

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LAW OFFICES OF RICHARD D. FARKAS
RICHARD D. FARKAS, ESQ. (State Bar No. 89157)
15300 Ventura Boulevard
Suite 504
Sherman Oaks, California 91403
Telephone: (818) 789-6001
Facsimile: (818) 789-6002

Attorneys for Plaintiffs
ALAN HOLLANDER and
CARDIO-HEALTH CONCEPTS, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES (WEST DISTRICT)

ALAN HOLLANDER, an individual,
CARDIO-HEALTH CONCEPTS, LLC, a
California Limited Liability Company,

Plaintiffs,

vs.

PREVENTION CONCEPTS, INC., a
California Corporation; JACQUES D.
BARTH, an individual; MAUD M. ZONJEE,
an individual; and DOES 1 through 100,
inclusive,

Defendants.

) Case No. SC 091469

) **OPPOSITION OF PLAINTIFFS ALAN**
) **HOLLANDER AND CARDIO-HEALTH**
) **CONCEPTS, LLC TO DEMURRER AND**
) **MOTION TO STRIKE OF DEFENDANTS**
) **TO FIRST AMENDED COMPLAINT**

) DATE: August 8, 2007 (noticed for 8/23/07)

) TIME: 8:30 a.m.

) DEPARTMENT: N

) Hon. Judge James A. Bascue

) Trial Date: January 22, 2007

Plaintiffs ALAN HOLLANDER and CARDIO-HEALTH CONCEPTS, LLC oppose the
Demurrer and Motion to Strike of Defendants PREVENTION CONCEPTS, INC., a California
Corporation; JACQUES D. BARTH, an individual; and MAUD M. ZONJEE, an individual; as
follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION.

Rather than properly address the sufficiency of the Plaintiffs’ first amended complaint, demurring Defendants have attempted to plead and prove their case. In so doing, they do not dispute the plaintiffs’ factual contentions, but rather attempt to argue that some of the causes of action are defective as uncertain and ambiguous, and on the completely erroneous basis that “there is another action pending between the same parties on the same cause of action.” Defendants’ arguments are completely without merit, factually and legally.

II. FACTUAL BACKGROUND OF PLAINTIFFS’ CLAIMS.

The original complaint in this case was filed on October 19, 2006. It alleged causes of action for Breach of Contract, Anticipatory Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Violation of Section 17200 of the California *Business and Professions Code*, Fraud, Conversion, Declaration of Constructive Trust, Negligent Misrepresentation, Conspiracy, an Accounting, Preliminary Injunction, Preliminary and Permanent Restraining Orders, and Declaratory Relief. Defendants have demurred to each of the causes of action. A demurrer to the original complaint was sustained on the basis that it omitted the holder of the subject promissory notes, CARDIO-HEALTH CONCEPTS, LLC, as a plaintiff. Other causes of action to which the demurrer was sustained have been deleted from the First Amended Complaint. All demurrable aspects of the original complaint have been cured by the First Amended Complaint, and the demurrer to the First Amended Complaint is without merit.

Factual Allegations.¹ Plaintiff, ALAN HOLLANDER, (hereafter occasionally referred to as “HOLLANDER” or “Plaintiff”) is an individual, residing in the County of Los

¹ Plaintiff acknowledges that the demurrer and its opposition must address the sufficiency of the complaint. This section is intended solely to give the Court some background of the dispute between Plaintiff and Defendants, to make the

RICHARD D. FARKAS\D:\UPLOADS\WORK\457A7B1B-D002-4B01-B8F1-7BCD59464C43_34114804332282731\IN\34114804332282731.DOC

1 Angeles, State of California. HOLLANDER is the founder and sole member of Plaintiff CARDIO-
2 HEALTH CONCEPTS, LLC. Defendant PREVENTION CONCEPTS, INC. (hereafter occasionally
3 referred to as “PREVENTION CONCEPTS”) is a California Corporation, doing business in the
4 County of Los Angeles, State of California. Defendant JACQUES D. BARTH (“BARTH”) is an
5 individual, residing in the County of Los Angeles, State of California. BARTH, along with his wife,
6 Defendant MAUD M. ZONJEE, were the founders of PREVENTION CONCEPTS, INC.
7

8 [Complaint ¶s 1-3 First Amended Complaint ¶s 4-8.]

