

1 **LAW OFFICES OF RICHARD D. FARKAS**
2 **RICHARD D. FARKAS, ESQ. (State Bar No. 89157)**
3 **15300 Ventura Boulevard**
4 **Suite 504**
5 **Sherman Oaks, California 91403**
6 **Telephone: (818) 789-6001**
7 **Facsimile: (818) 789-6002**

8 Attorneys for Defendants HOME MANAGEMENT
9 CARE, INC. and LAWRENCE APPEL

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES**

12 ALLISON BANKS HERBERT, an individual,) Case No. BC 658853
13 Plaintiff,)
14 vs.) **NOTICE OF DEMURRER AND**
15 HOME MANAGEMENT CARE, INC., a) **DEMURRER OF DEFENDANTS HOME**
16 California corporation; LAWRENCE APPEL,) **MANAGEMENT CARE, INC. AND**
17 an individual; and DOES 1 through 10,) **LAWRENCE APPEL TO PLAINTIFF'S**
18 inclusive,) **THIRD AMENDED COMPLAINT**
19) *(First Appearance and Motion Fee Paid;*
20) *filed concurrent with Declaration re: "Meet*
21) *and Confer")*
22) **DATE: December 11, 2018**
23) **TIME: 8:30 a.m.**
24) **DEPARTMENT: 53**
25) **Hon. Judge Howard L. Halm**
26)
27) **Res. ID: 180621324963**
28) **DISCOVERY CUT-OFF: Not set**
) **MOTION CUT-OFF: Not set**
) **TRIAL DATE: Not set**
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25 TO PLAINTIFF ALLISON BANKS HERBERT AND TO HER ATTORNEY:
26 PLEASE TAKE NOTICE that on December 11, 2018, in Department 53 of the Superior
27 Court of the County of Los Angeles, located at 111 North Hill Street, Los Angeles, California, at
28 8:30 a.m., or as soon thereafter as counsel can be heard, the demurrer of Defendants HOME

1 MANAGEMENT CARE, INC., a California corporation (hereafter “HOME MANAGEMENT” or
2 “HMCI” and LAWRENCE APPEL (hereafter “APPEL”), an individual, to the Third Amended
3 Complaint of Plaintiff ALLISON BANKS HERBERT on file herein will be heard.

4 This demurrer shall be based upon the grounds that the Third Amended Complaint still fails
5 to state facts sufficient to constitute a cause of action against these demurring defendants, that the
6 allegations in the Third Amended Complaint remain uncertain, unintelligible, and inconsistent with
7 previous complaint allegations, and that the Third Amended Complaint does not properly plead or
8 specify the elements of the purported causes of action as against these (or any) Defendants, and that
9 the purported claims of the Plaintiff, and each cause of action, are unintelligible and contrary to the
10 purported contract described in the complaint, now alleged to have been modified by agreement. It
11 is further based on the ground that the Plaintiff improperly seeks tort remedies for purely contractual
12 claims.

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

16 WHEREFORE, Defendants pray that this demurrer be sustained without further leave to
17 amend, that Plaintiff take nothing by her Third Amended Complaint, that Defendants have judgment
18 for their costs, and for all other relief this Court deems proper.

19
20 Dated: June 22, 2018

LAW OFFICES OF RICHARD D. FARKAS

21
22
23 By _____
24 Richard D. Farkas,
25 Attorneys for Defendants
26 HOME MANAGEMENT CARE, INC. and
27 LAWRENCE APPEL
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. BRIEF SUMMARY OF DEMURRER ISSUES.**

3 The Plaintiff’s belatedly-filed¹ Third Amended Complaint fails to address, much less cure,
4 the deficiencies that led this Court to sustain the demurrers to the original Complaint, the First
5 Amended Complaint, and the Second Amended Complaint. This demurrer to the Plaintiff’s Third
6 Amended Complaint, therefore, is based on the following points, among others:

- 7 • The Plaintiff’s Third Amended Complaint is uncertain and unintelligible;
- 8 • The Plaintiff fails to allege the elements of any of her purported causes of action
9 (including the requisite elements for a breach of fraudulent inducement, fraud, or
10 money had and received claim);
- 11 • No facts are alleged to support the apparent “alter ego” allegations in paragraph 6;
- 12 • It cannot be determined who the proper plaintiff (and defendants) are—Plaintiff has
13 alternatively alleged that she was a party to an oral contract (with whom it is
14 uncertain), although the contract allegations previously referenced Plaintiff’s parents’
15 agreement with Genworth Insurance (First Amended Complaint, paragraph 7), an
16 agreement between Genworth and Defendant HOME MANAGEMENT CARE, INC
17 (First Amended Complaint, paragraph 8), an agreement between Plaintiff’s parents
18 and Defendant HOME MANAGEMENT CARE, INC., (First Amended Complaint,
19 paragraph 8), apparently an agreement between Plaintiff and Plaintiff’s parents (First
20 Amended Complaint, paragraph 8), and an agreement between Plaintiff and HOME
21 MANAGEMENT CARE, INC. “through Appel” (First Amended Complaint,

22
23 ¹ This Court sustained Defendants’ Demurrer to the First Amended Complaint on January 8, 2018.
24 The Court further ruled “The Court orders Plaintiff to file any amended complaint within **20 days** of
25 this order.” [Emphasis added.] The Second Amended Complaint (and its proof of service) was
26 signed on February 12, 2018, and filed on February 13, 2018, 37 days later, and 17 days beyond this
27 Court’s Order. This Court sustained Defendants’ Demurrer to the Second Amended Complaint on
28 May 24, 2018. The Court sustained the demurrer to the breach of contract cause of action without
leave to amend, and further ruled “The Court orders Plaintiff to file any amended complaint within
20 days of this order.” [Emphasis added.] The unsigned Third Amended Complaint (and its proof
of service) was dated June 18, 2018, 25 days later, and 5 days beyond this Court’s Order.
Defendants respectfully submit that the Third Amended Complaint should be disallowed on this
basis alone, with no further leave to amend.

1 paragraph 8). Plaintiff now alleges that “HMCI, through Appel, entered into an oral
2 agreement with Herbert...” which is inconsistent with her previous allegations.
3 [Second Amended Complaint, paragraph 8; Third Amended Complaint, paragraph 8.]
4 Still, nowhere does the Complaint allege there was an agreement between anyone
5 (including Plaintiff) and Defendant LAWRENCE APPEL (or with any of the DOE
6 defendants);

- 7 • The Plaintiff still improperly seeks tort remedies for purely contractual claims (and
8 the demurrer to the previous breach of contract cause of action was sustained without
9 leave to amend);
- 10 • The “substantive” portions of the Third Amended Complaint fail to allege facts
11 sufficient to support liability of demurring defendant APPEL;
- 12 • The Plaintiff does not adequately allege reliance on any alleged fraud, as detailed in
13 this Court’s ruling on the demurrer to the Second Amended Complaint;
- 14 • The First Cause of Action, for “Fraudulent Inducement” again specifically
15 acknowledges that the Plaintiff agreed to “modify the oral agreement and take less
16 money.” [Second Amended Complaint, paragraph 17; Third Amended Complaint,
17 paragraph 13.]

18 For these reasons, developed herein, this demurrer to the Plaintiff’s Third Amended
19 Complaint should be sustained, without further leave to amend.

20 **II. INTRODUCTION.**

21 Plaintiff filed an original complaint for breach of oral contract, breach of the covenant of fair
22 dealing, fraud, and money had and received, while failing to account for, or even mention, legitimate
23 defenses and offsets to which Defendants are entitled. Plaintiff ALLISON BANKS HERBERT
24 (hereafter “HERBERT” or “Plaintiff”) filed a factually and legally inadequate complaint, seeking to
25 support five purported causes of action against one individual defendant, a California corporation,
26 and DOES 1 through 10, based, apparently, upon alleged breaches of an agreement between Plaintiff
27
28

1 and Defendant HOME MANAGEMENT CARE, INC.² Plaintiff deleted her original cause of action
2 for breach of the covenant of fair dealing, a demurrer to the breach of oral contract cause of action in
3 the Second Amended Complaint was sustained without leave to amend, and Plaintiff has restyled her
4 Third Amended Complaint to alleged causes of action for Fraudulent Inducement and Fraud, while
5 failing to address the insufficiencies noted in this Court’s ruling sustaining the demurrer to the
6 Second Amended Complaint.

