

[attorney info redacted]
[attorney info redacted]
[attorney info redacted]
[attorney info redacted]

Attorney for Defendants John Smith, and
Stan Moon

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT, MOSK COURTHOUSE — UNLIMITED**

SUE KIM

Plaintiff

vs.

JOHN SMITH, an individual;
STAN MOON, an individual; and
DOEs 1 to 10,
Defendants

Case Number: [redacted]
Dept.: [redacted]
Judge: [redacted]
Trial Date: [redacted]

**DEFENDANTS’ NOTICE OF MOTION
AND MOTION TO STRIKE PUNITIVE
AND EXEMPLARY DAMAGES AND
CERTAIN OTHER ALLEGATIONS
FROM COMPLAINT [CCP §§ 435, 436];
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Hearing Date: _____
Hearing Time: _____

TO THE ABOVE-ENTITLED COURT AND ALL INTERESTED PARTIES HEREIN:

PLEASE TAKE NOTICE THAT on _____ at _____, or as soon thereafter as the matter may be heard, in Department “69” of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California 90012, Defendants JOHN SMITH (hereinafter “**SMITH**”), and STAN MOON (hereinafter “**MOON**”), (hereinafter collectively “**MOVING DEFENDANTS**”), will and hereby do move to strike the following allegations from the Complaint:

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“23. MOON’s acts alleged above were willful, wanton, malicious, and oppressive, and were undertaken with intent to defraud, and justify the awarding of exemplary and punitive damages.” [Complaint ¶ 23].

“5. For punitive damages against defendant, STAN MOON, in an amount according to proof.” [Complaint p.7, lines 12-13].

This motion is based upon the grounds that the conclusory language of the Complaint relative to exemplary and punitive damages quoted above is improper and not in conformity with the laws of this State, and that the Complaint does not allege any despicable conduct by any of the Moving Defendants.

This motion will be made pursuant to Code of Civil Procedure §§ 435, and 436. This motion is based upon this notice, the accompanying memorandum of points and authorities, the all pleadings and papers on file in the above-captioned action, and other evidence that may be presented by Moving Defendants prior to or at the hearing on this motion to strike.

Dated: _____

[attorney name redacted]

Attorney for Defendants John Smith, and Stan Moon

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 The definitions set forth *ante* in the Notice of Motion and Motion are incorporated
4 herein to avoid repetition.

5 The Court should GRANT the motion for the following reasons.

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7 **1. Introduction**

8 This action arises from an attempt by Plaintiff to purchase property, wherein the
9 Plaintiff's actions resulted in failure to negotiate a deal, and now, several months later,
10 Plaintiff is suing to enforce a deal that never existed. This Motion to Strike concerns only the
11 Third Cause of Action for Intentional Interference with Contractual Relationship, and
12 specifically, the allegations in Complaint ¶ 23 that MOON engaged in conduct so despicable
13 as to justify exemplary or punitive damages. There is no need herein to detail the entire
14 story. It suffices to say that the Complaint nowhere alleges any act by MOON to support the
15 conclusory allegations in Complaint ¶ 23 that "MOON's acts alleged above were willful,
16 wanton, malicious, and oppressive, and were undertaken with intent to defraud, and justify
17 the awarding of exemplary and punitive damages." What "acts alleged above? MOON
18 simply attempted to do a job he was asked to do and asked to be paid for the work he did. A
19 disagreement occurred over the amount he was to be paid. That is all the Complaint alleges.

20 Hereinafter "CCP" shall refer to the Code of Civil Procedure, and "CC" shall refer to
21 the Civil Code.

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2 **2. The Court May Strike from a Pleading Any Irrelevant, False or**
3 **Improper Matter.**

4 The Court may strike from a pleading any irrelevant, false or improper matter. CCP
5 §435 provides in relevant part:

6 “Any party, within the time allowed to respond to a pleading may
7 serve and file a notice of motion to strike the whole or any part
8 thereof...”

9 CCP §436 provides in relevant part:

10 “The court may, upon a motion made pursuant to Section 435, or at
11 any time in its discretion, and upon terms it deems proper:

12 (a) Strike out any irrelevant, false, or improper matter inserted
13 in any pleading.”

14 The Court has authority to strike damages from a complaint if such damages are not
15 recoverable. The Court also has authority to strike punitive damages from the complaint.
16 See *Grieves v. Superior Court* (4th Dist.,1984) 157 Cal.App.3d 159 [203 Cal.Rptr. 556],
17 cited *post*.

18 **3. Claims for Damages Which May Not Be Imposed May Properly**
19 **Be Stricken from a Pleading.**

20 Claims for damages which may not be imposed may properly be stricken from a
21 pleading.

22 “Matter in a pleading which is not essential to the claim is surplusage;
23 probative facts are surplusage and may be stricken out or disregarded.”
24 *Stafford v. Shultz* (1954) 42 Cal.2d 767@782 [270 P.2d 1].

25 Allegations in a pleading with regard to damages which are not recoverable should be
26 disregarded and treated as surplusage.