9 Plaintiff’s initial role with respect to the defendants was generally described in
10 paragraph 11 through 13 of the complaint:

11 “[I]n or about February, 1997, Defendants BARTH and ZONJEE incorporated
12 PREVENTION CONCEPTS, INC. in California, as a corporation seeking to develop and
13 commercially exploit ultrasound technology to assess cardiovascular risk. As detailed herein,
14 Defendants BARTH, ZONJEE, and PREVENTION CONCEPTS secured the services of Plaintiff
15 HOLLANDER to assist Defendants in their efforts to expand and finance their business efforts. As a
16 part of the business transactions with the Defendants, Plaintiff HOLLANDER was to receive, among
17 other things, a monthly salary, a designated percentage interest in PREVENTION CONCEPTS
18 CORP., a percentage of the funds he was responsible for raising from third party investors, a
19 percentage ownership in the proceeds from the commercial exploitation of the technology of
20 PREVENTION CONCEPTS, and several other benefits and components of compensation.”
21

22 [Complaint ¶s 11-13.]

23
24 Introductory paragraph 14 further explains the basis of the Plaintiff’s complaint: “As
25 detailed herein, the Defendants, and each of them, have sought to terminate Plaintiff HOLLANDER
26

27 otherwise sparse demurrer more understandable. Plaintiff is not relying upon the facts in this introduction to support his
28 opposition to the demurrer to the complaint.

RICHARD D. FARKAS\D:\UPLOADS\WORK\457A7B1B-D002-4B01-B8F1-7BCD59464C43_341148043322822731\IN\341148043322822731.DOC

1 from all aspects of their business activities, and have wrongfully and unlawfully withheld
2 compensation from Plaintiff, have failed and refused to pay Plaintiff sums to which he is entitled,
3 and have wrongfully failed and refused to repay Plaintiff for money he advanced to the Defendants
4 as loans induced by the false representations of the Defendants. As such, Defendants have breached
5 their contractual obligations to Plaintiff, are anticipated to breach other agreements, and have
6 committed a variety of tortuous acts, entitling Plaintiff to the relief sought herein.” [Complaint ¶14.]
7

8 A very detailed explanation of the dealings between Plaintiffs and Defendants is now
9 found in paragraphs 15 through 32 of the First Amended Complaint, which describe the various
10 agreements between the parties, the unpaid promissory notes, and the breaches of the defendants.
11

12 ARGUMENT

13 III. APPLICABLE STANDARDS.

14 A. The Standard for Ruling on a Demurrer is Liberal Construction.

15 *Code of Civil Procedure*, Section 452 sets forth the legal standard for ruling on a demurrer—
16 liberal construction with a view to substantial justice between the parties. (See *Stevens v. Sup. Ct.*
17 (*API Auto Ins. Services*) (1999) 75 Cal.App.4th 594, 601.) As stated in *Gressley v. Williams* (1961)
18 193 Cal.App.2d 636, 639, “The court must, in every stage of an action, disregard any defect in the
19 pleadings which does not affect the substantial rights of the parties. . . . All that is necessary as
20 against a general demurrer is to plead facts entitling the plaintiff to some relief.”