7 Without attaching any contract naming the Plaintiff (or any defendant) alleged to have been
8 breached, or even providing any adequate description of the alleged oral contract (or the alleged
9 modified oral contract) or the history of transactions between the contracting parties, Plaintiff
10 contends that she is entitled to judgment against Defendants, HOME MANAGEMENT CARE, INC.
11 and LAWRENCE APPEL for unspecified amounts (“but no less than \$25,000 and punitive and/or
12 exemplary damages”) plus other damages, including prejudgment interest and costs. As detailed
13 herein, the Third Amended Complaint remains fatally uncertain, completely fails to properly allege
14 the elements of any causes of action and seeks remedies to which she is not entitled, as a matter of
15 law. A review of the tentative rulings on the demurrers to the original Complaint (which became the
16 ruling) the First Amended Complaint (which also became the ruling), and the Second Amended
17 Complaint indicate that the prior insufficiencies have not been cured.

18 III. STANDARD OF REVIEW.

19 Demurring defendants recognize that, for purposes of the present demurrer, the Court may
20 take as true well-pleaded allegations of fact. [5 Witkin, *Cal. Procedure* (3d ed. 1985 & Supp. 1994)

21 _____
22 ² As detailed herein, it cannot be determined who the proper plaintiff (and defendants) are—Plaintiff
23 has alternatively alleged that she is a party to an oral contract (with whom it is uncertain), although
24 the contract allegations have referenced Plaintiff’s parents’ agreement with Genworth Insurance
25 (Complaint, paragraph 7), an agreement between Genworth and Defendant HOME
26 MANAGEMENT CARE, INC (Complaint, paragraph 8), an agreement between Plaintiff’s parents
27 and Defendant HOME MANAGEMENT CARE, INC., (Complaint, paragraph 8), apparently an
28 agreement between Plaintiff and Plaintiff’s parents (Complaint, paragraph 8), an agreement between
Plaintiff and HOME MANAGEMENT CARE, INC. “through Appel”. The Third Amended
Complaint is simply inconsistent with the allegations of the Original and First Amended Complaints.
Nowhere does the original, First, or Second Amended Complaint allege there was an agreement
between anyone (including Plaintiff) and Defendant LAWRENCE APPEL (or with any of the DOE
defendants). The Third Amended Complaint, therefore, remains demurrable on these grounds,
among others.

RICHARD FARKAS\C:\PLEADINGS\NOT COMPLAINTS\DEMURRERS, OPPOSITIONS\HOME MANAGEMENT CARE-APPEL ADV HERBERT -- DEMURRER TO THIRD AMENDED COMPLAINT.DOC

1 Pleading §895.] Thus, for the purpose of testing the sufficiency of a cause of action, the demurrer
2 admits the truth of all material facts properly pleaded. [*Serrano v. Priest*, (1971) 5C3d 584,591.]
3 However, this principle is inapplicable to contentions, deductions, or conclusions of fact or law. [*Id.*]

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

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

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

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

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

13 A demurrer tests the legal sufficiency of the complaint. In evaluating a demurrer, a court
14 accepts plaintiff’s facts properly pleaded in a complaint as true, but “it does not admit contentions,
15 deductions, or conclusions of fact or law alleged therein.” [*Daar v. Yellow Cab Co.* (1976) 67 Cal.2d
16 695, 713; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.] In ruling on a demurrer, a court may properly
17 take judicial notice of statutes, legislative acts, and other matters which are subject to judicial notice
18 under the *Evidence Code*. [*People v. Oakland Water Front Co.* (1897) 118 Cal, 234, 245; *County of*
19 *Fresno v. Lehman* (1991) 229 Cal. App. 3d. 340,344-5.] Accordingly, a demurrer should be
20 sustained if there is no factual basis for relief under any theory reasonably contemplated by the
21 pleadings. [*Sher v. Leiderman* (1986) 181 Cal.App 3d. 867, 885.] Given the foregoing standard of
22 review, plaintiffs’ complaint is barred by well-established law.

23 **IV. FACTUAL BACKGROUND OF THIS LITIGATION.**³

24 Although not mentioned in the Third Amended Complaint, Defendant HOME
25 MANAGEMENT is a home health care agency, providing caregiver services to the ill and elderly.

26 _____
27 3 Defendants acknowledge that the demurrer must address the sufficiency of the complaint. This
28 section is intended solely to give the Court some background of the dispute between Plaintiff and
Defendants, to make the otherwise confusing pleading more understandable. Defendants are not
relying upon the facts in this introduction to support their demurrer to the Complaint.