“[W]here, as here, it appears that by no possibility can she recover for
these things, we think the allegations on the subject should be treated
as surplusage.” *Newman v. Smith* (1888) 18 P. 791 [p.27]

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2 Plaintiff's claims for exemplary and punitive damages are clearly improper and
3 should be stricken.
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5 **4. The Complaint Fails to State Facts Sufficient to Support the** 6 **Recovery of Exemplary or Punitive Damages.**

7 The recovery of exemplary or punitive damages is governed by CC § 3294, which
8 specifically sets forth the type of conduct which justifies their award. CC § 3294 provides:

9 “(a) In an action for the breach of an obligation not arising from
10 contract, where it is proven by clear and convincing evidence that the
11 defendant has been guilty of oppression, fraud, or malice, the plaintiff,
in addition to the actual damages, may recover damages for the sake of
example and by way of punishing the defendant.” CC § 3294(a),
emphasis added

12 The words “oppression”, “fraud” and “malice” are specifically defined in CC § 3294:

13 “(c) As used in this section, the following definitions shall apply:
14 (1) "Malice" means conduct which is intended by the defendant
15 to cause injury to the plaintiff or despicable conduct which is
carried on by the defendant with a willful and conscious
disregard of the rights or safety of others.
16 (2) "Oppression" means despicable conduct that subjects a
person to cruel and unjust hardship in conscious disregard of
17 that person's rights.
18 (3) "Fraud" means an intentional misrepresentation, deceit, or
concealment of a material fact known to the defendant with the
intention on the part of the defendant of thereby depriving a
19 person of property or legal rights or otherwise causing injury.”
CC § 3294(c), emphasis added.

20 CC § 3294 was revised effective January 1, 1988, to clarify that conduct must be
21 despicable before exemplary or punitive damages could be awarded. The amendments also
22 provide for proof of such conduct by clear and convincing evidence.
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2 In pleading exemplary or punitive damages, a party must plead facts from which is
3 can reasonably be inferred that the defendant acted with malice, oppression, or fraud within
4 the meaning of CC § 3294.

5 “The mere allegation an intentional tort was committed is not
6 sufficient to warrant an award of punitive damages... Not only must
7 there be circumstances of oppression, fraud or malice, but facts must
8 be alleged in the pleading to support such a claim.” [@166]

9 “For all the foregoing reasons we conclude the trial court should have
10 granted real parties' motions to strike...” [@168]

11 *Grieves v. Superior Court* (4th Dist.,1984) 157 Cal.App.3d 159 [203
12 Cal.Rptr. 556], emphasis added.

13 Based upon the express language of CC § 3294, it is clear that the request for
14 exemplary and punitive damages should be stricken from the Complaint. Complaint ¶ 23
15 characterizes “MOON’s acts alleged above” as malicious, oppressive etc., but no act alleged
16 above ¶ 23 states *any act* by MOON that, even remotely, supports such characterization.
17 When the Complaint is stripped of its legal conclusions in ¶ 23, there are no facts whatsoever
18 to support a claim for exemplary or punitive damages. The factual allegations of the
19 Complaint clearly do not describe any conduct on the part of MOON which could be
20 considered vile, base, contemptible, miserable, wretched or loathsome that would be looked
21 down upon as despised by ordinary, decent people. MOON was just doing the work he was
22 asked to do and asking to be paid for it, and that is all the Complaint alleges.

23 **5. Conclusion.**

24 For all of the foregoing reasons, Defendants’ motion to strike Complaint ¶ 23, and
25 Complaint p.7, lines 12-13, should be GRANTED without leave to amend.

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Dated: _____

[attorney name redacted]

Attorney for Defendants John Smith, and Stan Moon

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2 **PROOF OF SERVICE**

3 I, the undersigned, declare:

4 I am a citizen of the United States of America, am over the age of eighteen (18) years, and
5 am not a party to the within action. My business address is [redacted].

6 On _____, 2006, I caused to be served the following document(s): **DEFENDANTS’**
7 **NOTICE OF MOTION AND MOTION TO STRIKE PUNITIVE AND EXEMPLARY**
8 **DAMAGES AND CERTAIN OTHER ALLEGATIONS FROM COMPLAINT [CCP**
9 **§§ 435, 436]; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**, on
10 the parties involved addressed as follows:

11 [attorney name, address and fax number redacted]

12 XX BY MAIL: I caused each envelope, with postage fully prepaid, to be placed in the
13 United States mail at Los Angeles, California.

14 I declare under penalty of perjury under the laws of the State of California that the foregoing
15 is true and correct.

16 Executed on _____, 2006, at _____, California,

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[attorney info redacted]
[attorney info redacted]
[attorney info redacted]
[attorney info redacted]

Attorney for Defendants John Smith, and
Stan Moon

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

CENTRAL DISTRICT, MOSK COURTHOUSE — UNLIMITED

SUE KIM

Plaintiff

vs.

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DOEs 1 to 10,

Defendants

Case Number: [redacted]
Dept.: [redacted]
Judge: [redacted]
Trial Date: [redacted]

**[PROPOSED] ORDER TO STRIKE
PUNITIVE AND EXEMPLARY
DAMAGES AND CERTAIN OTHER
ALLEGATIONS FROM COMPLAINT**

Hearing Date: _____
Hearing Time: _____

GOOD CAUSE HAVING BEEN SHOWN, IT IS ORDERED THAT:

The following allegations in the Complaint filed in this matter are hereby stricken:

“23. MOON’s acts alleged above were willful, wanton, malicious, and oppressive, and were undertaken with intent to defraud, and justify the awarding of exemplary and punitive damages.” [Complaint ¶ 23].

“5. For punitive damages against defendant, STAN MOON, in an amount according to proof.” [Complaint p.7, lines 12-13].

IT IS SO ORDERED.

Dated: _____

Judge (or Judicial Officer)