

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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MEMORANDUM OF POINTS AND AUTHORITIES

ROBERT L. LURIE VS. ROBERT A. LURIE et al

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DEPUTY

1 Donn P. Pickett (SBN 72257)
donn.pickett@bingham.com
2 John D. Pernick (SBN 155468)
john.pernick@bingham.com
3 Brian C. Rocca (SBN 221576)
brian.rocca@bingham.com
4 Ali J. Gramaglia (SBN 287989)
ali.gramaglia@bingham.com
5 BINGHAM McCUTCHEEN LLP
Three Embarcadero Center
San Francisco, CA 94111
6 Telephone: (415) 393-2212
7 Facsimile: (415) 393-2286

8 Attorneys for Defendants
Robert A. Lurie and Connie L. Lurie

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 UNLIMITED CIVIL JURISDICTION
13

14 ROBERT L. LURIE, an individual,
15 Plaintiff,

16 v.

17 ROBERT A. LURIE, an individual, et al.,
18 Defendants.

Case No. CGC-14-538887

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO PLAINTIFF'S
AMENDED COMPLAINT**

Date: September 8, 2014
Time: 9:30 a.m.
Dept.: 302

[Reservation Number: 062614-13]

Complaint filed: April 23, 2014

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1 **I. INTRODUCTION**

2 Defendants Robert A. Lurie ("Bob") and Connie L. Lurie ("Connie") are directors of and
3 shareholders in The Lurie Company ("TLC"), a California Corporation.¹ Bob's son, Plaintiff
4 Robert L. Lurie ("Bobby"), is also a TLC shareholder.

5 In 1997, TLC and its shareholders entered into an S Corporation Shareholder Agreement
6 (the "Shareholder Agreement"). Included in that agreement are provisions regarding transfers or
7 sales of TLC shares, including provisions giving all TLC shareholders a Right of First Refusal on
8 such transfers and establishing a procedure for TLC to give notice of such proposed transfers to
9 its shareholders.

10 Bobby claims that he was deprived of an opportunity to exercise his Right of First
11 Refusal to purchase additional TLC shares when TLC failed to give him notice of certain TLC
12 share transfers in 1999 (the "Stock Transfers"). Bobby is suing TLC, claiming that its failure to
13 provide notice was a breach of the Shareholder Agreement. Bobby is also suing Bob and Connie
14 (and four other TLC directors) for a variety of tort claims, but not for breach of contract. He
15 claims that Bob and Connie breached their fiduciary duty as directors by failing to inform him of
16 the Stock Transfers. He also claims that Bob and Connie's failure to inform him of the Stock
17 Transfers interfered with his rights under the Shareholder Agreement.

18 Bobby's claims against Bob and Connie are without merit and should be dismissed.

19 First, neither Bob nor Connie owed Bobby any fiduciary duty with respect to the Stock
20 Transfers. The Shareholder Agreement creates no fiduciary duties and the facts surrounding the
21 Stock Transfers do not fall within the narrow circumstance in which a director would owe a
22 fiduciary duty of disclosure to an individual shareholder. Such a fiduciary duty exists only when
23 a director is involved in a share transaction with the complaining shareholder and the director has
24 information about the company that would impact the complaining shareholder's weighing of the
25 transaction. That situation is not present here.

26 Second, Bob and Connie are both parties to the Shareholder Agreement and cannot be
27 liable for alleged interference with their own contract.

28 ¹ To avoid confusion, Lurie family members are identified by their common name. No disrespect is intended.

1 Third, Bobby has not established any breach of fiduciary duty or other wrongdoing that
2 would justify his request for an accounting. Nor has he shown that an accounting would be
3 necessary with respect to the Stock Transactions in any case.

4 Finally, as to Connie, she had no involvement in any of the Stock Transfers. Therefore,
5 there is no factual basis for any claim against her for breach of fiduciary duty, interference with
6 contract, or otherwise.

7 The only obligations implicated by the Stock Transfers are the contractual duties set out
8 in the Shareholder Agreement. Bobby's attempt to bring tort claims against Bob and Connie
9 based on his purported contractual rights is not only facially inadequate, it is contrary to
10 California's long standing policy limiting breach of contract damages to sums within the
11 reasonable contemplation of the contracting parties. Bob and Connie's demurrers to the
12 Complaint should be sustained.

13 II. FACTUAL ALLEGATIONS

14 TLC is a California corporation. Amended Complaint for Damages ("Complaint"), ¶ 2.
15 Bob and Connie are directors of TLC and also own shares of TLC stock. Complaint, ¶¶ 5, 6, 11.
16 Bobby is also a TLC shareholder. Complaint, ¶ 4.

