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LAW OFFICES OF RICHARD D. FARKAS
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CHRISTINE ASHER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES — UNLIMITED JURISDICTION

CHRISTINE ASHER, an individual, doing business as FUN♥NASTICS and TUMBLE TYME,	)	CASE NO. BC 309247
	)	(Assigned to Hon. Soussan Bruguera)
)	
Plaintiff,	)	PLAINTIFF AND CROSS-DEFENDANT
	)	CHRISTINE ASHER’S DEMURRER TO FIRST
	)	AMENDED CROSS-COMPLAINT.
vs.)	
)	
AMBER RUTLEDGE, an individual;	)	DATE: September 23, 2004
MELANIE GRUBA, an individual also	)	TIME: 9:45 a.m.
known as MELANIE BEEMAN;	)	DEPT: Department 71
TUMBLING BUGS a business entity, form)	
unknown; and DOES 1 through 100,	)	COMPLAINT FILED: January 16, 2004
inclusive,)	
	)	Judge Soussan Bruguera
Defendants.)	
	)	DISCOVERY CUT-OFF : Not set
	)	MOTION CUT-OFF : Not set
	)	TRIAL DATE : December 6, 2004
AND RELATED CROSS-COMPLAINT.)	
)	

PLAINTIFF AND CROSS-DEFENDANT CHRISTINE ASHER, FOR HERSELF AND
FOR NO OTHER CROSS-DEFENDANT OR PARTY, DEMURRERS TO THE FIRST
AMENDED CROSS-COMPLAINT OF THE DEFENDANTS AND CROSS-COMPLAINANTS
AMBER RUTLEDGE and MELANIE GRUBA AS FOLLOWS:

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1 PLEASE TAKE NOTICE that on September 23, 2004, at 9:45 a.m., or as soon as the matter
2 may be heard in Department 71 of the above-entitled court, located at 111 North Hill Street,
3 California, 90012, the demurrer of Cross-Defendant CHRISTINE ASHER to the First Amended
4 Cross-Complaint of Defendants and Cross-Complainants AMBER RUTLEDGE and MELANIE
5 GRUBA on file herein will be heard.

6 This demurrer shall be based upon the grounds that the first amended cross-complaint still
7 fails to state facts sufficient to constitute a cause of action against this demurring plaintiff and cross-
8 defendant (or any other), that the allegations in the First Amended Cross-complaint are uncertain and
9 unintelligible, and that the First Amended Cross-complaint does not properly plead or specify the
10 elements of the purported cause of action for conversion as against this (or any) Cross-Defendant.

11 This demurrer will be based upon this notice, the Memorandum of Points and Authorities
12 attached hereto, and upon all of the records, pleadings and files in this matter, and upon such further
13 arguments and evidence that may be presented at the time of the hearing of this Demurrer.

14 WHEREFORE, Plaintiff prays that this demurrer be sustained, that Defendants and Cross-
15 complainants take nothing by their First Amended Cross-complaint, that Plaintiff have judgment for
16 her costs, and for all other relief this Court deems proper.

17
18 DATED: August 13th 2004

LAW OFFICES OF RICHARD D. FARKAS

19
20 By: _____

21 RICHARD D. FARKAS,
22 Attorneys for Plaintiff and Cross-Defendant
23 CHRISTINE ASHER
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MEMORANDUM OF POINTS AND AUTHORITIES

I. BRIEF SUMMARY OF DEMURRER ISSUES.

This demurrer to the Defendants’ “First Amended Cross-complaint” is based on the following points, among others:

- This Court, on July 15, 2004, sustained Cross-defendant’s demurrer to the original cross-complaint in its entirety; the First Amended Cross-complaint has not been materially changed, except for the deletion of a single cause of action (for “stalking”);
- The Defendants’ First Amended Cross-complaint is still uncertain and unintelligible, not having been materially amended;
- The Defendants still fail to allege the elements of any of their purported causes of action (including the requisite elements for a contract claim);
- The Defendants again improperly seek tort remedies for purely contractual claims;

For these reasons, developed herein, this demurrer to the Defendants’ First Amended Cross-complaint should be sustained.

II. INTRODUCTION.

In a striking display of “overpleading,” Defendants and Cross-Complainants AMBER RUTLEDGE and MELANIE GRUBA (hereafter “Defendants” or “Cross-complainants”) have re-filed, through a new attorney, a factually and legally inadequate First Amended Cross-complaint, seeking to support nine (9) purported causes of action against the Plaintiff and 100 “ROE” cross-defendants, based, apparently, upon an alleged breach of contract between themselves and their former “employer,” who is suing them for breach of contract and unfair business practices.

