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CC-LA JOLLA, INC., CCW-LA JOLLA, L.L.C.,
7 CC-DEVELOPMENT GROUP, INC., AND
8 CLASSIC RESIDENCE MANAGEMENT LIMITED
PARTNERSHIP

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN DIEGO

12 DONALD R. SHORT, JAMES F. GLEASON,
13 CASEY MEEHAN, MARILYN SHORT,
14 PATTY WESTERVELT, AND DOTTIE
YELLE, individually, and on behalf of all others
similarly situated,

15 Plaintiff,

16 v.

17 CC-LA JOLLA, Inc., a Delaware Corporation,
18 CC-LA JOLLA, L.L.C., a Delaware limited
liability company, CC-DEVELOPMENT
19 GROUP, INC., CLASSIC RESIDENCE
MANAGEMENT LIMITED PARTNERSHIP, an
20 Illinois Limited Partnership, and DOES 1 to 110,
inclusive,

21 Defendants.
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Case No. GIC877707

**DEFENDANTS' NOTICE OF
HEARING ON DEMURRER AND
DEMURRER TO PLAINTIFFS'
SECOND AMENDED CLASS
ACTION COMPLAINT**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: October 5, 2007
Time: 10:30 a.m.
Judge: Hon. Yuri Hofmann
Dept: C-60

Date Action Filed: December 29, 2006
Trial Date: Not yet set

1 **NOTICE OF HEARING ON DEMURRER**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on October 5, 2007, at 10:30 a.m., or as soon thereafter as
4 counsel may be heard before the Honorable Yuri Hofmann in Department C-60 of the above-entitled
5 Court, located at 330 West Broadway, San Diego, California, Defendants CC-La Jolla, Inc., CCW-La
6 Jolla L.L.C., CC Development Group, Inc., and Classic Residence Management Limited Partnership
7 (collectively, "Defendants") will and hereby do demur to the Second Amended Complaint ("SAC")
8 filed by Plaintiffs Donald R. Short, James F. Gleason, Casey Meehan, Marilyn Short, Patty
9 Westervelt, and Dottie Yelle (collectively, "Plaintiffs").

10 Defendants demurrer to Plaintiffs' SAC on the grounds set forth in the accompanying
11 Demurrer. This Demurrer will be based on this Notice, the accompanying Demurrer and
12 Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, the pleadings
13 and papers on file with the Court, and on such other and further evidence and argument as may be
14 presented at the hearing.

15 Dated: July/3 2007

16 ERIC M. ACKER
17 LINDA L. LANE
18 MORRISON & FOERSTER LLP

19 By:



Eric M. Acker

20 Attorneys for Defendants
21 CC-LA JOLLA, INC., CCW-LA
22 JOLLA, L.L.C., CC-DEVELOPMENT
23 GROUP, INC. AND CLASSIC
24 RESIDENCE MANAGEMENT
25 LIMITED PARTNERSHIP
26
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28

1 **DEMURRER**

2 Pursuant to California Code of Civil Procedure sections 430.10(e) and 430.30, Defendants
3 CC-La Jolla, Inc., CCW-La Jolla L.L.C., CC-Development Group, Inc., and Classic Residence
4 Management Limited Partnership (collectively, "Defendants") demur to the Second Amended
5 Complaint ("SAC") filed by Plaintiffs Donald R. Short, James F. Gleason, Casey Meehan, Marilyn
6 Short, Patty Westervelt, and Dottie Yelle (collectively, "Plaintiffs") as follows:

7 **Demurrer to First Cause of Action**

8 The first cause of action for violation of Section 1771.8 of the California Health and Safety
9 Code fails because Plaintiffs lack standing to bring suit to enforce this statute.

10 **Demurrer to Second Cause of Action**

11 The second cause of action for fraud (intentional misrepresentation) fails for lack of
12 specificity and failure to sufficiently allege reliance and damages.

13 **Demurrer to Third Cause of Action**

14 The third cause of action for fraud (negligent misrepresentation) fails for lack of specificity
15 and failure to sufficiently allege reliance and damages.

16 **Demurrer to Fourth Cause of Action**

17 The fourth cause of action for fraud (concealment) fails for lack of specificity and failure to
18 sufficiently allege reliance and damages.