21 B. Defendants Bear A Heavy Burden On A General Demurrer.

22 In California, the Court is required to accept the allegations of a Complaint as true when
23 ruling on a demurrer. Witkin, *Summary of California Procedure* (2d Ed.) Pleading, §800, p. 2413.
24 Plaintiff need only allege facts “in ordinary and concise language”. *California Code of Civil*
25 *Procedure* §425.10. A complaint states facts sufficient to constitute a cause of action if it appears
26 the plaintiff is entitled to any relief. [*Addiego v. Hill*, 238 Cal.App.2d 842 (1965).] It has also been
27 held that, in the context of a demurrer, complaints must be liberally construed. [*Buss v. J.O. Martin*
28

1 Co., 241 Cal.App.2d 123, 133-34, (1st Dist. 1966)]. It has been held that “a Plaintiff need not
2 plead facts with specificity where the facts are within the knowledge and control of the defendant
3 and are unknown to Plaintiff.” [*Credit Managers Association of Southern California v. Superior*
4 *Court*, 51 Cal.App.3d 352, 361 (1975) citations omitted.]

5 A demurrer can be used only to challenge defects that appear on the face of a complaint.
6 For the purpose of testing the sufficiency of the pleading on demurrer, the court must accept as true
7 all material facts properly pleaded. [*Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1040 (1986)
8 (citation omitted); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 558 (1998).]
9 All facts are to be construed in the light least favorable to defendant. [*Perdue v. Crocker Natl.*
10 *Bank*, 38 Cal. 3d 913, 922 (1985).] Whether the plaintiff will be able to prove the pleaded facts is
11 irrelevant to ruling upon the demurrer. [*Stevens v. Superior Court*, 180 Cal. App. 3d 605, 609-10
12 (1986).] It is error to sustain a demurrer if it appears that the plaintiff is entitled to any relief under
13 the circumstances pleaded. [*Dubins v. Regents of Univ. Of Cal.*, 25 Cal. App. 4th 77, 82 (1994);
14 *Jack Heskett Lincoln-Mercury, Inc. v. Metcalf*, 158 Cal. App. 3d 38, 41 (1984).] If there is a
15 reasonable possibility that a pleading defect can be cured, leave to amend must be granted. [*Platt*
16 *v. Coldwell Banker Residential Real Estate Servs.*, 217 Cal. App. 3d 1439, 1444 (1990); *Blank v.*
17 *Kirwan*, 39 Cal. 3d 311, 318 (1985).] Defendant’s demurrer cannot be granted under these
18 standards.
19
20
21

22 **IV. PLAINTIFFS HAVE ALLEGED ALL OF THE ELEMENTS OF BREACHES OF**
23 **CONTRACTS, INCLUDING THEIR OWN PERFORMANCE.**

24 Defendants’ original “boilerplate” demur stated that the causes of action for breach of
25 contract, anticipatory breach of contract and breach of the covenant of good faith and fair dealing fail
26 to state whether the alleged contract is written oral [*sic*], or implied by conduct.” [Demurrer, page 2,
27 lines 16-18.] Defendants claimed that “No copy of a written contract between the plaintiff Alan
28

RICHARD D. FARKAS\D:\UPLOADS\WORK\457A7B1B-D002-4B01-B8F1-7BCD59464C43_341148043322822731\IN\341148043322822731.DOC

1 Hollander and any of the defendants is attached to the complaint....” [Demurrer, page 2, lines 18-
2 20.] This was despite the opening sentence of the demurrer, which states “Attached as exhibits A
3 and B to the complaint of plaintiff Alan Hollander filed on October 19, 2006, are two promissory
4 notes.” [Demurrer, page 1, lines 19-20.] In any event, this has been addressed in the First Amended
5 Complaint, which attaches and incorporates the subject promissory notes, and the demurrer to the
6 First Amended Complaint no longer addresses this cause of action.
7

8 The contracts between Plaintiff and the Defendants are clear and adequately alleged,
9 throughout introductory paragraphs 15 through 27, as well as in paragraphs 29 through 35. In
10 addition to attaching and incorporating two written promissory notes (it is of no consequence that the
11 designated payee is Plaintiff’s company), the plaintiff details the additional agreements and
12 defendants’ breaches. Paragraph 30 of the original complaint (paragraph 35 of the First Amended
13 Complaint), for example, alleges that “Defendants breached their contracts with Plaintiff
14 HOLLANDER by, among other things:
15