Defendants RUTLEDGE AND GRUBA, who first came to this court denying the existence of a written contract with Plaintiff (in connection with a motion to change venue), have now responded to Plaintiff’s complaint with a fifteen-page First Amended Cross-complaint against Plaintiff CHRISTINE ASHER, alleging damages based on causes of action based on “fraud, constructive trust, unfair business practices, conversion, breach of contract, employer’s breach of

1 implied covenant of good faith and fair dealing, intrusion and invasion of privacy, slander per se, and
2 intentional infliction of emotional distress.” [First Amended Cross-complaint, page 1 and generally.]

3 Without providing any adequate or accurate description of the alleged contractual agreements
4 between the parties or the elements of any of their causes of action, Cross-defendants recite a
5 rambling story that fails to lend legal support for the purported causes of action. The Defendants still
6 fail to allege the elements of their purported causes of action. Some actions involve different parties
7 altogether, and some causes of action are, in fact, remedies, and not valid causes of action at all.
8 Accordingly, the First Amended Cross-complaint against the Plaintiff should be dismissed.

9 III. STANDARD OF REVIEW.

10 Demurring party recognizes that, for purposes of the present demurrer, the Court may take as
11 true well-pleaded allegations of fact. [5 Witkin, *Cal. Procedure* (3d ed. 1985 & Supp. 1994)
12 Pleading §895.] Thus, for the purpose of testing the sufficiency of a cause of action, the demurrer
13 admits the truth of all material facts properly pleaded. [*Serrano v. Priest*, (1971) 5C3d 584,591.]
14 However, this principle is inapplicable to contentions, deductions, or conclusions of fact or law. [*Id.*]

15 California *Code of Civil Procedure*, §430.10(b), (e) and (f) provide that:

16 “The party against whom a complaint or cross-complaint has been filed may object, by
17 demurrer or answer, as provided in Section 430.30, to the pleading on any one or more of the
18 following grounds:

19 “(e) The pleading does not state facts sufficient to constitute a cause of action.

20 “(f) The complaint or cross-complaint is “uncertain” (i.e., ambiguous and unintelligible).”

21 It is axiomatic that a demurrer tests the legal sufficiency of the complaint. The court
22 considers the pleading on its face, or those matters which may or must be judicially noticed. *Blank v.*
23 *Kirwan*, 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718 (1985).

24 A demurrer tests the legal sufficiency of the complaint. In evaluating a demurrer, a court
25 accepts Defendants’ (or cross-complainants’) facts properly pleaded in a complaint as true, but “it
26 does not admit contentions, deductions, or conclusions of fact or law alleged therein.” [*Daar v.*
27 *Yellow Cab Co.* (1976) 67 Cal.2d 695, 713; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.] In ruling on
28 a demurrer, a court may properly take judicial notice of statutes, legislative acts, and other matters

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1 which are subject to judicial notice under the *Evidence Code*. [*People v. Oakland Water Front Co.*
2 (1897) 118 Cal, 234, 245; *County of Fresno v. Lehman* (1991) 229 Cal. App. 3d. 340,344-5.]
3 Accordingly, a demurrer should be sustained if there is no factual basis for relief under any theory
4 reasonably contemplated by the pleadings. [*Sher v. Leiderman* (1986) 181 Cal.App 3d. 867, 885.]
5 Given the foregoing standard of review, Defendants' First Amended Cross-complaint is barred by
6 well-established law.

7 **IV. FACTUAL BACKGROUND OF THIS LITIGATION.**¹

8 **A. THE PARTIES.**

9 Plaintiff CHRISTINE ASHER (hereafter occasionally referred to as "Plaintiff" or
10 "CHRISTINE ASHER") is an individual, doing business as FUN♥NASTICS and TUMBLE TYME
11 in the Counties of Los Angeles and San Diego, State of California. [Complaint ¶ 1; First Amended
12 Cross-complaint ¶ 2] The individual defendants are AMBER RUTLEDGE and MELANIE
13 GRUBA, who, through their partnership, Defendant TUMBLING BUGS, are alleged to be "doing
14 business in Los Angeles and San Diego counties, and elsewhere." [Complaint ¶s 2-4.]

16 **B. FACTUAL BACKGROUND.**

17 Plaintiff CHRISTINE ASHER formed her business in Los Angeles County approximately
18 ten years ago, using, variously, the names FUN♥NASTICS and TUMBLE TYME.