1 The plaintiff alleges that “Approximately twenty (20) years ago, Dr. and Mrs. Leon Banks (the
2 “Parents”) signed an agreement with Genworth Insurance (“Genworth”) to provide an insurance
3 policy for in-home elder care for themselves,” [First Amended Complaint ¶7; Second Amended
4 Complaint ¶7; Third Amended Complaint ¶7.], and that “Some time in December, 2013 the Parents
5 notified Genworth that elder care was required under the Genworth policy.” [First Amended
6 Complaint ¶8; Second Amended Complaint ¶7; Third Amended Complaint ¶8.] The original
7 Complaint confusingly alleged that “*HMCI and the Parents agreed* that Herbert, the adult daughter
8 of the Parents, would provide the care and be paid by HMCI.” [Complaint ¶8 (*emphasis added*).] It
9 now inconsistently alleges that “Pursuant to the Genworth policy, at the request of the Parents,
10 HMCI, through Appel, entered into an oral agreement with Herbert, the adult daughter of the
11 Parents, that she would provide the in-home care and be paid by HMCI at a rate of \$15 per hours
12 [*sic*] for seven days a week for such services.” [First Amended Complaint ¶8; Second Amended
13 Complaint ¶8; Third Amended Complaint ¶8.] She concedes, without explanation, that this
14 agreement was “modified.” [Second Amended Complaint ¶11; Third Amended Complaint ¶11.]

15 Boilerplate and inadequate “alter ego” allegations are made against the corporate defendant
16 HMCI and APPEL with no factual support whatsoever, and again “on information and belief.” [E.g.,
17 First Amended Complaint ¶ 6; Second Amended Complaint ¶6; Third Amended Complaint ¶6.]

18 The Third Amended Complaint continues to acknowledge that Plaintiff did not submit time
19 sheets. [First Amended Complaint ¶ 10; Second Amended Complaint ¶ 10; Third Amended
20 Complaint ¶10.]

21 Apparently attempting to build a fraud claim, Plaintiff previously alleged that “Appel, the
22 president of HMCI informed Herbert that Genworth would only pay for forty-one (41) hours per
23 week” [First Amended Complaint ¶11]. She now alleges that “Appel, the president of HMCI
24 informed Herbert by telephone that Genworth would only pay for forty one (41) hours per week,
25 therefore the agreement needed to be modified.” [Compare, Second Amended Complaint ¶11; Third
26 Amended Complaint ¶11.] Finally, Plaintiff alleges that “HMCI [formerly HCMI] submitted
27 invoices to Genworth for every hour and every day, including weekends” [only weekend in original
28 Complaint] and that “HMCI intentionally failed to pay her for all of the hours worked, even though

1 HMCI [formerly HCMI] was paid by Genworth” [First Amended Complaint ¶11; Second Amended
2 Complaint ¶11; Third Amended Complaint ¶11.]

3 As this Court noted in its ruling sustaining Defendants’ demurrer to the First Amended
4 Complaint, “if Plaintiff, as she alleges, began working 56 hours per week on March 24, 2014, at
5 some point she was doing so believing that HMCI would not pay her for all 56 of those hours. (*See*
6 *FAC* ¶¶ 8-11.) Plaintiff has not adequately pled reasonable reliance.” Similarly, in sustaining the
7 demurrer to the Second Amended Complaint on May 24, 2018, this Court ruled “The modification is
8 essentially that while Plaintiff worked 56 hours per week, she agreed to be paid only for 41 of those
9 hours. The Court finds that there are insufficient facts showing actual reliance. Plaintiff does not
10 allege that she changed her position as a result of the alleged misrepresentations. Rather, she was
11 working 56 hours per week before the misrepresentation and continued working 56 hours per week
12 after the misrepresentation. There is no allegation of how the misrepresentation influenced
13 Plaintiff’s subsequent conduct or that Plaintiff would not have engaged in certain conduct without
14 the misrepresentation. Without actual reliance, there is no justifiable reliance. (*See Mirkin v.*
15 *Wasserman* (1993) 5 Cal.4th 1082, 1088 [“It is settled that a plaintiff, to state a cause of action for
16 deceit based on a misrepresentation, must plead that he or she actually relied on the
17 misrepresentation.”].) Therefore, the demurrer to the second and third causes of action is sustained
18 with leave to amend.” [May 25, 2017 Order.]

