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9 LAGUNA WHOLESale

10 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE**
11 **700 CIVIC CENTER DRIVE WEST, SANTA ANA, CALIFORNIA 92701**

12 MARTELLATO USA, A CALIFORNIA)
13 CORPORATION)
14 Plaintiff,)
15 vs.)
16 LAGUNA WHOLESale, A CALIFORNIA)
17 CORPORATION;)
18 AND DOES 1 TO 50, inclusive,)
19 Defendants.)

20 Case No.: 30-2014-00716206
21 ASSIGNED FOR ALL PURPOSES TO:
22 JUDICIAL OFFICER GEOFFREY T. GLASS
23 DEPARTMENT C-32

24 **DEFENDANT LAGUNA WHOLESale'S**
25 **NOTICE OF HEARING ON MOTION TO**
26 **STRIKE PORTIONS OF THE COMPLAINT**
27 **OF PLAINTIFF MARTELLATO USA;**
28 **MEMORANDUM OF POINTS AND**
AUTHORITIES

Hearing Date: October 6, 2014
Hearing Time: 1:30 p.m.
Department: C-32
Judge: Geoffrey T. Glass

Complaint Filed: April 11, 2014
Trial Date: None set

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 6, 2014 at 1:30 p.m. or as soon thereafter as the matter may be hear in Department C-32 of the above-entitled court located at 700 Civic Center Drive West, Santa Ana, California 92701, defendant, LAGUNA WHOLESale (hereafter "Laguna"), will and hereby does move the court for an order striking the following portions of the Complaint of plaintiff

1 MATELLATO USA's (hereafter "Martellato"), filed on April 11, 2014, pursuant to C.C.P. § 435 and
2 C.C.P. § 436.

3 1. The following language at page 2, paragraph 10 c: "attorney's fees according to proof."
4 Grounds for striking such matter from the pleading: the matter is irrelevant, false, improper, and/or not
5 drawn in conformity with laws, local rules, or order of court.

6 2. The following language at page 5, paragraph BC-5: "Plaintiff is entitled to attorney fees by an
7 agreement or a statute according to proof."
8 Grounds for striking such matter from the pleading: the matter is irrelevant, false, improper, and/or not
9 drawn in conformity with laws, local rules, or order of court.

10 3. The following language at page 6, paragraph CC-3: "Plaintiff is entitled to attorney fees by an
11 agreement or a statute according to proof."
12 Grounds for striking such matter from the pleading: the matter is irrelevant, false, improper, and/or not
13 drawn in conformity with laws, local rules, or order of court.

14 4. Paragraph 9(b) on page 2 of the complaint and the document entitled "ATTACHMENT TO
15 COMPLAINT" with page number 3 and 4.
16 Grounds for striking such matter from the pleading: the matter is irrelevant, false, improper, and/or not
17 drawn in conformity with laws, local rules, or order of court.

18 This motion is based upon this notice, upon the attached Memorandum of Points and Authorities;
19 upon the records and files in this action; and upon such further evidence and argument as may be
20 presented prior to or at the time of hearing on the motion.

21 Dated: August 12, 2014

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DAVID JAFARI
Attorney for defendant Laguna Wholesale

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 INTRODUCTION

4 This is a business collection case. On April 11, 2014, plaintiff MARTELLATO USA (hereafter
5 “Martellato”) filed a civil action against defendant, LAGUNA WHOLESALE (hereafter “Laguna”),
6 demanding \$28,392.40 in damages plus interest, costs, and attorney fees. The complaint alleges two
7 causes of action: 1) Breach of Contract, and 2) Common Counts.

8 Plaintiff’s first cause of action alleges breach of a written contract. It states the contract was
9 entered into “between 11/14/12 and 12/27/13.” It then alleges “Defendant purchased from Plaintiff,
10 products pursuant to purchase orders and invoices, and promised to pay for all products. Attached as
11 exhibit (a) is a true and correct copy of a statement of account reflecting all the amounts due.” It fails to
12 allege any provision regarding attorney fees to a party in the event of a dispute. Attached to the
13 complaint as Exhibit A is a single sheet entitled “Customer Open Balance” which lists invoices with
14 date, due date, open balance and amount. The top left corner of Exhibit A has a date and time stamp,
15 which seems to be the date Exhibit A was created. Exhibit A does not provide any provision regarding
16 attorney fees to a party in the event of a dispute.

17 Plaintiff’s second cause of action for common counts alleges a count for open book account for
18 money due. Concurrently with this motion, defendant has filed a demurrer to the open book account
19 count because it fails to state facts sufficient to constitute a cause of action.