19 Defendants RUTLEDGE and GRUBA began working for Plaintiff CHRISTINE ASHER in
20 approximately 2003 as independent Teachers. [Complaint ¶ 9; First Amended Cross-complaint ¶
21 10.] In or about 2003, RUTLEDGE and GRUBA, respectively, on the one hand, and CHRISTINE
22 ASHER, doing business as Fun♥Nastics, on the other hand, entered into a series of agreements,
23 pursuant to which Defendants would begin working for Plaintiff. Pursuant to these agreements,
24

25
26 1 Plaintiff and cross-defendant acknowledges that the demurrer must address the sufficiency of the cross-complaint.
27 This section is intended solely to give the Court some background of the dispute between Plaintiff and Defendants, to
28 make the otherwise confusing pleading more understandable. Plaintiff is not relying upon the facts in this introduction to
support her demurrer to the First Amended Cross-complaint.

1 Defendants RUTLEDGE and GRUBA executed written agreements, which provided, among other
2 things, as follows:

- 3 (a) “Asher is the owner of a business which provides teaching gymnastics, dance,
4 exercise, and related activities to children at various locations (hereafter
5 occasionally referred to as the ‘Locations’);”
- 6 (b) “Teacher [Defendants RUTLEDGE and GRUBA] has been, as desires to continue
7 to be, a teacher, as an independent contractor, for FUN♥NASTICS with respect to
8 the Locations”;
- 9 (c) “1.1 Unfair Competition. Teacher acknowledges and agrees that the sale or
10 unauthorized use or disclosure of any of Asher’s trade secrets, including
11 information concerning Asher’s customers, clients, products and services, and any
12 future or proposed products and services, the fact that those products or services
13 are planned, under consideration, or in production, as well as any descriptions of
14 the features of those products and services, constitute unfair competition.”
- 15 (d) “Teacher promises and agrees not to engage in any unfair competition with Asher,
16 either during the term of this Agreement or at any time thereafter.”
- 17 (e) “Customers and Clients. Teacher acknowledges and agrees that the names and
18 address of Asher’s customers and clients, including but not limited to those
19 customers currently at the Locations, and of the school directors and teachers at
20 the Locations, constitute trade secrets of Asher, and that the sale of, unauthorized
21 use, or disclosure of any of Asher’s trade secrets constitute unfair competition.
22 Teacher therefore agrees not to engage in any unfair competition with Asher.”
- 23 (f) “1.3 No Solicitation, Competition. For a period of one year following the date of
24 this Agreement, and continuing for one year after Teacher is no longer teaching
25 for Asher. Teacher agrees not to directly or indirectly make known to any person,
26 or corporation, the names or addresses of any of the Asher’s customers, clients,
27 instructors, independent contractors, or any other information pertaining to them,
28 or call on, solicit, take away, or attempt to call on, solicit, or take away any of the
customers or clients of Asher with whom Teacher became acquainted during her
affiliation with FUN♥NASTICS at the Locations.”

- 1 (g) “Teacher further agrees to not to compete, in any fashion, with Asher or
2 FUN♥NASTICS during this same period.”
- 3 (h) “2.2 Attorneys’ Fees and Costs. Should any litigation be commenced between
4 Asher and Teacher concerning this Agreement or the rights and duties of either in
5 relation thereto, the party, Asher or Teacher, prevailing in such litigation shall be
6 entitled, in addition to such other relief as may be granted, to a reasonable sum as
7 and for her attorney’s fees in such litigation...”
- 8 (i) “Venue for the resolution of any dispute concerning this Agreement shall be in the
9 County of Los Angeles.” [Complaint ¶s 9-11.]

10 The complaint alleges that, in furtherance of these agreements, CHRISTINE ASHER took
11 the necessary and appropriate steps to deliver to Defendants certain business property, proprietary
12 information, customer lists, and other confidential material, and to arrange to have the defendants
13 placed in positions of trust in furtherance of their retention as teachers for Fun♥Nastics. [Complaint
14 ¶ 12.] It then alleges that “In or about November 2003, Defendants RUTLEDGE and GRUBA, now
15 doing business as TUMBLING BUGS, and DOES 1 through 100, commenced a series of activities
16 in connection with the operations of TUMBLING BUGS which were intended to, and did, interfere
17 with the business operations of CHRISTINE ASHER, and which were violative of the agreements
18 between the parties, including those identified in paragraphs 11(a) through (g), above. Among other
19 things:

