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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **COUNTY OF KERN, METROPOLITAN DIVISION**

11 CATHY CRIGER, an individual, ) Case No.: S-1500-CV-260750-LPE  
12 and DEBRA CORONA, and )  
13 individual, ) **DEFENDANT'S NOTICE OF DEMURRER**  
14 ) **AND DEMURRER TO COMPLAINT;**  
15 Plaintiffs, ) **MEMORANDUM OF POINTS AND**  
16 vs. ) **AUTHORITIES**  
17 )  
18 STEVEN DUCE, and individual; ) Date: August 6, 2007  
19 GOLDEN LEGACY DEVELOPMENT, a ) Time: 8:30 a.m.  
20 business entity; and DOES 1-50, ) Dept: 15  
21 inclusive )  
22 )  
23 Defendants. )  
24 )  
25 )

26 TO THE COURT AND TO ALL PARTIES HEREIN AND THEIR ATTORNEYS  
27 OF RECORD:

28 PLEASE TAKE NOTICE THAT on August 6, 2007, at 8:30 a.m. in  
Department 15 of the Kern County Superior Court located at 1415  
Truxton Ave., Bakersfield, California, Defendant Steven Duce  
(hereinafter 'Defendant') shall demur to the following causes of  
action from CATHY CRIGER's and DEBRA CORONA's (hereinafter  
collectively 'Plaintiffs') Complaint:

1. First Cause of Action for General Negligence;
2. Second Cause of Action for Intentional Tort;
3. Third Cause of Action for Fraud - Intentional or
4. Negligent Misrepresentation and Concealment;
5. Fourth Cause of Action for Intentional Interference
6. with Business Advantage and Professional Position;
7. Fifth Cause of Action of Negligent Infliction of
8. Emotional Distress; and,
9. Sixth Cause of Action for Intentional Infliction of
10. Emotional Distress.

11 This demurrer is based upon this notice of motion and  
12 motion, the attached memorandum of points of authorities, the  
13 anticipated reply brief, and such other oral and/or documentary  
14 evidence presented at or before the hearing.

15 Dated: July 6, 2007

16 By: \_\_\_\_\_  
17 Kassandra Clingan, Attorney  
18 For Defendant STEVEN DUCE.





1 facts sufficient to sustain a cause of action." Code of Civil  
2 Procedure § 430.10(e).

3 **III.**

4 **NEITHER PLAINTIFF IS A REAL PARTY IN INTEREST**

5 "Every action must be prosecuted in the name of the real  
6 party in interest, except as otherwise provided by statute." Code  
7 of Civil Procedure § 367.

8 California Code of Civil Procedure § 369 lists exceptions to  
9 Section 367 but none are alleged in the complaint.

10 Plaintiffs repeatedly allege the same basic facts: that on  
11 March 26, 2006 Defendant went to Union Bank in Tehachapi where  
12 both Plaintiffs were employed, and attempted to deposit at the  
13 bank a check or checks that were fraudulent instruments.

14 Plaintiffs fail to allege any contractual or other legal  
15 relationship with Defendant that would give rise to a duty that  
16 would give them standing as real parties of interest to bring  
17 this action in accordance with either Section 367 or 369 as cited  
18 above.

19 Each of the causes of action brought by Plaintiffs requires  
20 as an element thereof a showing of a duty owed by Defendant to  
21 each Plaintiff. No such duty has been alleged except as a legal  
22 conclusion and simply cannot be alleged so neither Plaintiff is a  
23 real party in interest.

24 Plaintiffs were employees at Union Bank in Tehachapi,  
25 California. Defendant took a check, or checks, to Union Bank for  
26 deposit into his personal account with the bank. Plaintiffs,  
27 working in their capacity as bank employees, allegedly handled  
28 the deposit of the checks and transfer of funds for Defendant and

1 Union Bank. Defendant did not take the check(s) to the bank for  
2 submission to any specific employee, Plaintiffs just happened to  
3 be the employees on hand that day and were agents of the bank  
4 when they handled Defendant's transactions.

5 Plaintiffs had no personal interest in the checks, their  
6 validity, or Defendant's business with the bank other than to  
7 verify and process the check(s) in accordance with bank and  
8 financial code procedures. They allege no inducement, no special  
9 circumstances or actions taken by Defendant to enhance their  
10 positions as employees of the bank, and have no personal interest  
11 in the financial transactions other than to process them.