- 16 i. Refusing to give Plaintiff the opportunity to succeed at his agreed efforts;
- 17 ii. Failing to treat Plaintiff in accordance with Defendants’ stated policies;
- 18 iii. Terminating Plaintiff in breach of the promises made to him;
- 19 iv. Terminating Plaintiff without following the benefits of Defendants’ policies
20 and practices.”
21

22 In addition, former paragraph 31 (now paragraph 36 of the First Amended Complaint)
23 alleges:

- 24 ■ Mr. HOLLANDER has not been fully compensated by the company for his agreed
25 efforts;
- 26 ■ The company has failed and refused to repay Plaintiff for money he advanced on behalf
27 of the Defendants and for the benefit of the Defendants;
28

1 ■ Mr. HOLLANDER has not been fully compensated for his efforts and monetary advances
2 on behalf of the Defendants;

3 ■ Mr. HOLLANDER has been denied his percentage interest in the Company;

4 ■ Mr. HOLLANDER has not been repaid for the loans he made to the Company, which
5 loans were made solely because of the false representations of the Defendants that
6 Plaintiff would be joining the Company as an officer and director, and that he would
7 continue to be involved in bringing in the funds to capitalize the business .
8

9 Defendants no longer demurrer to these contractually-based causes of action, but seek to
10 eliminate other causes of action already accepted by this Court.

11 **V. THIS COURT ALREADY HELD THAT PLAINTIFF HAS ALLEGED THE BASIS FOR**
12 **FRAUD AND NEGLIGENT MISREPRESENTATION WITH THE REQUISITE**
13 **PARTICULARITY.**

14
15 Actual fraud occurs when a party to the contract intends to deceive another party to the
16 contract or to induce another party to enter into the contract on the basis of a promise made without
17 any intention of performing it or any other deceitful act. *Benson v. Hamilton*, 126 Cal.App. 331,
18 334 (1932). “A promise to do something necessarily implies the intention to perform, and where
19 such an intention is absent, there is an implied misrepresentation of fact, which is actionable fraud.”
20 *Joanaco Projects v. Nixon & Tierney Constr. Co.*, 248 Cal.App.2d 821, 831 (1967) (emphasis in
21 original). Accordingly, a defendant’s promise that it is capable of performing its obligations, or
22 one which induces a plaintiff to contract with a defendant, is a “duty that gives rise to tort liability
23 completely independent of the contract.” [*Erlich v. Menezes*, 21 Cal.4th 543, 552 (1999)
24 (acknowledging the blurred distinctions between tort and contract claims).]
25

26 In any event, much of what Defendants point to as lacking particularity is the question of
27 Defendants’ intent, information exclusively within their control which subsequently lessens the
28

1 particularity pleading requirement for fraud. [*Committee on Children’s Television, Inc. v. General*
2 *Foods Corps.*, 35 Cal.3d 197, 217 (1983).]

3 Contrary to the defendants’ claim that Plaintiffs failed to plead fraud with particularity,
4 Plaintiffs’ Complaint alleges, among other things, that “Plaintiff HOLLANDER was solicited by the
5 Defendants, through written communications and telephonic and face-to-face meetings with
6 Defendants to continue his efforts, to act in the best interests of the Company, to arrange for loans of
7 money to the Defendants (including the loans repayable to Plaintiff CARDIO-HEALTH, evidenced
8 by Exhibits A and B), and otherwise act as alleged herein. In reliance on the above representations,
9 Plaintiff HOLLANDER agreed to assist the Defendants with their efforts to expand and obtain
10 outside financing for PREVENTION CONCEPTS. In furtherance of Plaintiff HOLLANDER’s faith
11 and trust in Defendants, Plaintiff agreed to seek to secure funding for the Defendants, to arrange for
12 loans of money to PREVENTION CONCEPTS to benefit the individual Defendants, and to take an
13 active role in the activities of PREVENTION CONCEPTS and to otherwise act in the best interests
14 in the Defendants.” [Complaint ¶s 46-48; First Amended Complaint ¶s 50-52.]