- 20 ➤ Defendants RUTLEDGE, GRUBA, TUMBLING BUGS, and DOES 1 through 100,
21 acting through RUTLEDGE, GRUBA, and employees of TUMBLING BUGS, have
22 issued contracts and quotations to customers of Plaintiff, seeking to usurp Plaintiff’s
23 business and to have those customers deal with Defendants, rather than with Plaintiff;
- 24 ➤ Defendants RUTLEDGE, GRUBA, TUMBLING BUGS, and DOES 1 through 100,
25 acting through RUTLEDGE, GRUBA, and employees of TUMBLING BUGS, have
26 taken steps to intentionally confuse third parties, including Plaintiff’s vendors,
27 customers, and others, that Defendant TUMBLING BUGS is, in fact, authorized to
28 transact business with third parties who had been contracting with Plaintiff;

- 1 ➤ Defendants RUTLEDGE, GRUBA, TUMBLING BUGS, and DOES 1 through 100,
2 acting through RUTLEDGE, GRUBA, and employees of TUMBLING BUGS, have
3 further attempted to confuse third parties, including Plaintiff’s vendors, customers,
4 and others, not only by utilizing the name of TUMBLING BUGS, but by improperly
5 employing proprietary business methods and processes of the Plaintiff, and by using a
6 confusingly similar marketing material and forms of Plaintiff CHRISTINE ASHER,
7 and by marketing their services and products by using Plaintiff’s products, identifying
8 information, and other proprietary material in such a fashion so as to confuse the
9 public;
- 10 ➤ Defendants RUTLEDGE, GRUBA, TUMBLING BUGS, and DOES 1 through 100,
11 acting through RUTLEDGE, GRUBA, and employees of TUMBLING BUGS, have
12 converted property of the Plaintiff to their own use and benefit, without payment to
13 Plaintiff;
- 14 ➤ Defendants RUTLEDGE, TUMBLING BUGS and GRUBA, and DOES 1 through
15 100, acting through RUTLEDGE, have continued to market products and services of
16 Plaintiff CHRISTINE ASHER by improperly and unlawfully utilizing the name,
17 goodwill and likeness of CHRISTINE ASHER in product descriptions and elsewhere.
18 [Complaint ¶ 13.]

19 Based on the foregoing, Plaintiff filed suit in Los Angeles County, alleging causes of action
20 for Intentional Interference with Prospective Business Relations, Breach of Implied Covenant of
21 Good Faith and Fair Dealing, Unfair Business Practices, Fraud, Conversion, Constructive Trust,
22 Declaratory Relief, and Breach of Written Contract. [Complaint, generally.]²

23 **V. THE DEFENDANTS’ FIRST AMENDED CROSS-COMPLAINT CANNOT**
24 **WITHSTAND DEMURRER.**

25 ² The gist of the Complaint, therefore, revolves between the contractual relationship between the Plaintiff and the
26 defendants, both of whom, as with all of Plaintiff’s similarly-situated teachers, agreed, “**Venue for the resolution of any**
27 **dispute concerning this Agreement shall be in the County of Los Angeles.**” [Farkas declaration ¶ 4-6, Asher
28 declaration ¶s 4-7.] Defendants originally denied having signed these contracts in their unsuccessful motions for change
 of venue.

1 The First Amended Cross-complaint of Defendants remains a vague, factually and legally-
2 inadequate pleading, seeking to support nine (previously ten) purported causes of action based upon
3 an alleged breach of a Contract, presumably between Defendants and their former “employer.” The
4 Cross-Defendants’ First Amended Cross-complaint, not having been amended in substance, remain
5 legally insufficient in numerous respects with respect to all nine purported causes of action against
6 the cross-defendants.

7 The Defendants fail to allege the elements of their purported causes of action against the
8 named cross-defendants. Accordingly, the First Amended Cross-complaint against the Plaintiff
9 should be dismissed, with prejudice.

10 VI. THE FIRST AMENDED CROSS-COMPLAINT IS FATALLY UNCERTAIN.

11 The Defendants, in their First Amended Cross-complaint, fail even to disclose the critical
12 details of the parties’ contract (which, as previously noted, they previously denied signing in
13 connection with their motion to change venue). The breach of contract is not even addressed until
14 their fifth cause of action, which fails completely to even describe the elements of a contract claim
15 other than the incorporation, by reference in paragraph 36, to “each and every previous and
16 subsequent allegation.” [First Amended Cross-complaint ¶36]. Defendants fail to identify the terms
17 of the contract which were breached, and allege no facts in support of their contention that Asher is an
18 alter ego of the corporate defendant. The cause of action for breach of contract merely concludes,
19 without supporting facts that “The actions, of Asher, as herein alleged, including but not limited to
20 the withholding of contractually established wages and bonuses, the falsification and destruction of
21 employment records and the later theft and destruction of promotional materials, sign-up sheets,
22 whiteboards and other materials constitute a breach of the employment contract as defined by
23 California law.” [Cross –complaint ¶ 37.] This, without more, wholly fails to set forth a cause of
24 action for anything.