17 In 1997, in connection with TLC's conversion into an S Corporation, the shareholders of
18 TLC were asked to sign the Shareholder Agreement. Complaint, ¶ 36. TLC and Connie signed
19 the Shareholder Agreement in September 1997. Complaint, ¶ 41, 47. Bobby signed the
20 Shareholder Agreement in October 1997. Complaint, ¶ 48. Bob signed the Shareholder
21 Agreement in November 1997. Complaint, ¶ 42.

22 The Shareholder Agreement contains various provisions relating to transfers of TLC
23 shares. This action concerns the Right of First Refusal provisions in Section 7 of the
24 Shareholder Agreement. Under those provisions, if a TLC shareholder wishes to transfer all or
25 any part of his shares to a third-party (including another TLC shareholder), the shareholder
26 desiring to transfer (the "Selling Shareholder") shall give written notice to TLC of his intention
27 to transfer the shares, the name of the transferee, and the terms of the proposed transfer,
28 including the price. Shareholder Agreement, § 7(a). TLC is then given thirty days to exercise its

1 option to purchase all or any portion of the shares being offered at the same terms. Shareholder
2 Agreement § 7(b). Within that thirty days, TLC shall provide TLC's other shareholders with a
3 copy of the notice from the Selling Shareholder containing the information about the proposed
4 transfer and also give notice to the Selling Shareholder and the other TLC shareholders of its
5 decision regarding the exercise of its purchase option. *Id.* If TLC does not choose to purchase
6 all of the offered shares, then other TLC shareholders have the option to purchase some or all of
7 the shares being offered that are not purchased by TLC. Shareholder Agreement, § 7(c). If more
8 than one TLC shareholder wishes to exercise the option to purchase shares (each a "Purchasing
9 Shareholder"), then each Purchasing Shareholder is entitled to purchase shares on a pro rata
10 basis. *Id.*

11 In March 1999, TLC shareholder David L. Lurie ("David") sold 3,000 TLC shares to Bob
12 and Defendants Michael Kurzman, Eugene Valla, and William Harris. Also in March 1999, Bob
13 sold 500 TLC shares to Defendant James Hunt. Complaint, ¶¶ 51-56. Bobby alleges that no
14 notices were sent out by TLC with respect to these Stock Transfers and that, therefore, he was
15 deprived of his right under the Shareholder Agreement to purchase some or all of the transferred
16 shares. Complaint, ¶¶ 59, 74.

17 Bobby filed his initial complaint in this action on April 23, 2014, followed by an
18 amended complaint filed on April 24, 2014. In addition to claiming that TLC breached its
19 contractual duties under the Shareholder Agreement to give notice of the transfers, Bobby also
20 claims that Bob and Connie, and TLC's other directors, had fiduciary duties to provide him
21 notice of the Stock Transfers and/or disclose to him TLC's failure to provide that notice. Bobby
22 also claims that Bob's and Connie's and the other directors' failure to disclose the Stock
23 Transfers was an intentional interference with his rights under the Shareholder Agreement.

24 **III. ARGUMENT**

25 **A. *Bob and Connie Had No Fiduciary Duty to Disclose the Stock Transfers***

26 Bobby's Second and Third Causes of Action, for Fraudulent Concealment and Breach of
27 Fiduciary Duty are both based on his contention that Bob and Connie had a fiduciary duty to
28 "deal honestly and fairly with Plaintiff" and to "honor the Shareholder Agreement." *See*

1 Complaint, ¶¶ 79, 81, 88. Each of these causes of action then alleges that Bob and Connie
2 breached that duty by failing to disclose and/or concealing the Stock Transfers. *See* Complaint,
3 ¶¶ 81, 90. But neither the Shareholder Agreement nor Bob and Connie's role as directors of
4 TLC created a fiduciary duty to disclose the Stock Transfers to Bobby.

5 The Shareholder Agreement is just a contract. It creates no fiduciary duties:

6 The performance of a stockholder agreement giving corporations or corporate
7 insiders rights of first refusal over other stockholders' shares is not governed by
8 any generalized fiduciary duty of disclosure like that known to exist when a
9 corporation asks its stockholders to engage in some discretionary action (such as
granting a proxy, voting, or tendering shares). Nor is such performance governed
by any generalized application of the duty of loyalty.

10 *Latesco, L.P. v. Wayport, Inc.*, No. 4167-VCL, 2009 Del. Ch. LEXIS 145, at *3-4 (Del. Ch. July
11 24, 2009) (dismissing selling shareholder's breach of fiduciary duty of disclosure claim against
12 company insiders who held, but chose not to exercise, right of first refusal under shareholder
13 agreement); *see also City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386
14 (2008) (contract does not impose fiduciary duty unless contractual language or nature of
15 contractual relationship imposes duty on one party to act on behalf and for the benefit of the
16 other). Consequently, the Shareholder Agreement created no fiduciary duty that would have
17 required Bob or Connie to disclose the Stock Transfers to Bobby.