17 It continues: “At the time of the misrepresentations and omissions referenced herein,
18 Defendants were aware that such misrepresentations and omissions were taking place, and allowed
19 them to take place because they were co-founders, directors, and officers of PREVENTION
20 CONCEPTS, and benefited from the misrepresentations and omissions set forth herein.
21 [Complaint ¶ 49; First Amended Complaint ¶ 53.] After detailing the wrongful activities of the
22 defendants, and each of them, the complaint alleges that “Defendants’ conduct evidenced a
23 conscious disregard of the Plaintiff’s rights, and exhibited a particularly malicious intent in light of
24 the Defendants’ knowledge of Plaintiff’s financial status, activities, and efforts.” [Complaint ¶ 51;
25 First Amended Complaint ¶ 55.] The fraud cause of action, in light of the totality of the
26 allegations, is also sufficiently pleaded.
27
28

RICHARD D. FARKAS\D:\UPLOADS\WORK\457A7B1B-D002-4B01-B8F1-7BCD59464C43_341148043322822731\IN\341148043322822731.DOC

1 VI. PLAINTIFF HAS ADEQUATELY ALLEGED A CONSPIRACY BASED ON AN
2 INDEPENDENT CIVIL WRONG. CONVERSION, ACCOUNTING AND
3 DECLARATORY RELIEF ARE ALSO WELL PLED, AND INJUNCTIVE RELIEF IS
4 APPROPRIATE.

5
6 Defendants previously challenged the Plaintiffs' cause of action for conspiracy, on the sole
7 basis that "this complaint fails to adequately plead any cause of action that could would [sic]
8 constitute a wrongful act." [Demurrer, page 8, lines 8, 9.] "The elements of an action for civil
9 conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from
10 an act or acts done in furtherance of the common design. . . . In such an action the major
11 significance of the conspiracy lies in the fact that it renders each participant in the wrongful act
12 responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or
13 not he was a direct actor and regardless of the degree of his activity.'" [*Doctors' Co. v. Superior*
14 *Court* (1989) 49 Cal.3d 44, citing *Mox Incorporated v. Woods* (1927) 202 Cal. 675, 677-678 (262
15 P. 302); accord *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 (157 Cal.Rptr. 392, 598
16 P.2d 45).]

17
18 The ninth cause of action (conspiracy) is specifically "Against All Defendants," and
19 incorporates paragraphs 1 through 67, inclusive. [Complaint ¶ 68.] In addition to the numerous
20 and specific "independent civil wrongs" set forth in those paragraphs, the Plaintiffs further alleged,
21 in paragraph 69, that the defendants "falsely and fraudulently represented to Plaintiff, among other
22 things, that if Plaintiff became affiliated with them and contributed his time, expertise, experience,
23 efforts and resources, then Plaintiff would be fully compensated in accordance with the agreements
24 set forth herein." The complaint further alleges that "the Defendants, and each of them, willingly
25 and willfully conspired and agreed among themselves to perform the wrongful acts and schemes set
26 forth in this Complaint. Said conspiracy included, but is not limited to, the methods employed by
27
28

RICHARD D. FARKAS\D:\UPLOADS\WORK\457A7B1B-D002-4B01-B8F1-7BCD59464C43_341148043322822731\IN\341148043322822731.DOC

1 the Defendants, and each of them, to misappropriate the Plaintiff's money, efforts, and experience,
2 and to conceal their wrongful actions." [Complaint ¶ 72.] The demurrer to the First Amended
3 Complaint no longer addresses this cause of action.

4 Defendants now conclude, despite the allegations of the complaint, that Plaintiff fails to
5 state facts giving rise to a fiduciary relationship to support an accounting. Disregarding all of the
6 other allegations of the First Amended Complaint, Defendants wrongfully maintain only that
7 "plaintiff [*sic*] is alleging the right to recover a sum of money as stated in a promissory note."
8 [Demurrer, page 5, lines 27-28.]