19 Once again, Plaintiff admits that she did not even submit time sheets, alleging “Herbert
20 requested HMCI accept time sheets that she would provide. However, HMCI (again, not APPEL)
21 declined and told her that HMCI) would ‘handle the paperwork.’” [Second Amended Complaint ¶10;
22 Third Amended Complaint ¶10.] At best, she seems to allege that HMCI overbilled or was overpaid
23 by Genworth, so she is entitled to additional compensation, despite the fact that Plaintiff “agreed to
24 modify the agreement.” [Second Amended Complaint ¶11.], which now reads “the agreement
25 needed to be modified.” [Third Amended Complaint ¶11.]

26 Plaintiff then sets forth equally vague and improperly pleaded causes of action for
27 “Fraudulent Inducement,” “Fraud” and for “Money Had and Received,” [Third Amended Complaint
28

1 ¶s 13- 26.] with a reference to her discovery that Defendants [not specified] “forged Herbert’s
2 signature on time sheets” at paragraph 12).

3 Plaintiff has again filed a factually and legally inadequate Third Amended Complaint,
4 seeking to support three improperly-pled causes of action against two named defendants and 10 DOE
5 defendants, based, apparently, upon an alleged breach of a “modified” oral contract between
6 unspecified parties. She seeks tort remedies (including punitive damages) to which she is not
7 entitled, as a matter of law.

8 **V. THE PLAINTIFF’S COMPLAINT CANNOT WITHSTAND DEMURRER.**

9 The Third Complaint of Plaintiff remains a vague, factually and legally-inadequate pleading,
10 seeking to support three purported causes of action based upon alleged breaches of an oral agreement
11 with unclear parties including, presumably, with Defendant APPEL (this Court sustained the
12 demurrer to the breach of contract cause of action without leave to amend on May 24, 2018;
13 Plaintiff’s counsel did not even appear at the hearing). The Plaintiff’s Third Amended Complaint—
14 again filed after this Court’s amendment deadline—remains legally insufficient in numerous respects
15 with respect to all of its purported causes of action against the defendants.⁴

16 **VI. THE COMPLAINT IS FATALY UNCERTAIN.**

17 The Plaintiff, in her Third Amended Complaint, still fails even to disclose the critical details
18 of the parties’ alleged contracts, how they were “modified,” and how they were breached. The terms

19 ⁴ This Court’s ruling as to the First Cause of Action of the original Complaint was as follows: “The
20 Court finds that the Complaint has not alleged the existence of a contract with adequate specificity.
21 A complaint must indicate on its face whether the contract is written, oral, or implied by conduct.
22 Cal. Civ. Proc. Code § 430.10 (g). (*See also Otworth v. Southern Pac. Transportation Co.* (1985)
23 166 Cal. App. 3d 452, 458 – 459.) The Complaint does not allege what form the contract here took,
24 apart from the heading of the cause of action being labelled “oral.” Moreover, Plaintiff provides
25 insufficient details regarding the terms of the contract and with whom it was entered into –although
26 the Complaint alleges that HMCI agreed to pay Herbert \$15 per hour to care for her parents seven
27 days a week (Comp. ¶ 9), the Complaint does not allege how many hours were initially agreed to.
28 The Complaint also later alleges the agreement was breached by Defendants (Compl. ¶ 15), but does
not allege the terms as to each party to the agreement, or how that party breached. She also does not
allege that she worked additional hours which she should have compensated for, only that HMCI
billed more hours to the Insurance than they paid to Plaintiff. (Compl. ¶ 11.) Accordingly, the
demurrer is sustained as to the first cause of action.” The reasoning of this Court sustaining every
cause of action in the First Amended Complaint continues to apply to the Second Amended
Complaint.

1 of any modified oral agreement are not adequately specified, nor is any alleged breach. Plaintiff's
2 effort to cure previous insufficiencies has merely led her to allege facts that are inconsistent with the
3 allegations in her three previous complaints.

4 The Plaintiff's Third Amended Complaint contains referenced to an oral agreement, but still
5 has no clear description of the terms of the contract, and it remains unclear how the contract was
6 modified, how it was breached, and by whom (other than confusing references to "falsely
7 representing" and "forging time sheets" [Second Amended Complaint ¶15; Third Amended
8 Complaint ¶12.]. Again, the Third Amended Complaint now alleges that Plaintiff "agreed to modify
9 the agreement." [Second Amended Complaint ¶11; Third Amended Complaint ¶11 ("the agreement
10 needed to be modified".)]

