **FOR BREACH FOR FIDUCIARY DUTY**

7 A cause of action for breach of fiduciary duty is a “species of tort distinct from a
8 cause of action for professional negligence.” Stanley v. Richmond, 35 Cal.App.4th 1070,
9 1086 (1995). Here, the breach of fiduciary duty cause of action is nothing more than a
10 reiteration of the cause of action for legal malpractice. Moreover, because it does not
11 allege that J-M suffered any compensable tort damages as a result of the alleged breach of
12 fiduciary duty, the breach of fiduciary duty claim fails to plead the required elements of
13 causation and damages.

14 **IV.**

15 **THE ACCOUNTING CLAIM FAILS**

16 J-M seeks an accounting, basing its claim on alleged “information and belief.” J-M
17 alleges that MWE billed it for work that was “not necessary, not done and not done
18 competently.” (FAC ¶ 29.) Iqbal demands much more than this “unadorned the-
19 defendant-unlawfully-harmed-me accusation.” Iqbal, 129 S.Ct. at 1949.

20 Moreover, to the extent J-M alleges that MWE billed for work that was “not
21 necessary or not done,” the FAC alleges that MWE was engaged in fraudulent activities.
22 Despite this serious attack on MWE’s character, J-M fails to comply with Federal Rule of
23 Civil Procedure 9(b) because it does not identify a single fact which has caused J-M to
24 conclude that MWE committed fraud.

25 Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud or mistake, a
26 party must state with particularity the circumstances constituting fraud or mistake.”
27 (Federal Rule of Civil Procedure 9(b).) See also, Pirelli Armstrong Tire Corp. Retiree
28 Medical Benefits Trust v. Walgreen Co., 631 F.3d 436, 446 (7th Cir. 2011) (“the practices

1 alleged in Pirelli's complaint constitute fraudulent activity, and the dictates of Rule 9(b)
2 apply to allegations of fraud, not claims of fraud.") Indeed, a plaintiff who bases
3 allegations of fraud on information and belief "bears the burden of pleading plausible
4 grounds for suspecting that the defendant was engaged in a fraudulent scheme." Pirelli,
5 631 F.3d at 447. Here, the FAC does not provide any factual basis for concluding that
6 MWE engaged in fraudulent billing practices. For that reason alone, the accounting claim
7 must be dismissed.

8 More significantly, a claim for damages for an overpayment of legal fees is
9 properly characterized as a breach of contract claim, not a claim for an accounting. A
10 claim for an accounting will not lie when there is an adequate remedy at law. Hamilton v.
11 Bank of Blue Valley, 746 F.Supp.2d 1160, 1175 (E.D.Cal. 2010) citing Civil Western
12 Corp. v. Zila Industries, Inc., 66 Cal.App.3d 1, 14 (1977). Here, the remedy at law is a
13 cause of action for breach of contract. See, Orrick Herrington & Sutcliffe v. Superior
14 Court, 107 Cal.App.4th 1052, 1060 (2003) ("an overpayment for services in contract
15 damages").

16 V.

17 **THIS COURT SHOULD DISMISS THE**
18 **PUNITIVE DAMAGES ALLEGATIONS**

19 J-M's claim for punitive damages is based on a conclusion, allegedly based on
20 "information and belief," that MWE's actions were intentional, fraudulent, oppressive and
21 malicious (FAC, ¶ 26.) J-M alleges the conclusion that MWE's actions satisfy the
22 definitions of fraud, oppression and malice set forth in California Civil Code § 3294(c).
23 However, the FAC does not even attempt to plead a conclusion that the acts of anyone
24 employed by MWE were ratified by a managing agent of MWE as required by California
25 Civil Code § 3294(b).

26 The pleading standards set forth in Twombly and Iqbal are applicable to claims for
27 punitive damages. Kelley v. Corrections Corp. of America, 750 F.Supp.2d 1132, 1147
28 (E.D.Cal. 2010). See also Rhynes v. Stryker Corp., 2011 U.S. Dist. LEXIS 59286 (E.D.

1 May 31, Cal. 2011). The Twombly and Iqbal standards require that a claim for punitive
2 damages which is unsupported by facts be dismissed. Id.

3 Moreover, a punitive damages claim does not lie against the firm because plaintiffs
4 fail to allege any facts establishing that any managing agent of MWE either committed
5 malicious conduct or authorized or ratified it, as required by Civil Code section 3294(b).
6 This is a fatal omission. Weeks v. Baker & McKenzie, 63 Cal.App.4th 1128, 1159
7 (1998). Ratification requires that a managing agent “had actual knowledge of the
8 malicious conduct and its outrageous character.” Cruz v. Home Base, 83 Cal.App.4th 160,
9 168 (2000); College Hospital, Inc. v. Superior Court, 8 Cal. 4th 704, 726 (1994).

10 A “managing agent” is someone who “exercises substantial discretionary authority
11 over decisions that ultimately determine the policy” of the firm. White v. Ultramar, Inc.,
12 21 Cal.4th 563, 566-67, 573 (1999); Cruz v. Home Base, supra, 83 Cal.App.4th at 163,
13 167 (“Corporate policy” means “the broad principles and rules of general application
14 which govern corporate conduct” and are “intended to be followed consistently over time
15 in corporate operations”.)

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

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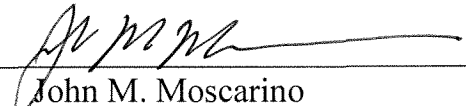
VI.

CONCLUSION

For all of the reasons set forth herein, the motion to dismiss should be granted.

Dated: August 25, 2011

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