

1 MORGAN, LEWIS & BOCKIUS LLP  
2 Donn P. Pickett (SBN 72257)  
3 Brian C. Rocca (SBN 221576)  
4 Alyse J. Gramaglia (SBN 287989)  
5 One Market, Spear Street Tower  
6 San Francisco, California 94105  
7 Telephone: (415) 442-1000  
8 Facsimile: (415) 442-1001  
9 Email: brian.rocca@morganlewis.com

10 *Attorneys for Defendants*  
11 *Robert A. Lurie and Connie L. Lurie*

12 ORRICK, HERRINGTON & SUTCLIFFE LLP  
13 Karen Johnson-McKewan (SBN 121570)  
14 Ian Johnson (SBN 208713)  
15 The Orrick Building  
16 405 Howard Street  
17 San Francisco, California 94105  
18 Telephone: (415) 773-5700  
19 Facsimile: (415) 773-5759  
20 Email: ijohnson@orrick.com

21 *Attorneys for Defendants, James L. Hunt,*  
22 *H. Michael Kurzman, Eugene L. Valla, and*  
23 *William M. Harris*

KAUFHOLD GASKIN LLP  
Steven S. Kaufhold (SBN 157195)  
Quynh Vu (SBN 286631)  
388 Market Street, Suite 1300  
San Francisco, California 94111  
Telephone: (415) 445-4620  
Facsimile: (415) 874-1071  
Email: skaufhold@kaufholdgaskin.com

*Attorneys for Defendant The Lurie*  
*Company*

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF SAN FRANCISCO  
17 UNLIMITED CIVIL JURISDICTION

18 ROBERT L. LURIE, an individual,  
19  
20 Plaintiff,

21 v.

22 ROBERT A. LURIE, an individual, *et al.*,  
23 Defendants.

Case No. CGC-14-538887

**DEFENDANTS' MOTION IN LIMINE  
NO. 1: MOTION TO EXCLUDE  
PLAINTIFF'S DERIVATIVE  
ALLEGATIONS AND EVIDENCE  
RELATING TO THEM**

Date: November 7, 2016  
Time: 9:30 a.m.  
Dept.: 606  
Judge: Hon. Cynthia Ming-Mei Lee

Complaint filed: April 23, 2014  
Trial Date: November 7, 2016

**ELECTRONICALLY  
FILED**  
*Superior Court of California,  
County of San Francisco*  
**10/28/2016**  
**Clerk of the Court**  
BY:ROMY RISK  
Deputy Clerk

Case No. CGC-14-538887

DEFENDANTS' MOTION IN LIMINE NO. 1

1 **I. INTRODUCTION**

2 Defendants The Lurie Company, Robert A. Lurie, Connie L. Lurie, H. Michael Kurzman,  
3 Eugene L. Valla, William Harris, and Daniel J. Hunt, as personal representative of the Estate of  
4 James L. Hunt (collectively “Defendants”), hereby move *in limine* to exclude testimony or  
5 documentary evidence relating to Plaintiff’s Derivative Allegations, as defined in Plaintiff’s  
6 Third Amended Complaint (“Complaint” or “TAC”).

7 The matter set for trial on November 7 is limited to two stock transactions from March  
8 1999. Plaintiff claims that these two stock transactions resulted from a breach of the Shareholder  
9 Agreement by The Lurie Company, and that the Individual Defendants concealed that breach.  
10 These two stock transactions are limited both in time and substantive scope. The Court has  
11 bifurcated all other issues in the case because Plaintiff does not have standing to pursue those  
12 other claims individually or directly. Rather, those derivative claims (the “Derivative  
13 Allegations”) fall squarely within the purview of a Special Litigation Committee (“SLC”), which  
14 has conducted a thorough investigation and issued a comprehensive report.

15 Plaintiff intends to convert what should be a manageable trial focused on two stock  
16 transactions into an indictment of more than 40 years of The Lurie Company’s management and  
17 operations. Indeed, in connection with what the parties have agreed will be a four or five day  
18 trial, Plaintiff has attempted to designate *more than 300 trial exhibits*, many of which relate  
19 entirely to irrelevant issues. With respect, the Court should not permit Plaintiff to introduce such  
20 irrelevant matters to distract, prejudice or confuse the jury from the key issues in this trial.