12 Defendant owed no duty to Plaintiffs with regard to the  
13 veracity of the check(s) as they were not submitted to either  
14 Plaintiff as an individual. Rather, the duty was owed to the bank  
15 as the entity with whom Defendant was making assertions and  
16 attempting to conduct financial transactions.

17 Actions must be brought in the name of the real party in  
18 interest to save the defendant from a multiplicity of suits,  
19 further annoyance and vexation, and to fix and determine the real  
20 liability, if any. *Kadota Fig Asso. V. Case-Swayne Co.* (1946) 73  
21 CA2d 796, 167 P2d 518.

22 It is difficult to imagine any bank staying in business if  
23 it did not have procedures in place for the verification of  
24 financial documents. The actions of Defendant submitting  
25 allegedly fraudulent financial documents to Union Bank through  
26 its employees do not impute a duty to the employees of the bank  
27 that, in acting as agents of the bank, handled the documents.  
28

1 Union Bank is the proper real party in interest. It is the  
2 entity to whom Defendant owed any duties giving rise to the  
3 allegations in the complaint. Defendant did not go to Union Bank  
4 to present a check or checks to the tellers, he went there to  
5 present the check(s) to the bank for processing. The employees of  
6 the bank, if following proper bank procedure, had no way of being  
7 harmed by Defendant's alleged actions. In fact, Union Bank has  
8 already pursued this matter under a separate lawsuit, KCSC Case  
9 No. S-1500-CV-258430, which has been resolved through a  
10 confidential settlement agreement. Plaintiffs were never brought  
11 in as parties to that action.

12 To allow Plaintiffs to proceed with this action would be  
13 akin to allowing every bank teller at every bank in California  
14 who accepts a fraudulent check from a customer to sue that  
15 customer individually for submitting the check. It would open the  
16 floodgates of litigation to every employee who does not follow  
17 company procedure to blame the customer for the employees' own  
18 transgressions.

19 Defendant respectfully requests that the entire complaint by  
20 each Plaintiff should be dismissed on the basis that neither  
21 Plaintiff is a real party in interest.

22 **IV.**

23 **FIRST CAUSE OF ACTION FOR GENERAL NEGLIGENCE**

24 Elements of cause of action for negligence: (1) legal duty  
25 to use due care, (2) breach of that duty; (3) reasonably close  
26 causal connection between that breach and resulting injury; and  
27  
28

1 (4) actual loss or damage. *Wylie v. Gresch* (1987) 191 Cal.App.3d  
2 412, 416.

3  
4 Plaintiffs allege they were owed a duty by Defendant  
5 but do not enumerate on what gave rise to that duty. It is  
6 Defendant's contention that there exists no duty between a bank  
7 customer and the employee of the bank who is acting only in her  
8 capacity as a bank employee in handling a transaction on behalf  
9 of the bank. Rather, the duty is owed to the bank.  
10

11 Factors to be considered by the court when determining  
12 whether a duty was owed by defendant include: The foreseeability  
13 of harm to the plaintiff; The degree of certainty that the  
14 plaintiff has been injured; The connection between the  
15 defendant's conduct and the injury suffered; The moral blame  
16 attached to the defendant's conduct; The policy of preventing  
17 future harm; The extent of the burden on the defendant caused by  
18 the imposition of a duty to exercise reasonable care; The  
19 consequences to the community of imposing such a duty; and The  
20 availability, cost, and prevalence of insurance for the risk  
21 involved. *Rowland v. Christian* (1968) 69 Cal. 2d 108, 112-113.  
22  
23

24  
25 In the present action no reasonable duty was owed by  
26 Defendant to Plaintiffs based on the above elements to show a  
27 duty was owed.  
28



1 First, it is not foreseeable that a bank employee would be  
2 terminated because he or she received a bad check on behalf of  
3 the bank for a customer. We would have no bank tellers if this  
4 were the case. As such, a customer submitting a check to a bank  
5 has no way of foreseeing that the bank employee who accepts the  
6 check on behalf of the bank could possibly be harmed if the check  
7 is bad. The bank employee could not foreseeably be harmed by such  
8 conduct. Rather, it is the bank who would be harmed by  
9 Defendant's alleged actions.  
10  
11