11 In the first and second causes of action, for fraud, there are still no terms of the contract
12 alleged to have been breached. Plaintiff previously alleged that "Appel, on behalf of himself and
13 HMCI [formerly "Defendants"] represented to Herbert that a certain fact was true, namely, that
14 Genworth would only pay her for forty one (41) hours per week to care for her Parents." [First
15 Amended Complaint ¶17; formerly Complaint ¶20.] Again, Plaintiff never alleged in this cause of
16 action that she worked more than 41 hours per week, or that she was not paid for any hours actually
17 worked. Now, she concedes that she agreed to "modify the oral agreement and take less money"
18 [Second Amended Complaint ¶17], "but alleges that "Appel knew that Herbert would continue to
19 works [*sic*] fifty six (56) hours per week because her parents required the care." [Second Amended
20 Complaint ¶17; Third Amended Complaint ¶13.] Logically, if any defendant allegedly overbilled
21 Genworth, or "forged" time sheets, the cause of action would belong to Genworth, not Plaintiff
22 Herbert. As this Court held in a previous demurrer ruling, "while Plaintiff alleges that she worked
23 56 hours a week, she does not allege that Defendants ever promised to pay her for all of those
24 hours." Again, as this Court held in its prior Order, "There is no allegation of how the
25 misrepresentation influenced Plaintiff's subsequent conduct or that Plaintiff would not have engaged
26 in certain conduct without the misrepresentation. Without actual reliance, there is no justifiable
27 reliance." [Order, May 24, 2018.] This is not cured by Plaintiff's vague allegation that "Herbert
28 acted in reliance of [*sic*] the false information" found in paragraph 17.

1 The Third Amended Complaint, therefore, is still impossible to fully address. The Plaintiff's
2 complaint is not sufficiently certain and is inconsistent with previous allegations, and the allegations
3 and the elements of the various causes of action against the defendants (including APPEL,
4 incidentally added with no substantive allegations) cannot be certainly ascertained. It is impossible
5 to ascertain the precise basis of the Plaintiff's claims against these Defendants, since they are not
6 adequately specified, and cannot be determined by the presence of the necessary elements to
7 establish valid causes of action.

8 **VII. THE PLAINTIFF STILL CONCEDES THAT SHE AGREED TO BE PAID FOR**
9 **41 HOURS PER WEEK.**

10 Defendants' demurrer to Plaintiff's prior cause of action was sustained without leave to
11 amend. The fact remains, however, that Plaintiff concedes that she agreed to "modify her agreement
12 and take less money." [Second Amended Complaint ¶20; see also, Second Amended Complaint ¶11;
13 Third Amended Complaint ¶11 ("the agreement needed to be modified") and Third Amended
14 Complaint ¶13.]

15 The Plaintiff still fails to allege reasonable reliance, as this Court noted in giving leave to
16 amend the Second Amended Complaint. Further leave to amend should not be granted.

17 **VIII. PLAINTIFF FAILS TO ALLEGE THE ELEMENTS OF ANY OF HER TORT**
18 **CAUSES OF ACTION.**

19 **A. The Plaintiff Has Failed to Properly Allege the Elements of Fraud.** The complaint
20 also alleges tort (fraud) causes of action against defendants, and seeks a variety of remedies,
21 including monetary and punitive damages, based upon alleged "fraud." (The Prayer in the Third
22 Amended Complaint seeks punitive/exemplary damages on every cause of action, even though such
23 damages are not legally recoverable under the contract-based claims or for "money had and
24 received" (see Section IX, below). The complaint does not properly set forth the elements of any of
25 the tort causes of action.⁵ As this Court noted while sustaining the demurrer to the First Amended

26 ⁵ "The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or
27 nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4)
28 justifiable reliance; and (5) resulting 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 Complaint, “In fact, Plaintiff arguably did not rely on these representations, because despite being
2 allegedly told in March 2014 that Genworth would only pay for 41 hours per week for her work,
3 Plaintiff worked 56 hours per week from March 2014 until August 2016. (FAC ¶ 11.) Plaintiff does
4 not allege what acts she took in reliance on Appel’s misrepresentation.” These incomprehensible
5 causes of action fail to identify the acts of any single defendant, and essentially state that a purported
6 contract was breached. None of the elements of fraud are adequately alleged, and the cause of action
7 still appears to be time-barred. It is clear that the Plaintiff is taking a simple (and time-barred) wage
8 dispute with a corporation and attempting to spin a tale entitling her to allege tort damages against
9 the company and its individual president, where none are available, as a matter of law.