21 Plaintiff suggests that his Derivative Allegations establish some sort of pattern or  
22 intention by the Individual Defendants to conceal information from Plaintiff. However, the  
23 Derivative Allegations bear minimal similarity to or connection with the allegations in question  
24 in this trial; they have no probative value for this trial and are therefore inadmissible. Moreover,  
25 any minimal probative value would be substantially outweighed by the probability that its  
26 admission will create a substantial danger of confusion, undue prejudice and undue time  
27 consumption. If the Court permits Plaintiff to disparage the management of The Lurie Company  
28 on these tangential issues—issues that the Special Litigation Committee has exhaustively

1 reviewed—Defendants will have no choice but to defend their conduct at every step of the way  
2 during their decades of loyal service to The Lurie Company.

3 Accordingly, the Court should exclude testimony and documentary evidence from the  
4 trial that relates to the Derivative Allegations. Otherwise this trial will take weeks to complete  
5 and the jury would be asked to consider issues presently before the Special Litigation  
6 Committee, which Plaintiff has no standing to pursue.

7 **II. PLAINTIFF’S DERIVATIVE ALLEGATIONS**

8 Plaintiff has included extensive Derivative Allegations in his Complaint, appearing at  
9 paragraphs 77-96 and 111-125, all of which have been properly bifurcated from this trial and  
10 thus should be excluded. The following are representative samples of those allegations.

- 11 • Robert A. Lurie (“Bob”) “us[ed] Company money and other resources for his own  
12 benefit, rather than for the benefit of the Company’s shareholders.” TAC ¶ 81.
- 13 • Bob used Company money to fund and settle his divorce from his ex-wife Jane  
14 Lurie, and the Individual Defendants caused, permitted, and/or ratified that conduct.  
15 *Id.* ¶¶ 81, 83-87.
- 16 • Bob employed Company staff during business hours to perform tasks for his  
17 benefit. *Id.* ¶ 81.
- 18 • Individual Defendants caused the Company to wind down its business and sell  
19 valuable real estate, during what the Individual Defendants knew or should have  
20 known to be a period of very unfavorable market conditions, to accommodate Bob  
21 and Connie Lurie’s personal financial interests. *Id.* ¶¶ 81, 83-87.
- 22 • Bob Lurie misled Plaintiff about the Company’s management to deter Plaintiff from  
23 inquiring into the Company’s affairs, and improperly influenced the remaining  
24 Individual Defendants to acquiesce in his improper management. *Id.* ¶ 81.
- 25 • Individual Defendants abdicated their fiduciary responsibilities in favor of  
26 advancing Bob and Connie’s own personal interests, and failed to exercise  
27 independent judgment or to act in the interests of all shareholders. *Id.* ¶¶ 81, 83-87.
- 28 • Individual Defendants engaged in a 40-year pattern of self-dealing. *Id.* ¶ 88.
- The Board approved salary increases and prerequisites for Messrs. Lurie, Kurzman  
and Valla. *Id.* ¶ 88 (b) and (d).
- The Board approved a transaction in which the Company sold shares of its common  
stock to Mr. Kurzman at a price nearly 25 percent below their appraised value, and  
lent Mr. Kurzman \$240,000 to complete that transaction. *Id.* ¶ 88(e).
- The Board operated with a lack of transparency for the entirety of their rule and the  
Company refused to produce any further information to Plaintiff regarding his  
concerns of wrongdoing. *Id.* ¶ 95.

1 The Special Litigation Committee (“SLC”) exhaustively reviewed all of those  
2 allegations, and rejected all but one narrow claim. The results of the investigation and the SLC’s  
3 recommendation will be formally presented to the Court, but that should have no bearing on the  
4 trial related to the 1999 stock transactions

5 **III. PLAINTIFF’S LIST OF 300+ TRIAL EXHIBITS AND WITNESS LIST REVEALS**  
6 **THE EXTENT OF THEIR IMPROPER TRIAL PLAN**