9
10 Plaintiffs repeatedly alleges how HOLLANDER was assured that he would become an
11 integral part of the company, as an officer and co-owner. [See, e.g. Complaint ¶ 17; First Amended
12 Complaint ¶ 21.] An action for an accounting, which usually invokes the equity powers of the
13 court, is a proceeding for the purpose of obtaining a judicial settlement of the accounts of the
14 parties. [Verdier vs. Superior Court, 88 Cal.App. 2d 527, 199 P.2d 325, app. dsmd. 336 US 957, 93
15 L. Ed. 1110, 69 S.Ct. 893.] Accounting may also be an auxiliary remedy in actions other than
16 those brought for an accounting as such. [Hillman vs. Stults, 263 Cal.App.2d 848, 70 Cal.Rptr
17 295.]²

18
19
20
21 ² Courts of law and equity are possessed of concurrent jurisdiction in matters of accounting, though an action for an
22 accounting ordinarily invokes the equity power of the court. [Smith vs. Blodget, 187 C. 235, 201 P. 594; Kritzer vs.
23 Lancaster, 96 Cal.App. 2d 1, 214 P.2d 407; Hillman vs. Stults, 263 Cal.App.2d 848, 70 Cal.Rptr 295.] Where, as here,
24 the allegations of a complaint show that the plaintiff is entitled to some remedy from a court of general jurisdiction, and
25 that it is necessary to have an accounting to determine his rights, the accounting may be had in that court, regardless of
26 whether the facts would have given jurisdiction to a court of equity. [Coward vs. Clanton, 122 C. 451, 55 P. 147;
27 Arbuckle vs. Reid (Clifford F.), Inc. 118 Cal.App. 272, 4 P.2nd 978; Remme vs. Herzog, 222 Cal.App. 2d 863, 35 Cal.
28 Rptr. 586.] Moreover, a court may also assume jurisdiction and order an accounting where other grounds for invoking
equity are present, such as fraud, as is alleged by Plaintiff in this action. [Smith vs. Blodget, 187 Cal. 235, 201 P. 584;
Holmes vs. Hatch, 11 Cal.2d 376, 80 P.2d 70.] In an action where either party alleges facts showing an accounting to
be necessary, an accounting may be had. [Jones vs. Gardner, 57 C. 641.] Moreover, the pleader in an action for an
accounting is not required specifically to state facts that a peculiarly within the knowledge of his opponent. [Brea vs.
McGlashan, 3 Cal.App.2d 454, 39 P.2d 877; Hillman vs. Stults, 263 Cal.App.2d 848, 70 Cal.Rptr. 295.]

1 The declaratory relief cause of action properly alleges that “an actual controversy has arisen
2 and now exists between the Plaintiff and the Defendants concerning their respective rights in and
3 concerning the structure of PREVENTION CONCEPTS which is the subject of this lawsuit, as
4 well elements of compensation and Plaintiff’s entitlement of immediate repayment of loans
5 induced by the false representations of the Defendants, and each of them.” [Complaint ¶ 85.]

6
7 The purpose of declaratory relief is to determine and declare rights before the rights have
8 been invaded. [*Babb v Superior Court of Sonoma County* (1971) 3 Cal 3d 841, 92 Cal Rptr 179,
9 479 P2d 379; Witkin, 5 Cal. Proc. 3d, Pleading, §800] The declaratory relief action allows a party
10 to shape his or her conduct so as to avoid a violation of either his or her own or another party’s
11 rights, and saves the party from having to risk such a violation before an adjudication of differences
12 can be obtained. [*Tolle v Struve* (1932) 124 Cal App 263, 12 P2d 61 (discussing history and
13 purpose of declaratory relief); see Witkin, 5 Cal. Proc. 3d, Pleading, §800] The statute specifically
14 authorizes a party to obtain a declaration before there has been a breach of the obligation with
15 respect to which the declaration is sought. [CCP §1060] .