25 The First Amended Cross-complaint, therefore, is impossible to fully address. The
26 Defendants’ First Amended Cross-complaint is not sufficiently certain, and the allegations and the
27 elements of the various causes of action against the named defendants cannot be certainly
28 ascertained. It is still impossible to ascertain the basis of the Defendants’ claims against the Plaintiff,

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1 since they are not adequately specified, and cannot be determined by the presence of the necessary
2 elements to establish valid causes of action.

3 **VII. THE DEFENDANTS HAVE NOT ADEQUATELY ALLEGED A CAUSE OF**
4 **ACTION FOR BREACH OF CONTRACT AGAINST THE DEFENDANTS.**

5 The only written contract to come to light before this court, so far, is the non-competition
6 agreement which defeated the defendants' unsuccessful motion to change venue. Nevertheless,
7 Defendants again claim that they "deny that any non-competition agreement was discussed or
8 entered into prior to their being hired." [First Amended Cross-complaint ¶ 11.] They now
9 inconsistently allege that the documents "were executed fraudulently, without clear communication
10 to defendants, and may contain forged signatures." [First Amended Cross-complaint ¶ 37.] They
11 do, however, make rambling allegations about "numerous documents" signed after they were
12 "verbally hired," and "transcript documents to be signed" with "mostly blank pages that were
13 subsequently altered" and an unspecified "original agreement." [First Amended Cross-complaint, ¶s
14 11-13.] None of these documents are attached, however, and the charging allegations fail to tie any
15 such documents to the terms of any contract The First Amended Cross-complaint makes reference to
16 a Contract, which is not described or attached. Throughout the First Amended Cross-complaint,
17 there are vague references to duties of ASHER, presumably based on representations which are not
18 indicated as written or oral.³ The fifth cause of action is for breach of contract, wrongly
19 incorporating the previous thirty-five paragraphs, as well as "every subsequent allegation." [First
20 Amended Cross-complaint ¶36.] The parties to the alleged contract(s) are not identified, nor are the
21 alleged terms that were breached.

22 Under California law, the elements of a breach of contract claim are: (1) the existence of a
23 valid contract between the parties; (2) Defendants' performance; (3) defendant's unjustified or
24 unexcused failure to perform; and (4) damages to Defendants caused by the breach. See *Careau &*

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26 3 It does not allege any contractual terms with the separate cross-defendants, much less which of those terms was
27 breached. An oral contract must be pleaded according to its legal effect (i.e., by alleging the substance of its relevant
28 terms), and a written contract may be pleaded either according to its legal effect or verbatim (in the body of the
complaint or as a copy attached and incorporated by reference). 4 Witkin, *Cal. Procedure* (3rd ed. 1985) Pleading,
§§467-471, at 507-509.

1 *Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1388, 272 Cal. Rptr. 387
2 (1990). Defendants' First Amended Cross-complaint again fails to properly plead (a) the existence
3 of a valid contract between the parties held to be liable (b) defendants' unjustified or unexcused
4 failure to perform, or (c) Defendants' performance. Based on these fatal pleading deficiencies,
5 Defendants' First Amended Cross-complaint must fail.

6 Defendants must properly allege the elements of their alleged contract. Moreover, they
7 should identify all of the parties to the alleged contract, what its terms were, how these terms were
8 allegedly breached, and by whom. The existence of a contract between the litigating parties is a
9 necessary element to an action based on contract. [*Roth v. Malson*, 67 Cal.App. 4th 552, 557
10 (1998).] Defendants asserting breaches of contract must plead and prove contract formation in
11 addition to breach (offer, acceptance, and consideration.) [*Binder v. Aetna Life Ins. Co.*, 75 Cal.
12 App. 4th 832, 839 (1999).] Moreover, the Defendants must ensure that the contractually-based
13 allegations do not materially differ from the alleged contract itself.

14 The Defendants fail to properly allege the formation of a valid contract with the individual
15 cross-defendants, although Defendants seek, in previous causes of action, to hold Plaintiff and others
16 liable under contract terms, while they obliquely refers to ASHER as an "alter ego," failing to allege
17 any facts in support of this assertion. Because Defendants' vague and conclusory pleading fails to
18 allege the formation of any contract that has allegedly been breached by the named Cross-
19 defendants, the Defendants' contractually-based claims must fail.