7 Plaintiff’s Trial Exhibit List also identifies a number of documents that relate solely to  
8 Plaintiff’s Derivative Allegations, including documents dated 20 years prior to the 1999 Stock  
9 Transactions and documents related to Bob Lurie’s divorce. Several exhibits, for example, relate  
10 to a Jane Lurie loan agreement arising out of the divorce, an issue the SLC carefully considered.  
11 The SLC concluded that the Company should not pursue a claim on that issue against Individual  
12 Defendants. The following are representative examples of such documents:

13 70.	11/28/1979	The Lurie Company Consent of Directors
14 71.	12/19/1979	The Lurie Company Consent of Directors
15 72.	4/9/1980	The Lurie Company Consent of Directors
16 73.	4/28/1983	The Lurie Company Consent of Directors
17 74.	4/10/1984	Minutes of Meeting of Board of Directors of The Lurie Company
18 75.	9/1/1986	The Lurie Company Consent of Directors
19 76.	6/26/1991	The Lurie Company Consent of Loan Committee
20 77.	12/9/1991	The Lurie Company Consent of Directors
21 78.	12/9/1999	Minutes of Meeting of Board of Directors of The Lurie Company
22 79.	6/30/1974	American Appraisal Company Appraisal
23 80.	12/31/1978	American Appraisal Company Appraisal
24 81.	12/31/1984	American Appraisal Associates, Inc. Appraisal
25 82.	12/31/1989	American Appraisal Associates, Inc. Appraisal
26 83.	9/30/1992	American Appraisal Associates, Inc. Appraisal
27 84.		Board of Director Meeting Minutes, January 10, 1972 through August 20, 2013, Including Written Consent of Directors, Resolutions of the Board, and Other Board Meeting Documents
28 86.	11/22/1978	TLC Minutes of Meeting of the Board of Directors
	11/1/1998	Jane Lurie Agreement for Modification of Promissory Note

88.	10/16/2000	Letter from Derek T. Knudsen to Jane Lurie re: Income and Expense Declaration
89.	12/11/2000	Jane Lurie TLC Note Receivable
90.	5/30/1978	Final Judgment of Dissolution of Janice R. Lurie and Robert A. Lurie
175.	8/11/2006	TLC00052971 – Modifications of your Executive Loans

Plaintiff’s witness list echoes the same plan. The list includes Jane Lurie, who Plaintiff notes will testify about the “note held by The Lurie Company.” Jane Lurie is not a party to this action, was not a shareholder at the time of the 1999 Stock Transaction, and other than her speculative testimony that she would have loaned money to Bobby to buy shares in 1999, has no relevant information regarding the 1999 Stock Transaction.<sup>1</sup>

All of the allegations that appear at paragraphs 77-96 and 111-125 of the Complaint and Plaintiff’s Trial Exhibits relating to such allegations should be excluded from evidence at trial.

**IV. ARGUMENT**

**A. Plaintiff’s Derivative Claims Are Inadmissible Because They Are Irrelevant To the Claims In This Trial**

Plaintiff’s Derivative Allegations are irrelevant to the specific elements of breach of contract and fraudulent concealment claims, the only claims to be tried. Although Plaintiff has suggested he believes this evidence is relevant to Defendants’ intent to defraud Plaintiff as part of his fraudulent concealment claim, Defendants’ conduct in the management of the company has “no tendency in reason to prove or disprove” Defendants’ intent in regard to the specific 1999 Stock Transactions. Cal. Evid. Code §§ 210, 350. The Derivative Allegations assert acts completely unrelated, in subject matter and time, to the 1999 Stock Transactions, such as the “use of Company resources to satisfy [Robert A. Lurie’s] personal financial obligations in connection with his divorce from Jane Lurie”; “causing or permitting the company to enter into the 34-year [loan] agreement with Jane Lurie”; “causing, permitting and/or ratifying the wind-down of the Company’s business and the sale of real estate owned by the Company”; and “caus[ing], permitt[ing], and/or ratif[ying] those actions for the purpose of meeting Robert A.

---

<sup>1</sup> Defendants separately file a motion to limit the testimony of Jane Lurie.

1 Lurie's and Connie Lurie's own personal financial needs and facilitating Robert A. Lurie's  
2 retirement, rather than promoting the interests of all Company shareholders." See Section II.