18 Bob and Connie's role as directors of TLC did not create a fiduciary duty of disclosure
19 either. In California, a director only owes a fiduciary duty of disclosure to an individual
20 shareholder when the director is involved in a share transaction with that shareholder that falls
21 within the scope of what is known as the "special facts" doctrine. Under the special facts
22 doctrine, when (a) a director is involved in a share purchase or sale transaction with a
23 shareholder and (b) the director, because of his position at the company, knows facts about the
24 company that would impact the shareholder's judgment as to the advantages of the share
25 transaction, then the director has a fiduciary duty to disclose those "special facts" to that
26 shareholder. *See, Low v. Wheeler*, 207 Cal. App. 2d 477, 484 (1962) (director seeking to arrange
27 for the purchase of a shareholder's shares by third party had fiduciary duty under special facts
28 doctrine to disclose that the proposed purchaser was buying the director's shares at a higher

1 price). California courts have consistently limited a director's fiduciary duty of disclosure to
2 individual shareholders to circumstances that meet the elements of the special facts doctrine.
3 *See, e.g., Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412 (1945) (director attempting to purchase
4 stock from shareholder breached fiduciary duty of disclosure under special facts doctrine when
5 he told shareholder that company's stock was worth \$25 per share even though he had recently
6 determined the value to be \$55 per share); *Fisher v. Penn. Life Co.*, 69 Cal. App. 3d 506 (1977)
7 (directors negotiating agreement with shareholder for release of claims and issuance of shares
8 had fiduciary duty under special facts doctrine to disclose fraudulent transactions that artificially
9 inflated the market price of the company's stock); *Haussler v. Wilson*, 164 Cal. App. 2d 421
10 (1958) (director of bank who claimed that his offer to shareholder of \$300 per share was more
11 than stock was worth had fiduciary duty under special facts doctrine to disclose that bank was
12 planning to declare a 100 percent stock dividend and that he had been negotiating for purchase of
13 shares with another stockholder for \$500 per share).

14 The facts surrounding the Stock Transfers do not meet the elements of the special facts
15 doctrine. First, the doctrine only imposes a fiduciary duty on a director to disclose information
16 to a shareholder who is involved in a share transaction with the director. Neither Bob nor Connie
17 was involved in any TLC share transaction with Bobby. Second, the disclosure obligation only
18 arises when there exist "special facts" regarding the company that would impact a shareholder's
19 decision as to whether to enter into the proposed transaction with the director (*i.e.* some
20 transaction or other fact impacting the value of the company or its stock). The existence of the
21 Stock Transfers is not such a special fact, and Bobby was not involved a TLC share transaction
22 at the time of the Stock Transfers in any case.

23 Absent facts sufficient to bring the special facts doctrine into play, California does not
24 impose a fiduciary duty on directors to inform individual shareholders of a company's acts or
25 failures to act. Those facts are not present here. Therefore, Bob and Connie's demurrers to the
26 Second and Third Causes of Action should be sustained.

27 //

28 //

1 **B. Bobby's Cause of Action for Intentional Interference with Contractual**
2 **Relations Fails Because Bob and Connie are Parties to the Shareholder**
3 **Agreement.**

4 Bobby alleges that Bob and Connie, along with himself, TLC, and the other defendants,
5 are parties to the Shareholder Agreement. "The signing of the Shareholder Agreement by each
6 Defendant created a valid contract between Plaintiff and each Defendant individually."
7 Complaint, ¶ 49. Then, in his Fourth Cause of Action, Bobby claims that Bob and Connie are
8 liable to him because they interfered with and induced a breach of the Shareholder Agreement.
9 Complaint, ¶¶ 94-95. But an action for intentional interference with contractual relations cannot
10 be brought against a party to the contract at issue. "*Because a party to a contract owes no tort*
11 *duty to refrain from interference with its performance, he or she cannot be bootstrapped into tort*
12 *liability by the pejorative plea of conspiracy.*" *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*,
13 7 Cal. 4th 503, 514 (1994) (emphasis in original); *see also Mintz v. Blue Cross of California*, 172
14 Cal. App. 4th 1594, 1603 (2009) (stating that only a "stranger" to the contract may be liable for
15 interfering with it). Bob and Connie are parties to the Shareholder Agreement. Therefore, the
16 interference claim fails.