20 Paragraph 9(b) of the complaint alleges “(b): See attachment to complaint - Alter Ego
21 Allegations”. Attached to the complaint as pages 3 and 4 is a document on pleading paper entitled
22 “ATTACHMENT TO COMPLAINT”. Said document includes conclusory allegations of alter ego
23 liability, such as “(b) Said alter ego defendants treated the defendant's assets as their own.”

24 As explained below, the court should strike paragraph 9(b) and the document entitled
25 “ATTACHMENT TO COMPLAINT” attached to the complaint because it contains conclusory
26 allegations of fact and law that are irrelevant and improper matter in a complaint. Further, the Court
27 should strike the other referenced paragraph regarding recovery of attorney fees because plaintiff has not
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1 shown it is entitled to recover attorney fees, therefore such requests are irrelevant and improper matter
2 that should also be struck from the complaint.

3 **ARGUMENT**

4 II.

5 **THE COURT IS AUTHORIZED TO STRIKE ALL OR PART OF A PLEADING**

6 "Any party, within the time allowed to respond to a pleading may serve and file a notice of
7 motion to strike the whole or any part thereof, but this time limitation shall not apply to motions
8 specified in subdivision (e) [motions to strike after failure to amend following judgment on the
9 pleadings]." C.C.P. § 435(b)(1).

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

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

13 (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of
14 this state, a court rule, or an order of the court."

15 C.C.P. § 436. Where pleadings are defective, "the defect may be raised by a demurrer or motion
16 to strike or by motion for judgment on the pleadings." Coyne v. Kremfels, 36 Cal. 2d 257, 223 P.2d 244
17 (1950).

18 III.

19 **GROUND S EXIST FOR AN ORDER STRIKING PORTIONS OF PLAINTIFF'S COMPLAINT**

20 "A notice of motion to strike a portion of a pleading must quote in full the portions
21 sought to be stricken except where the motion is to strike an entire paragraph, cause of
22 action, count or defense. Specifications in a notice must be numbered consecutively."

23 Cal. Rules of Court, rule 3.1322(a).

24 As set forth in the Notice herewith, Defendants seek an order striking the following matters from
25 plaintiff's complaint:

26 1. The following language at page 2, paragraph 10 c: "attorney's fees according to proof."

27 2. The following language at page 5, paragraph BC-5: "Plaintiff is entitled to attorney fees by an
28 agreement or a statue according to proof,"

1 3. The following language at page 6, paragraph CC-3: "Plaintiff is entitled to attorney fees by an
2 agreement or a statute according to proof."

3 Grounds: The matter is irrelevant because the damages sought by Plaintiff are not supported by
4 the cause of actions pleaded and Plaintiff has otherwise failed to plead fact showing Plaintiff that it is
5 entitled to attorney fees. Attorney fees are only recoverable when authorized by contract, statute or
6 "law." (CCP § 1033.5(a)(10)(A),(B) & (C)). The First cause of action is for breach of written contract
7 and Plaintiff has failed to allege that the written agreement between the parties provided for attorney
8 fees. Nor does the statement that Plaintiff attaches as Exhibit "A" provides for recovery of attorney fees.
9 The Second cause of action for account stated fails to provide that an agreement between the parties
10 provides for attorney fees. Plaintiff's only basis for a limited recovery of attorney fees would be its
11 claim for book account. However, concurrently with this motion and set for the hearing at the same date,
12 defendant has filed a demurrer to the open book account count because it fails to state facts sufficient to
13 constitute a cause of action. If defendant's demurrer is sustained without leave to amend as to the book
14 account claim, plaintiff's prayer for attorney fees fails as well. For the foregoing reasons, the court
15 should struck plaintiff allegations regarding attorney fees set forth above.

16 4. Paragraph 9(b) on page 2 of the complaint and the document entitled "ATTACHMENT TO
17 COMPLAINT" as page number 3 and 4. The allegations in "ATTACHMENT TO COMPLAINT" are
18 conclusory allegations regarding alter ego liability without any specific facts. Such allegations are
19 conclusions of the pleader and thus are "irrelevant matter," subject to a motion to strike. Accordingly,
20 the court should strike Paragraph 9(b) on page 2 of the complaint and the document entitled
21 "ATTACHMENT TO COMPLAINT" as page number 3 and 4.

22 IV.

23 CONCLUSION

24 Based upon the foregoing facts and authorities, Defendants respectfully request that the court
25 issue an order striking those portions of the pleading as specified in this noticed motion.

26 Dated: August 12, 2014

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Attorney for defendant Laguna Wholesale