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

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

26 Plaintiff has done nothing more than offer a legal conclusion of fraud, which is not
27 satisfactory under *Wilhelm*. Plaintiff’s fraud causes of action are completely vague, and fall far short
28

1 of meeting the requirements of specificity required to successfully plead a cause of action for
2 intentional misrepresentation. She still cannot allege reliance. No facts are alleged to support these
3 causes of action, and therefore Plaintiff has not stated any cause of action. As a result of Plaintiff's
4 failure to plead intentional misrepresentation with specificity, she has, in fact, not stated a cause of
5 action.⁶

6 **B. Plaintiff's "Fraud" Claims Sound in Contract, and Relief in Tort is Inappropriate**
7 **for the Damages Alleged.** Plaintiff's fraud allegations (in the first and second causes of action)
8 merely incorporate and re-state allegations in the nature of an attempted breach of contract claim
9 (and the demurrer to the breach of contract claim was sustained without leave to amend). Plaintiff
10 essentially alleges that the unidentified "defendants" represented that an insurance carrier would
11 limit the number of hours would pay Plaintiff (for living at home with her parents) that they would
12 perform in some matter, and that the defendants did not perform as promised. **Conduct amounting**
13 **to a breach of contract, however, becomes tortious only when it also violates an independent**
14 **duty arising from principles of tort law.** [*Erlich v. Menezes*, 21 Cal. 4th 543, 551, 87 Cal. Rptr.
15 2nd 886 (1999); *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515, 28 Cal
16 Rptr. 2nd 475 (1994)]. The alleged facts that "the defendants knew" that their representations were

17 _____
18 ⁶ This Court's ruling of the demurrer to the original Complaint held, in part: "Plaintiff's third cause
19 of action [now second cause of action] fails to plead with specificity which Defendants made what
20 representation to Plaintiff when, and how. Although she pleads that Appel informed her the Insurance
21 would only pay for 41 hours a week, an intentionally and knowingly false statement, she has not
22 alleged when Appel made this false representation or by what means. (*See* Compl. ¶¶ 11, 20.) The
23 Complaint also fails to allege an intent to defraud on the part of any Defendant. Accordingly, the
24 demurrer is sustained as to the third cause of action.

25 Plaintiff's fourth cause of action [now third cause of action] fails for the same reasons. This
26 cause of action appears to be one for promissory fraud. "Promissory fraud is a subspecies of the
27 action for fraud and deceit. A promise to do something necessarily implies the intention to perform;
28 hence, where a promise is made without such intention, there is an implied misrepresentation of fact
that may be actionable fraud." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Although
Plaintiff makes conclusory allegations that Defendants misrepresented their intent to perform under a
contract and intended Plaintiff to rely on their misrepresentations, Plaintiff does not allege with
adequate specificity who made what promises when, or how. The Complaint also does not allege that
Defendants intended to induce Plaintiff to act in a particular way. Accordingly, the demurrer is
sustained as to the fourth cause of action."

Defendants urge this Court to review its Orders sustaining the demurrer to the First Amended
Complaint and Second Amended Complaint, because they are fully applicable to the Third Amended
Complaint as well.

RICHARD FARKAS\C:\PLEADINGS\NOT COMPLAINTS\DEMURRERS, OPPOSITIONS\HOME MANAGEMENT CARE-APPEL ADV HERBERT -- DEMURRER TO THIRD AMENDED COMPLAINT.DOC

1 false do not make an alleged breach of contract distinguishable from any other breach. [*Freeman &*
2 *Mills, Inc. v. Belcher Oil Co.*, 11 Cal 4th 85, 98, 44 Cal. Rptr. 2nd 420 (1995).] “In economic terms,
3 the impact is identical—plaintiff has lost the benefit of a bargain and is entitled to recover
4 compensation in the form of contract damages,” should Plaintiff ever be able to allege and prove a
5 breach and resulting damages. [*Applied Equipment Corp.*, 7 Cal. 4th at 517.] The law simply does
6 not distinguish between good and bad motives for breaching a contract; regardless of the motives of
7 the breaching party, the remedies are limited to contract damages. [*Id.* at 516.] California law now
8 precludes tort recovery for breach of contract absent the breach of an independent duty arising from
9 principles of tort law. [*Freeman & Mills v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102.] Thus, the
10 Plaintiff’s contractually-based tort claims of fraud, still fail as a matter of law.

