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14 and BEHNAM RAFALIAN

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
16 COUNTY OF LOS ANGELES

17 **HYMAN LEVY, an individual,** ) Case No.: BC391640  
18 )  
19 **Plaintiff,** ) [Hon. Mary Ann Murphy; Dept.25]  
20 **vs.** )  
21 ) **REPLY TO PLAINTIFF’S OPPOSITION**  
22 ) **TO DEFENDANTS’ DEMURRER TO**  
23 ) **THE COMPLAINT**  
24 **BMD WASHINGTON, LLC, a California** )  
25 **limited liability company; BEHNAM** )  
26 **RAFALIAN, an individual; and DOES 1-10,** )  
27 **inclusive,** ) **Date: October 31, 2008**  
28 ) **Time: 8:30 a.m.**  
 ) **Dept: 25**  
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 )  
 )

29 **I. BECAUSE THE AGENT’S IMMUNITY RULE APPLIES HERE RAFALIAN IS**  
30 **NOT A PROPER PARTY TO THIS CASE.**

31 Plaintiff asserts that Rafalian is a proper party because he “alleged that Rafalian was an  
32 agent, employee, joint venturer, and/or co-conspirator of BMD at all times motioned[sic]

1 in the Complaint.” See Complaint ¶ 5. Plaintiff then concludes that “[a]s an agent  
2 and/or co-conspirator of BMD, Rafalian is liable for the same actionable torts as is  
3 BMD.” *Id.*

4 But Rafalian cannot be sued as a co-conspirator as alleged in the Complaint as a matter  
5 of law. While Plaintiff correctly states the proposition that a co-conspirator effectively  
6 adopts as his/her own the torts of other co-conspirators by participation in a civil  
7 conspiracy, he ignores the application of the agent’s immunity rule to this case:

8 “Agents and employees of a corporation cannot conspire with their  
9 corporate principal or employer where they act in their official capacities  
10 on behalf of the corporation and not as individuals for their individual  
11 advantage.”

11 *Applied Equipment Corp., supra* at 512; *Black, et al. v. Bank of America, et al.* (1994)  
12 726.

13 Here, Plaintiff alleges the following:

14 “5. Plaintiff is informed, believes, and thereon alleges that defendants  
15 BMD, **RAFALIAN**, and DOES 1 through 10, inclusive (collectively,  
16 “Defendants), and each of them, **were at all times herein mentioned the**  
17 **agents, servants, employees, joint venturers, and/or co-conspirators**  
18 **of each of the other Defendants**, and at all times herein mentioned,  
19 **were acting within the scope of said agency, employment, or service,**  
20 **and in furtherance of a joint venture and/or conspiracy.”**

21 Complaint ¶ 5. (Emphasis added). Stated simply, the allegations are that Rafalian was  
22 acting as an agent and/or co-conspirator of BMD, and that Rafalian was acting within  
23 the course and scope of said agency. But as correctly stated in *Black*, “[w]hen a  
24 corporate employee acts in the course and scope of his or her employment, on behalf of  
25 the corporation, there is no entity apart from the employee with whom the employee can  
26 conspire.” *Black, supra* at 728 (Citations omitted). “[A] corporation cannot conspire  
27 with itself.” *Id.* at 729. It is crystal-clear, therefore, that the agent’s immunity rule  
28 applies, and that Rafalian is not a proper party to this suit as alleged in the Complaint.

Nor can Plaintiff amend the Complaint to state a cause of action against Rafalian.  
In *Black*, the court stated that the Appellants in that case could not rely on the exception

1 to the agent's immunity rule "allowing corporate employees to be held liable for  
2 conspiracy with their principal when they act for their own individual advantage and not  
3 solely on behalf of the corporation, or act beyond the scope of their authority." *Id.* The  
4 court's reasoning was that Appellants had expressly alleged in their prior verified  
5 pleading that the individual defendants had committed the alleged wrongful acts "in the  
6 course and scope of their respective employment and agency for the Bank." *Id.* As a  
7 result, defendants could not, "in a desperate attempt to state a claim for conspiracy,  
8 directly contradict these allegations and assert that the same officers were acting  
9 beyond the scope of their authority. *Id.* (Emphasis in original)(citations omitted).  
10 Plaintiff filed a verified Complaint alleging that **all** of Rafalian's alleged acts were within  
11 the scope of his agency relationship with BMD. Complaint ¶ 5. Nowhere does the  
12 complaint state that Rafalian acted for his own individual advantage and not solely on  
13 behalf of BMD. As a consequence, Plaintiff may not amend the Complaint to contradict  
14 the allegations made thus far. *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th  
15 857, 877-878 (plaintiff cannot avoid demurrer by pleading facts that are contradictory to  
16 facts alleged in prior pleading). Therefore, Plaintiff's demurrer should be sustained  
17 without leave to amend as to Rafalian.

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21 II.

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27 **V. CONCLUSION**

28 Based on the foregoing, this court should sustain the demurrer on behalf of

1 RAFALIAN described in Section III above with prejudice, and should grant the demurrer  
2 of RAFALIAN and BMD in Section IV.

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4 Dated: September 12, 2008

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