12 Next, there is no degree of certainty that defendant's  
13 conduct in presenting a check to a bank through its employee  
14 would lead to harm to the employee. Had Defendant deposited his  
15 checks in the ATM machine this case would not even exist because  
16 the ATM machine is the property of the bank, the only possible  
17 party that could be harmed by such a duty owed by Defendant.  
18

19 Banks have their own policies regarding accepting deposits  
20 and transacting business. These policies are meant to protect the  
21 bank from fraudulent bank activities. There are also criminal and  
22 civil statutes protecting financial institutions and creditors  
23 from the passing of bad checks. The area is covered by state and  
24 federal laws and does not relate in any way to employees of  
25 creditors or financial institutions. Imposing a duty on bank  
26 customers that extends beyond the bank to its employees would not  
27 prevent future harm, rather it would result in more litigation at  
28

1 the expense of the community, a burden on the courts for every  
2 time a bad check is submitted to a bank or creditor through one  
3 of its employees, and would possibly be extended to employees at  
4 any business that accepts checks in its daily course of business.  
5

6 The California Supreme Court has held that foreseeability is  
7 not to be measured by what is more probable than not, but  
8 "includes whatever is likely enough in the setting of modern life  
9 that a reasonably thoughtful [person] would take account of it in  
10 guiding practical conduct" *Bigbee v. Pacific Tel. & Tel. Co.*  
11 (1983) 34 Cal.3d 49, 57.  
12

13 It is unreasonable in the age of computers, internet, and  
14 information at your fingertips that the facts alleged by  
15 Plaintiffs would give rise to a duty by Defendant.  
16

17 The demurrer to the first cause of action for General  
18 Negligence should be sustained on the basis that no duty to  
19 Plaintiffs was properly alleged and so no cause of action has  
20 been stated.  
21

22 **V.**

23 **SECOND CAUSE OF ACTION FOR INTENTIONAL TORT**

24 Plaintiffs fail to identify what intentional tort they are  
25 seeking relief for in their first cause of action and it is  
26 impossible from the allegations to determine what the tort is.  
27  
28

1 At best the first cause of action could be construed as  
2 intentional or negligent misrepresentation, which is pled in the  
3 third cause of action.

4 Because no cause of action is identified, it is impossible  
5 to answer the first cause of action and the demurrer to the First  
6 Cause of Action for Intentional Tort should be sustained on the  
7 basis that Plaintiff failed to allege facts sufficient to sustain  
8 a cause of action.  
9

10  
11 v.

12 **THIRD CAUSE OF ACTION FOR FRAUD - INTENTIONAL OR NEGLIGENT**

13 **MISREPRESENTATION AND CONCEALMENT**

14 The facts constituting fraud must be specifically pleaded so  
15 that the court can determine from the complaint whether a prima  
16 facie case is alleged [*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d  
17 627, 636.

18 Every element of the cause of action for fraud must be  
19 alleged in the proper manner, factually and specifically  
20 *Lesperance v. North Am. Aviation, Inc.* (1963) 217 Cal.App.2d 336,  
21 344.

22 The elements of a cause of action for damages for fraud and  
23 deceit are: (1) Representation; (2) falsity; (3) knowledge of  
24 falsity; (4) intent to deceive; (5) reliance and resulting damage  
25 (causation). 2 Witkin, California Procedure, p. 1326; *Compas v.*  
26 *Escondido Mutual Water Co.*, 86 Cal.App.2d 407, 411.  
27  
28

1 The third cause of action, which really attempts to state  
2 two counts of fraud - the first for Intentional or Negligent  
3 Misrepresentation and the second for Concealment - fails to  
4 properly state a cause of action for either count on the basis  
5 that the elements of each are not specifically pled.  
6

7 Nowhere in the pleadings do Plaintiffs specifically state  
8 what the alleged misrepresentations were. The complaint merely  
9 states, "Defendants made false representations as to the nature  
10 of the checks, where they came, they source of funds..." (Complaint  
11 page 6, paragraph a).  
12