11 **IX. THE THIRD CAUSE OF ACTION FOR “MONEY HAD AND RECEIVED”,**
12 **BASED ON THE FIRST TWO CAUSES OF ACTION, FAILS AS WELL.**

13 Finally, the fourth cause of action for “Money Had and Received” is wholly devoid of any
14 factual allegations, other than the conclusory statements that “Beginning in 2014 and continuing
15 through 2016, Defendants wrongfully diverted more than \$25,000 in cash that belonged to Herbert
16 (paragraph 24) and that “Herbert did not discover Defendants’ wrongful conduct until some time in
17 September, 2016.” [Second Amended Complaint, ¶ 29; Third Amended Complaint ¶ 25.]

18 This count is subject to the rule that ‘if plaintiff is not entitled to recover under one count in a
19 complaint wherein all the facts upon which his demand is based are specifically pleaded, it is proper
20 to sustain a demurrer to a common count set forth in the complaint, the recovery under which is
21 obviously based on the set of facts specifically pleaded in the other count.’ (*Hays v. Temple* (1937)
22 23 Cal.App.2d 690, 695, 73 P.2d 1248, 1250; accord, e.g., *Orloff v. Metropolitan Trust Co.* (1941)
23 17 Cal.2d 484, 489, 110 P.2d 396.)

24 “[S]ince the basic premise for pleading a common count . . . is that the person is thereby
25 ‘waiving the tort and suing in assumpsit,’ any tort damages are out. Likewise excluded are damages
26 for a breach of an express contract. [*Zumbrun v. University of Southern California* (1972) 25
27 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.

1 This Court previously ruled that “The Court finds that, because it sustained Defendants’
2 demurrer as to the first three causes of action, the demurrer must be sustained to the fourth cause of
3 action based on the same facts.” It made the same finding in sustaining the demurrer to the Second
4 Amended Complaint. It should do so again, but without further leave to amend.

5 **X. CONCLUSION.**

6 Since the defects noted in this demurrer have not been cured, it is difficult to address the
7 substantive allegations of the Third Amended Complaint, if there are any. Plaintiff has had four
8 opportunities to allege viable causes of action, and has failed to do so. Defendant APPEL still
9 appears as an afterthought in the substantive text of the complaint, which has no facts to support alter
10 ego allegations. Plaintiff fails, as a matter of law, for the fourth time, to set forth any of the requisite
11 elements of any of her causes of action, some of which are time-barred on their face. The Plaintiff is
12 now alleging facts that are fatally inconsistent with her previous allegations. She has, for the second
13 time, filed an amended complaint well after the deadline set by this Court. This is now her fourth—
14 and should be her final—attempt. For the foregoing reasons, it is respectfully submitted that this
15 Demurrer of Defendants should be sustained, without leave to amend.

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DATED: June 22, 2018

LAW OFFICES OF RICHARD D. FARKAS

By: _____
RICHARD D. FARKAS,
Attorneys for Defendants
HOME MANAGEMENT CARE, INC.
And LAWRENCE APPEL

1 *Allison Banks Herbert vs. Home Management Care, Inc., Appel, etc.*
2 Los Angeles County, Superior Court of California Case No. BC 658853

3 **PROOF OF SERVICE**

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

8 **NOTICE OF DEMURRER AND DEMURRER OF DEFENDANTS TO THIRD AMENDED
9 COMPLAINT**

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

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

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

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

23 **XX** by causing personal delivery of the document(s) listed above to the address set forth below.

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

26 Reginald K. Brown, Esq. 27 Law Office of Reginald K. Brown 28 6601 Center Drive West, Suite 500 Los Angeles, CA 90045 Email: reggielaw42@gmail.com	
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29 I declare under penalty of perjury under the laws of the State of California that the foregoing is
30 true and correct.

31 Dated: June _____, 2018

32 _____
33 KERRI CONAWAY