3 **B. Plaintiff's Derivative Allegations Are Inadmissible Character Evidence**

4 Plaintiff has also indicated that his Derivative Allegations may go to show that Individual  
5 Defendants had a pattern and practice of self-dealing and mismanaging the company, and that  
6 this evidence is probative of Individual Defendants' actions at the time of the 1999 Stock  
7 Transactions. The Court should not permit this use of Plaintiff's Derivative Allegations at trial.

8 The Derivative Allegations are not related to the 1999 Stock Transactions and therefore  
9 are inadmissible as character evidence. Where a party attempts to use character evidence to  
10 prove intent, "the hallmark of admissibility on any of these grounds is similitude, in subject  
11 matter and time, of the prior and present conduct." *Holdgrafer v. Unocal Corp.*, 160 Cal. App.  
12 4th 907, 929 (2008). The Derivative Allegations are based on mismanagement starting in 1972.  
13 They bear no similarity to the alleged fraudulent intent of not disclosing the 1999 Stock  
14 Transactions, and are therefore inadmissible.

15 **C. Plaintiff's Derivative Allegations are Inadmissible Because They Will**  
16 **Consume Undue Time, Confuse the Issues, and Mislead and Unfairly**  
**Prejudice the Jurors**

17 Significantly, introduction of such purported character evidence is much more likely to  
18 be prejudicial than probative. As the Law Revision Commission has noted, there are at least  
19 three reasons to exclude such evidence as unduly prejudicial at trial:

20 First, character evidence is of slight probative value and may be very prejudicial. Second,  
21 character evidence tends to distract the trier of fact from the main question of what actually  
22 happened on the particular occasion and permits the trier of fact to reward the good man and to  
23 punish the bad man because of their respective characters. Third, introduction of character  
24 evidence may result in confusion of issues and require extended collateral inquiry. See Cal.  
25 Evid. Code § 1101; see also *People v. Harris*, 60 Cal. App. 4th 727, 737 (1998) (introduction of  
26 character evidence must avoid prejudice that causes jurors to make a decision "on the basis of  
27 extraneous factors").

28 Furthermore, evidence of Plaintiff's Derivative Allegations would lengthen this trial by

1 weeks; Plaintiff's Derivative Allegations involve evidence spanning many decades of Company  
2 activities. Plaintiff has already argued his derivative claims to the SLC and, with a single narrow  
3 exception, lost. If the Court were to allow this type of evidence, Defendants would be required  
4 to rebut it with massive evidence related to their management of the Company since the 1970s.  
5 To be clear, this will require delving into more than 40 years of Company history, on a year-by-  
6 year, decision-by-decision basis to prove there was no wrongdoing.

7 The Court need not expose itself and jurors to such time-consuming and irrelevant  
8 information. The Evidence Code provides that the Court may "exclude evidence if its probative  
9 value is substantially outweighed by the probability that its admission will (a) necessitate undue  
10 consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,  
11 or of misleading the jury." Cal. Evid. Code § 352. Plaintiff's theory implicates each of these  
12 concerns. The Court should not permit this irrelevant testimony and evidence

13 **V. CONCLUSION**

14 For the foregoing reasons, Individual Defendants respectfully request that the Court grant  
15 its Motion and exclude from evidence any testimony or documents relating to allegations  
16 Plaintiff has identified as "Derivative Allegations." Should the Court conclude that evidence of  
17 the Derivative Allegations is admissible, Defendants hereby reserve the right to amend their trial  
18 exhibit and witness lists accordingly.

19 Dated: October 28, 2016

MORGAN, LEWIS & BOCKIUS LLP

21 By:   
22 \_\_\_\_\_  
Brian C. Rocca

23 *Attorneys for Defendants*  
24 *Robert A. Lurie and Connie L. Lurie*

1 Dated: October 28, 2016

ORRICK, HERRINGTON & SUTCLIFFE

2  
3 By: *Ian Johnson* /BCR  
4 Ian Johnson

5 *Attorneys for Defendants, H. Michael Kurzman,*  
6 *Eugene L. Valla, William M. Harris and James*  
7 *L. Hunt*

8 Dated: October 28, 2016

KAUFHOLD GASKIN LLP

9 By: *Steven Kaufhold* /BCR  
10 Steven S. Kaufhold

11 *Attorneys for Defendant The Lurie Company*