17 Bobby's interference claim is just an improper attempt to transform his breach of contract
18 claim against TLC into a tort claim. *See Applied Equip. Corp.*, 7 Cal. 4th at 517 (imposition of
19 tort liability on contracting party for conspiracy to interfere with contract would "thwart[] legal
20 rules and policies limiting contract damages to those sums reasonably foreseeable to the
21 contracting parties."). The demurrer to the Fourth Cause of Action should be sustained.

22 **C. There is No Basis or Need for an Accounting**

23 To establish a right to an accounting, a plaintiff must allege some wrongdoing in
24 connection with a fiduciary or other relationship that provides the basis of a claim for relief and
25 that the books and records relating to the amount allegedly owing are so complicated that an
26 action demanding a fixed sum is inadequate. *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223
27 Cal. App. 4th 1105, 1136-37 (2014). The existence of a relationship with complex records is
28 not sufficient to establish a right to an accounting absent allegations demonstrating wrongdoing
 on the part of the defendant. *Union Bank v. Superior Court*, 31 Cal. App. 4th 573, 594 (1995)

1 (where plaintiff established no basis for a finding of fraud or breach of fiduciary duty or other
2 wrongdoing by defendant, claim for accounting properly denied).

3 Here, Bobby has failed to allege facts demonstrating any breach of fiduciary duty or other
4 actionable wrongdoing by Bob or Connie. Consequently, there is no basis for an accounting.
5 Moreover, Bobby has not alleged facts demonstrating that review of Bob's or Connie's financial
6 records is necessary to determine any aspect of the relief he is seeking. Connie is not alleged to
7 have purchased or sold any of the TLC shares at issue. The amount of shares purchased and sold
8 by Bob in his transactions is alleged in the Complaint. Bobby is a TLC shareholder so, to the
9 extent any relief sought depends on the amount of dividends paid per TLC, he has that
10 information. Bobby has failed to allege facts establishing either a right to or a need for an
11 accounting. The demurrer to the Fifth Cause of Action should be sustained.

12 ***D. Connie Had No Involvement in the Stock Transfers***

13 As is set out above, the facts surrounding the Stock Transfers are insufficient to support
14 breach of fiduciary duty or interference with contract claims against Bob or Connie. Bobby's
15 claims as to Connie fail for the additional reason that she had no involvement in the Stock
16 Transfers at all. Connie was not a seller or a buyer of TLC stock. She is apparently being sued
17 because she is (a) a director of TLC and (b) married to Bob. Those facts, separately or
18 combined, do not provide any basis for liability under any theory. Connie's demurrers should be
19 sustained on that ground as well.

20 **IV. CONCLUSION**

21 The Complaint fails to allege facts sufficient to state any claim against Bob or Connie.
22 The Court should reject Bobby's improper and deficient attempt to transform his breach of
23 contract claim against TLC into tort claims against Bob and Connie and should sustain Bob and
24 Connie's demurrers to the Complaint.

25 //

26 //

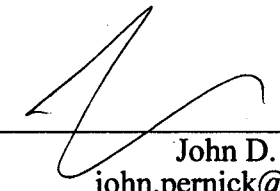
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DATED: June 27, 2014

BINGHAM McCUTCHEN LLP

By: 

John D. Pernick
john.pernick@bingham.com
Attorneys for Defendants
Robert A. Lurie and Connie L. Lurie

1 **PROOF OF SERVICE**

2 I am over eighteen years of age, not a party in this action, and employed in San
3 Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-
4 4067. I am readily familiar with the practice of this office for collection and processing of
5 correspondence for mail/fax/hand delivery/next business day delivery, and they are deposited
6 that same day in the ordinary course of business.

7 On June 27, 2014, I served the attached:

8 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
9 **OF DEMURRER TO PLAINTIFF'S AMENDED COMPLAINT**



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course of business.

14 Karen G. Johnson-McKewan, Esq.
15 The Orrick Building
16 405 Howard Street
17 San Francisco, CA 94105-2669
18 Telephone: (415) 773-5917
19 kjohnson-mckewan@orrick.com

Steven S. Kaufhold, Esq.
Kaufhold Gaskin LLP
388 Market Street, Suite 1300
San Francisco, CA 94111
Telephone: (415) 632-8188
skaufhold@kaufholdgaskin.com

18 Lisa Kobialka, Esq.
19 Kramer Levin Naftalis & Frankel LLP
20 990 Marsh Road
21 Menlo Park, CA 94025
22 Telephone: (650) 752-1711
23 lkobialka@kramerlevin.com

24 I declare under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct and that this declaration was executed on June 27, 2014 at
26 San Francisco, California.


Rose Marie Secretario