13 No further specifics, such as what the false representations  
14 were, what he claimed the nature of the checks was, where he said  
15 the checks came from, or what he said the source of the funds was  
16 are made.  
17

18 Absent a more specific allegation of the actual alleged  
19 misrepresentation, the allegations of fraud are insufficient to  
20 state a cause of action for fraud and impossible to admit or deny  
21 through an answer.  
22

23 Additionally, the allegations are jumbled and incoherent.  
24 They do not state how Defendant induced Plaintiffs into believing  
25 the alleged misrepresentations, merely that he did. Plaintiffs  
26 need to state with specificity the representations they claim are  
27 false, the manner in which they became informed and believed the  
28

1 Defendant took his actions intentionally, and who was the actual  
2 intended payee if the truth was that Defendant was not.

3 With regard to the Concealment allegations, no Attachment  
4 FR-3a was included with the complaint as served on Defendant. The  
5 page numbers do not allow for the inclusion of such an attachment  
6 and it is unlikely one was filed. Because no factual allegations  
7 whatsoever appear to have been made to support this count of the  
8 fraud cause of action so it must fail.  
9

10 Finally, Plaintiffs fail to show a causal link between  
11 alleged, yet unspecified, false representations made to the bank  
12 through them in their capacity as bank employees and their  
13 alleged damages.  
14

15 Because the allegations of fraud are incomplete, not pled  
16 with specificity as required, and show no causal link between  
17 Plaintiffs and Defendant, the demurrer to the third cause of  
18 action for fraud-based claims should be sustained.  
19

20 **VI.**

21 **FOURTH CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH BUSINESS**

22 **ADVANTAGE AND PROFESSIONAL POSITION**

23 According to *Della Penna v. Toyota Motor Sales, U.S.A.*  
24 (1995) 11 Cal.4th<sup>h</sup> 376, the essential elements of a cause of  
25 action for Intentional Interference with Prospective Economic  
26 Advantage are:  
27  
28

- 1 (1) An economic relationship between the plaintiff and
- 2 another, "containing a probable future economic
- 3 benefit or advantage to plaintiff,"
- 4
- 5 (2) Defendant's knowledge of the existence of the
- 6 relationship,
- 7
- 8 (3) That defendant "intentionally engaged in acts or
- 9 conduct designed to interfere with or disrupt" the
- 10 relationship,
- 11
- 12 (4) Actual disruption, and
- 13
- 14 (5) Damage to the plaintiff as a result of defendant's
- 15 acts.

14 In their complaint, Plaintiffs fail to allege any specific  
15 economic relationship between Plaintiffs and a third party.  
16 Plaintiffs have not alleged interference with any third party  
17 other than stating that "The behavior of Defendants...caused them  
18 [Plaintiffs] to be terminated from their positions at the Union  
19 Bank of California." Complaint, p. 8, last paragraph.  
20

21 Plaintiffs also fail to state any professional position that  
22 was held or compromised or how such a position was compromised as  
23 a result of Defendant's alleged interference with a professional  
24 position.  
25

26 According to the complaint, Plaintiffs were terminated from  
27 their employment with Union Bank based on their reliance on  
28 Defendant's representations to them. Plaintiffs fail to allege

1 Defendant intended to harm them as individuals, rather they  
2 allege that he intended to submit fraudulent check to the bank.  
3 Plaintiffs also do not allege that Defendant actually contacted  
4 Union Bank, the only third party mentioned in the complaint, in  
5 any manner that would have affected their employment with the  
6 Bank.  
7

8 Plaintiffs failed to alleged any intent by Defendant  
9 involving a third party that would induce a third party to cease  
10 an economic relationship with either Plaintiff and give rise to a  
11 cause of action for intentional interference. Statements made  
12 directly to Plaintiffs cannot reasonably be construed as  
13 interfering with a third party relationship. Plaintiffs did not  
14 allege that Defendant actually intended to interfere with any  
15 economic relationship between them and the bank or any other  
16 third party and fail to provide any instances showing intent or  
17 actual inducement.  
18  
19

20 Finally, Plaintiffs failed to allege any actual disruption  
21 of an existing economic relationship or professional position. In  
22 the State of California most employees at "at will" employees  
23 with no guarantee of employment from one day to the next. Because  
24 Plaintiffs failed to allege any continuing contractual economic  
25 relationship with Union Bank or any other third party, no such  
26 disruption was alleged and the cause of action must fail.  
27  
28