20 **VIII. DEFENDANTS FAIL TO ALLEGE THE ELEMENTS OF ANY OF THEIR**
21 **REMAINING TORT CAUSES OF ACTION.**

22 **A. The Defendants Have Failed to Properly Allege the Elements of Fraud.** The First
23 Amended Cross-complaint also alleges several additional tort causes of action against Cross-
24 Defendant ASHER and 100 "ROES," and seek a variety of remedies, including monetary damages,
25 based upon alleged "fraud" and other associated claims. Despite attempting to describe contractual
26 relationship, the First Amended Cross-complaint does not properly set forth the elements of fraud or
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1 any of its additional tort causes of action.⁴ The first cause of action for fraud, for example, does not
2 adequately identify the actions or omissions of any specific defendant, and indicates only that the
3 Defendants “reasonably relied upon ASHER’s promises to conduct her business in a legal and
4 responsible manner, to their detriment.” [First Amended Cross-complaint, ¶ 27.] It is clear that the
5 Defendants are taking a simple commercial dispute and attempting to spin a tale entitling them to
6 allege tort damages, where none are available, as a matter of law. Defendants further allege
7 entitlement under the contract to remedies, including attorneys’ fees, despite the absence of any
8 allegation that a contract provides for anything of the sort.

9 In an action for intentional misrepresentation, the Cross-complainants are required to plead
10 the facts that support such a cause of action with specificity. The California Appellate Court in
11 *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal.App.3d 1324 (1986), outlined the elements
12 necessary to plead intentional misrepresentation. Such a pleading must allege a false representation
13 as to a material fact, knowledge of its falsity on the part of the Defendant, with the intent to defraud
14 the Defendants, that the Defendants justifiably relied on the representation, and that damage to the
15 Defendants ensued as a result of this reliance. [*Wilhelm* at 1331.] Further, the Court in *Wilhelm*
16 noted that these allegations must be alleged specifically. In this case, the Defendants have failed to
17 adequately tie any specific fraudulent act or misrepresentation to the named defendants.

18 Importantly, a general legal conclusion of fraud is an insufficient pleading. [*Wilhelm* at 1331]
19 Moreover, the Court observed how to plead such a cause of action properly “every element of the
20 cause of action for fraud must be alleged in full, factually and specifically, and the policy of liberal
21 construction of pleading will not usually be invoked to sustain a pleading that is defective in any
22 material respect.” [*Wilhelm* at 1331.] In the present case, Defendants failed to do so. Defendants
23 have failed to even attempt to allege which defendants made misrepresentations, what specifically
24 the misrepresentations were, and when such misrepresentations were made.

25 _____
26 ⁴ "The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2)
27 knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting
28 damage." (*Molko v. Holy Spirit Assn.* (1988) [46 Cal.3d 1092](#), 1108 [252 Cal.Rptr. 122, 762 P.2d 46]; see *Seeger v. Odell*
(1941) [18 Cal.2d 409](#), 414 [115 P.2d 977, 136 A.L.R. 1291]; § 1709.)

1 Defendants have done nothing more than offer a legal conclusion of fraud, which is not
2 satisfactory under *Wilhelm*. Defendants' fraud and conversion causes of action are completely
3 vague, and fall far short of meeting the requirements of specificity required to successfully plead a
4 cause of action for intentional misrepresentation. No facts are alleged to support these causes of
5 action, and therefore Defendants have not stated any cause of action. As a result of Defendants'
6 failure to plead intentional misrepresentation with specificity, they have, in fact, not stated a cause of
7 action. A "Constructive Trust," based on such allegations, as sought in the Second Cause of Action,
8 similarly cannot be granted.

9 The elements of fraud or deceit (see *Civ. Code*, §§ 1709, 1710) are: a representation, usually
10 of fact, which is false, knowledge of its falsity, intent to defraud, justifiable reliance upon the
11 misrepresentation, and damage [220 Cal.App.3d 73] resulting from that justifiable reliance. (*Roberts*
12 *v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109 [128 Cal.Rptr. 901]; 5
13 Witkin, *Summary of Cal. Law* (9th ed. 1988) Torts, § 676, p. 778.)

14 "Every element of the cause of action for fraud must be alleged in the proper manner and the
15 facts constituting the fraud must be alleged with sufficient specificity to allow defendant to
16 understand fully the nature of the charge made." (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*,
17 *supra*, 57 Cal.App.3d at p. 109.)

18 But the rationale for this "strict requirement of pleading" (*Committee on Children's*
19 *Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d 197, 216) is not merely notice to the
20 defendant. "The idea seems to be that allegations of fraud involve a serious attack on character, and
21 fairness to the defendant demands that he should receive the fullest possible details of the charge in
22 order to prepare his defense." (*Ibid.*) Thus "the policy of liberal construction of the pleadings ... will
23 not ordinarily be invoked to sustain a pleading defective in any material respect." (*Ibid.*) This
24 particularity requirement necessitates pleading facts which "show how, when, where, to whom, and
25 by what means the representations were tendered." (*Hills Trans. Co. v. Southwest* (1968) 266
26 Cal.App.2d 702, 707 [72 Cal.Rptr. 441].)