16
17 Actions for declaratory relief are included in the statutory definition of civil actions. [CCP
18 §§22, 30; see *Maguire v Hibernia Sav. & Loan Soc.* (1944) 23 Cal 2d 719, 146 P2d 673, 151 ALR
19 1062 (discussing procedural nature of civil action and citing CCP §§22, 30)] An action for
20 declaratory relief is therefore not a special proceeding and is generally treated like other civil
21 actions. [See Witkin, 5 Cal. Proc. 3d, Pleading, §800]³

22
23
24 ³ Declaratory relief is a cumulative remedy, which should not be construed as restricting any remedy
25 provided by law for the benefit of any party to an action seeking declaratory judgment. Moreover, a
26 declaratory judgment does not preclude any party from obtaining additional relief based on the same facts.
27 [CCP §1062] Thus, the court may not dismiss a correctly pleaded action for declaratory relief merely
28 because the plaintiff filed or could have filed an action for another type of relief. [*Olson v Cory* (1983) 35
Cal 3d 390, 197 Cal Rptr 843, 673 P2d 720 (complaints for declaratory and coercive relief may be made in
the same action); *Californians for Native Salmon etc. Assn. v Department of Forestry* (1990, 1st Dist) 221
Cal App 3d 1419, 271 Cal Rptr 270, review den (Cal) 1990 Cal LEXIS 4380 (that plaintiff could have filed
another form of action did not permit trial court to dismiss properly pleaded declaratory relief complaint)]

1 In this case, Plaintiffs alleges that “A judicial determination is necessary and appropriate at
2 this time under the circumstances in order that Plaintiff HOLLANDER and the Defendants may
3 establish their rights and pursue their business interests. Because of the relative instability of the
4 Defendants’ business, and the fact that Plaintiff may have no other adequate remedy at law, this
5 relief is necessary and appropriate.” [Complaint ¶ 86; First Amended Complaint ¶ 87.] With
6 respect to the conversion cause of action, Plaintiffs allege converted property over and above the
7 admittedly-unpaid amounts evidenced by the Promissory notes: “The funds held by the Defendants
8 on behalf of the Plaintiffs **included those funds** owed to Plaintiff CARDIO-HEALTH
9 CONCEPTS, LLC as money loaned to the Company, as described herein in Exhibits A and B
10 (specifically, the Notes in the principal amounts of \$25,000.00 and \$6,500.00), **and other valuable**
11 **consideration** owed to Plaintiff, as described in this Complaint, **including but not limited to an**
12 **additional \$7,500.00** provided by Plaintiffs to attorneys on behalf of the Defendants, and each of
13 them.” [First Amended Complaint ¶ 57 (emphasis added).]
14
15

16 In order to obtain a preliminary injunction or other form of injunctive relief, an applicant is
17 required to show a significant threat of irreparable injury and that legal remedies are inadequate.
18 The “traditional test” focuses on whether the plaintiff has demonstrated the following factors: 1) a
19 fair chance of success on the merits; 2) significant threat of irreparable injury; 3) at least a minimal
20 tip in the balance of hardships in plaintiff’s favor (i.e., the risk or irreparable injury to plaintiff if
21 the injunction is denied must exceed the foreseeable hardship to defendant if it is granted); and 4)
22
23

24 The court may combine declaratory relief with other remedies, such as injunctions or damages.
25 [*Hollenbeck Lodge (486) I.O.O.F. v Wilshire Boulevard Temple* (1959, 2nd Dist) 175 Cal App 2d 469, 346
26 P2d 422 (injunctive and declaratory relief may be granted in the same action); *Lortz v Connell* (1969, 1st
27 Dist) 273 Cal App 2d 286, 78 Cal Rptr 6 (court could have assessed damages in action for declaratory relief
28 where right to damages had accrued).] “The fundamental basis of declaratory relief is the existence of an
actual, present controversy over a proper subject.” (5 Witkin, op. cit. supra, § 811, p. 254, emphasis
omitted.)