1 Not a single element that would support a cause of action  
2 for intentional interference was pled, therefore the demurrer to  
3 the Fourth Cause of Action for Intentional Interference with  
4 Business Advantage and Professional Position should be sustained  
5 on the basis that the complaint fails to state a cause of action.  
6

7 **VII.**

8 **FIFTH CAUSE OF ACTION FOR NEGLIGENT INFLECTION OF EMOTIONAL**  
9 **DISTRESS**

10 "The tort of negligent infliction of emotional distress is a  
11 variation of the tort of negligence. The traditional elements of  
12 duty, breach of duty, causation, and damages apply." *Slaughter v.*  
13 *Legal Process & Courier Serv.* (1984) 162 Cal. App. 3d 1236, 1249.  
14

15 The issue of whether a duty was owed by Defendant to  
16 Plaintiffs is discussed above under the demurrer to the First  
17 Cause of Action for General Negligence. Rather than regurgitate  
18 the same argument here, Defendant asserts the same bases for the  
19 sustaining of a demurrer on the theory that no reasonable or  
20 foreseeable no duty was owed and a reasonable person would not  
21 believe a bank employee would suffer emotional distress as a  
22 result of a bank patron submitting a fraudulent check to a  
23 financial institution where that bank employee is merely acting  
24 as a representative of the institution and could not possibly  
25 suffer harm thereby.  
26  
27  
28



1 The demurrer to the Fifth Cause of Action for Negligent  
2 Infliction of Emotional Distress should be sustained on the basis  
3 that Plaintiffs failed to state a cause of action.  
4

5 **VIII.**

6 **SIXTH CAUSE OF ACTION FOR INTENTIONAL INFLECTION OF EMOTIONAL**

7 **DISTRESS**

8 The elements of prima facie case of intentional infliction  
9 of mental distress are (1) outrageous conduct by the  
10 defendants, (2) intention to cause or reckless disregard of the  
11 probability of causing emotional distress, (3) severe emotional  
12 suffering and (4) actual and proximate causation of the emotional  
13 distress. *Kiseskey v. Carpenters' Trust for So. Cal.*, 144  
14 Cal.App.3d 222, 229.  
15

16 Plaintiffs failed to allege any outrageous conduct by  
17 Defendant toward them as individuals that would give rise to a  
18 cause of action for IIED. The depositing of bad checks to a  
19 financial institution can hardly be considered outrageous conduct  
20 toward its employees. Plaintiffs were not owed any duty by  
21 Defendant when he allegedly submitted bad checks to the bank. No  
22 specific instances of outrageous conduct to Plaintiffs as  
23 individuals has been alleged. No harmful or personally offensive  
24 comments or acts that would upset a reasonably prudent employee  
25 at a bank have been alleged. The claim is entirely without merit.  
26  
27  
28

1 Nor have Plaintiffs alleged any intent by Defendant to harm  
2 them as individuals. If anything, they have alleged an intent by  
3 Defendant to harm the bank. Certainly Defendant was in no  
4 position, after one visit to a bank to deposit checks and  
5 transfer money, to cause the termination of Plaintiffs'  
6 employment a month and a half after his visit. No allegations are  
7 made of any other conduct by Defendant that may have caused any  
8 type of harm to either Plaintiff individually.  
9

10 Plaintiffs have failed to properly plead outrageous conduct,  
11 intent, or causation as required to sustain a cause of action for  
12 Intentional Infliction of Emotional Distress so the demurrer  
13 should be sustained.  
14

15 **IX.**

16 **CONCLUSION**

17 In light of the insufficiency of the pleadings, Defendant  
18 respectfully requests that the entire complaint be dismissed on  
19 the basis that Plaintiffs lack standing to bring such an action,  
20 and if the complaint is not dismissed on such basis that the  
21 demurrers to the each cause of action in the Complaint be  
22 sustained.  
23

24 Dated: July 7, 2006

25 \_\_\_\_\_  
26 KASSANDRA CLINGAN, Counsel for  
27 Defendant STEVEN DUCE  
28