27 **B. Defendants' "Fraud" Claims Sound In Contract, and Relief in Tort is Inappropriate**
28 **for the Damages Alleged.** Defendants' fraud allegations (and all the other claims referenced in the

1 other causes of action) merely incorporate and re-state allegations in the nature of an attempted
2 breach of contract claim. Defendants essentially allege that the cross-defendants represented that she
3 or it would perform in some matter, and that the Cross-Defendant(s) did not perform as promised.
4 **Conduct amounting to a breach of contract, however, becomes tortious only when it also**
5 **violates an independent duty arising from principles of tort law.** [*Erlich v. Menezes*, 21 Cal. 4th
6 543, 551, 87 Cal. Rptr. 2d 886 (1999); *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.
7 4th 503, 515, 28 Cal Rptr. 2d 475 (1994). The alleged facts (largely “on information and belief”)
8 that “ASHER failed to satisfy her obligations” or that she “failed to satisfy her responsibilities as a
9 business owner and manager” do not make an alleged breach of contract distinguishable from any
10 other breach. [*Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal 4th 85, 98, 44 Cal. Rptr. 2d 420
11 (1995).] “In economic terms, the impact is identical—Defendants has lost the benefit of a bargain
12 and is entitled to recover compensation in the form of contract damages,” should Defendants ever be
13 able to allege and prove a breach and resulting damages. [*Applied Equipment Corp.*, 7 Cal. 4th at
14 517.] The law simply does not distinguish between good and bad motives for breaching a contract;
15 regardless of the motives of the breaching party, the remedies are limited to contract damages. [Id.
16 At 516.] California law now precludes tort recovery for breach of contract absent the breach of an
17 independent duty arising from principles of tort law. [*Freeman & Mills v. Belcher Oil Co.* (1995) 11
18 Cal.4th 85, 102.] Thus, the Defendants’ contractually-based tort claims, including the implied
19 covenant of good faith and fair dealing, fail as a matter of law.

20 **C. Defendants Fail to Allege the Elements Necessary for Any of the Causes of Action.**

21 As detailed herein, the entire First Amended Cross-complaint fails for uncertainty, and fails to
22 establish the elements necessary for a contract claim, or associated fraud claims. The remaining,
23 “add-on” causes of action for Conversion, Constructive Trust, (if it could even be a separate cause of
24 action), and Violations of the Business and Professions Code, are equally insufficient.

25 The Second Cause of Action purports to be for “Constructive Trust,” apparently relating to
26 “withholding of wages,” but this is unclear. Nevertheless, it is a basic rule of pleading that
27 Constructive Trust is a **remedy**, and not a separate cause of action. [(5 Witkin, *Cal. Procedure* (3d
28

1 ed. 1985) Pleading, §§ 788-791, pp. 232-235).]⁵ A demurrer to this cause of action is properly
 2 sustained without leave to amend. [*Stansfield v. Starkey*, 220 Cal.App.3d 59]

3 Similarly, Defendants, in their First Amended Cross-complaint, include a two-sentence third
 4 cause of action, that Defendants engaged in unspecified “unfair business practices” under the
 5 Business and Professional Code 17200.⁶ In support of this cause of action, they merely reallege
 6 “each and every previous and subsequent allegation” and conclude, without further factual
 7 allegation, that the “actions, omissions and fraudulent activities of ASHER” constitute “an unlawful,
 8 unfair and deceptive business act or practice.” [First Amended Cross-complaint, ¶s 31-33.] This
 9 Court already sustained demurrers to these unchanged causes of action. The sixth cause of action,
 10 which relies on a contractual relationship (denied, in large part, by defendants themselves) fails for
 11 the same reasons as the contract claims.

12 Cross-complainants, despite their tedious narrative of wrongdoing, make no effort to plead
 13 the elements of their causes of action. The eighth cause of action (for slander) fails to plead such
 14 elements, or to even allege that the claimed statements were false. Indeed, one such slanderous
 15 statement (allegedly made to GRUBA that “I don’t think what you are doing is the Christian thing to
 16 do” not only fails to rise to the level of slander, but is alleged to have been made by a third party

17
 18 ⁵ "A constructive trust is a *remedy* used by a court of equity to compel a person who has property to which he is not
 19 justly entitled to transfer it to the person entitled thereto." 11 B. Witkin, *Summary of California Law, Trusts*, § 305 at
 20 1138 (9th ed. 1990). Under California Law, constructive trusts are governed by Sections 2223 and 2224 of the California
 21 *Civil Code*. Section 2223 provides: "One who wrongfully detains a thing is an involuntary trustee thereof, for the
 benefit of the owner." Section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the
 violation of trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee
 of the thing gained, for the benefit of the person who would otherwise have had it."