1 whether any public interest favors granting the injunction. *See California Practice Guide, Civil*
2 *Procedure Before Trial*, Chapter 13, 13:43-13:44, p. 13-14; *Atari Games Corp. v. Nintendo of*
3 *America, Inc.* 897 F.2d 1572, 1575 (Fed.Cir. 1990); *American Motorcyclist Ass’n v. Watt* 714 F.2d
4 962, 965 (9th Cir. 1983).

5 Paragraph 86 of the First Amended Complaint alleges that “Defendants have undertaken
6 steps to disavow Plaintiff HOLLANDER’s role as an officer and director of PREVENTION
7 CONCEPTS, and have failed to honor their agreements to have Plaintiff HOLLANDER act as an
8 officer and director of PREVENTION CONCEPTS....” The following paragraph further provides
9 that “Plaintiff HOLLANDER will suffer a great and irreparable injury, in that the Plaintiff
10 HOLLANDER will be completely prevented from protecting his interests, leaving Plaintiff without
11 an adequate remedy at law.” The demurrer to this cause of action should also be denied.
12

13 **VII. THE MOTION TO STRIKE SHOULD BE DENIED.**

14 The sole basis of the Motion to Strike is to strike the portion of Plaintiffs’ Prayer for Relief
15 for Attorneys’ fees because the attached promissory notes do not contain an attorneys’ fee
16 provision. The Motion should be denied, so that this matter may proceed on the merits.
17

18 First of all, the relief sought in a prayer for relief is not to be considered as an allegation of
19 the complaint. Moreover, the Motion to Strike appears to be based on the mistaken assertion that
20 the First Amended Complaint is based solely on the breaches of contract alleged. The First
21 Amended Complaint also contains all of the elements necessary to support its causes of action for
22 breaches of the covenant of good faith and fair dealing, conspiracy to defraud, fraud, and other
23 intentional torts. The ultimate facts will be proven at trial, and it is then when it will be determined
24 whether an award of attorneys’ fees is appropriate—not through a premature motion to strike.
25

26 **VIII. CONCLUSION.**

1 The Plaintiffs have, with great specificity, alleged all of the necessary elements to set forth
2 the causes of action contained in their first amended complaint. At this stage of pleading, the
3 allegations must be taken as true, and the complaint is to be construed liberally. All of the facts are
4 sufficient to state the associated causes of action, and the allegations of the Plaintiffs' first
5 complaint are ripe for adjudication at this time.
6

7 For the reasons stated herein, plaintiffs respectfully request that the demurrer and motion to
8 strike the First Amended Complaint be denied.

9 DATED: August 1, 2007

LAW OFFICES OF RICHARD D. FARKAS

10
11 By _____
12 RICHARD D. FARKAS
13 Attorneys for Plaintiffs,
14 ALAN HOLLANDER and
15 CARDIO-HEALTH CONCEPTS, LLC
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Alan Hollander vs. Prevention Concepts, Inc., Barth, Zonjee
Los Angeles Superior Court of California Case No. SC 091469

PROOF OF SERVICE

I am a resident of the State of California, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is Law Offices of Richard D. Farkas, 15300 Ventura Boulevard, Suite 504, Sherman Oaks, California 91403. On the date listed below, I served the following document(s):

PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE FIRST AMENDED COMPLAINT.

_____ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5 p.m. Our facsimile machine reported the "send" as successful.

XX _____ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. According to that practice, items are deposited with the United States mail on that same day with postage thereon fully prepaid. 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 the date of deposit for mailing stated in the affidavit.

_____ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, deposited with Federal Express Corporation on the same date set out below in the ordinary course of business; that on the date set below, I caused to be served a true copy of the attached document(s).

_____ by causing personal delivery of the document(s) listed above _____ at the address set forth below.

_____ by personally delivering the document(s) listed above to the person at the address set forth below.

Christine S. Upton, Esq. Kehr, Schiff & Crane, LLP 12400 Wilshire Blvd. Suite 1300 Los Angeles, CA 90025	
---	--

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

Dated: _____, 2007

KERRI CONAWAY