22 ⁶ California *Business & Professions Code* § 17200, prohibits “unfair competition” defined as “any unlawful, unfair or
 23 fraudulent business act or practice” in addition to false or misleading “advertising.” As the Court stated in *Stop Youth*
 24 *Addiction*, “any person acting for the interest of itself, its members or the general public” may bring a claim under §
 25 17200. However, the civil penalties section of the UCL (§17206) clearly does not permit a private party to seek and
 26 obtain civil penalties. There are also cases holding that a private party can’t recover damages; See, e.g., *Independent*
 27 *Housing Services of S.F. v. Fillmore Center Associates*, 840 F.Supp. 1328 (N.D. Cal. 1993). The test of whether a
 28 practice is unfair involves examination of that practice’s impact on its alleged victim, balanced against the reasons,
 justifications and motives of alleged wrongdoer, and a weighing of utility of defendant’s conduct against gravity of harm
 to alleged victim – *Podolsky* (1996) 58 CR2d 89, 50 CA4th 632; *State Farm Fire and Cas. Co. v. Superior Court* (1996)
 53 CR2d 229, 45 CA4th 1093. An unfair business practice occurs when it offends an established public policy or when
 the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers – *People v. Casa*
Blanca Convalescent Homes (1984) 206 CR 164, 159 CA3d 509. “Unlawful” acts or practices are those forbidden by
 law, be it civil or criminal, federal, state, or municipal, statutory, or court-made. *Saudners v. Superior Court* (1994) 33
 CR2d 438, 27 CA4th 832; *Hewlett v. Squaw Valley* (1997) 63 CR2d 118, 54 CA4th 499.

1 (“Colleen” at Horizons Christian Fellowship) and not by any Cross-defendant. [First Amended
2 Cross-complaint ¶ 44.] Their “add-on” claim of infliction of emotional distress is similarly
3 unsupported and fails for lack of legally-cognizable elements.
4

5 IX. CONCLUSION.

6 Unless the defects noted in this demurrer are cured, it is impossible to address the substantive
7 allegations of First Amended Cross-complaint, if any can be stated. Even if the pleading defects
8 were cured, the Defendants’ disputes against the defendants cannot proceed. The Defendants fail to
9 properly allege the requisite elements of breach of contract, what the terms of the alleged contract
10 were (and who the parties were), and how each defendant allegedly breached it. Defendants seek to
11 enforce these claims without pleading the requisite elements, and further fail to allege the elements
12 of their related tort claims, some of which do not even constitute causes of action. In so doing,
13 Defendants fail, as a matter of law, to set forth any of the requisite elements of any of its causes of
14 action.

15 This Court previously sustained a demurrer to the original cross-complaint. The cross-
16 complainants have failed to address, much less cure, any of the defects of their original pleading.
17 For the foregoing reasons, it is respectfully submitted that this Demurrer of Cross-Defendant should
18 be again sustained, without further leave.

19
20 DATED: May 4, 2008

LAW OFFICES OF RICHARD D. FARKAS

21
22
23 By: _____

RICHARD D. FARKAS
Attorneys for Plaintiff and Cross-Defendant
CHRISTINE ASHER

1
2 *Asher vs. Rutledge, Gruba, et al*
3 Los Angeles Superior Court of California Case No. BC 309247

4 **PROOF OF SERVICE**

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

9 **PLAINTIFF AND CROSS-DEFENDANT'S DEMURRER TO FIRST AMENDED
10 CROSS-COMPLAINT.**

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

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

15 I am readily familiar with the firm's practice of collecting and processing correspondence for mailing.
16 According to that practice, items are deposited with the United States mail on that same day with postage
17 thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if postal
18 cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in
19 the affidavit.

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

23 _ by causing personal delivery of the document(s) listed above to the recipient at the address set forth
24 below.

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

26 Thomas C. Bobzin, Esq. 27 LAW OFFICES OF THOMAS C. 28 BOBZIN 3465 Catalina Drive Carlsbad, CA 92008	
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29 I declare under penalty of perjury under the laws of the State of California that the
30 foregoing is true and correct.

31 Dated: August ____, 2004

32 _____
33 KERRI CONAWAY