19 **Demurrer to Sixth Cause of Action**

20 The sixth cause of action for violation of the Consumer Legal Remedies Act fails to state a
21 claim upon which relief can be granted and fails because Plaintiffs have not complied with California
22 Civil Code Section 1780(c).

23 **Demurrer to Seventh Cause of Action**

24 The seventh cause of action for breach of a fiduciary duty fails to sufficiently allege a
25 fiduciary relationship between the parties.

26 **Demurrer to Eight Cause of Action**

27 The eighth cause of action for alleged violation of the Unfair Competition Law fails to
28 properly allege the commission of an "unfair" business practice.

1 Demurrer to Ninth Cause of Action

2 The ninth cause of action for breach of contract fails because it fails to allege a cause of action
3 for breach of the written agreement between the parties.

4 Demurrer to Tenth Cause of Action

5 The tenth cause of action for constructive fraud fails because there is no fiduciary relationship
6 between the parties and because the claim is not pled with the requisite specificity.


7 Demurrer to Eleventh Cause of Action

8 The eleventh cause of action for violation of Health & Safety Code Section 1793.5 fails
9 because Plaintiffs fail to allege facts sufficient to state a violation of this statute.

10 WHEREFORE, Defendants request that the Court sustain the Demurrer in its entirety.

11 Dated: July 13, 2007

12 ERIC M. ACKER
13 LINDA L. LANE
14 MORRISON & FOERSTER LLP

15 By: 
16 Eric M. Acker

17 Attorneys for Defendants
18 CC-LA JOLLA, INC., CCW-LA
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21 RESIDENCE MANAGEMENT
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23
24
25
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27
28

TABLE OF CONTENTS

Page

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND	2
A.	The La Jolla Village Towers Community	2
B.	Plaintiffs' Continuing Care Residency Agreements	2
C.	The Master Trust Agreement	3
III.	TEN OF PLAINTIFFS' ELEVEN CAUSES OF ACTION IN THE SECOND AMENDED COMPLAINT FAIL TO STATE A VIABLE CLAIM	4
A.	Plaintiffs Have No Standing to Bring a Cause of Action for Violation of Health and Safety Code Section 1771.8	4
B.	Plaintiffs Fail To State Any Cause of Action for Fraud	5
1.	Plaintiffs' Misrepresentation and Concealment Claims Are Not Pled with the Requisite Particularity as to Each Individual Plaintiff.....	5
2.	Plaintiffs' Misrepresentation Claims Fail to Plead with Particularity that the Representations Were False When Made.....	7
3.	Plaintiffs' Concealment Claim Fails to Plead with Particularity that Defendants Intended to Deceive Plaintiffs.....	8
4.	Plaintiffs Fail to Properly Allege Justifiable Reliance and Damage.....	8
C.	Plaintiffs Fail to State a Cause of Action for Violation of the Consumers Legal Remedies Act	9
D.	Plaintiffs Fail to Allege a Cause of Action for Breach of Fiduciary Duty.....	10
E.	Plaintiffs Fail to Allege a Cause of Action for Violation of the UCL	12
F.	Plaintiffs Fail to Allege a Cause of Action for Breach of Contract	13
G.	Plaintiffs Fail to Allege a Cause of Action for Constructive Fraud	14
H.	Plaintiffs Fail to Allege a Cause of Action for Violation of Health and Safety Code Section 1793.5	15
IV.	CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

250 L.L.C. v. PhotoPoint Corp.	8, 9
131 Cal. App. 4th 703	
Alling v. Universal Manuf. Corp.	8
5 Cal. App. 4th 1412	
Barbara A. v. John G.	6
145 Cal. App. 3d 369	
Barnett v. Fireman's Fund Ins. Co.	4
90 Cal. App. 4th 500	
Camacho v. Auto. Club of S. Cal.	7
142 Cal. App. 4th 1394	
Careau & Co. v. Sec. Pac. Bus. Credit	9
222 Cal. App. 3d 1371	
Charnay v. Cobert	3, 5
145 Cal. App. 4th 170	
Consumer Cause,	
Inc. v. Arkopharma, Inc., 106 Cal. App. 4th 824	4
Covenant Care, Inc. v. Super. Ct.	10
32 Cal. 4th 771	
Daar v. Yellow Cab Co.	4
67 Cal. 2d 695	
Daugherty v. Am. Honda Motor Co., Inc.	7
144 Cal. App. 4th 824	
Frantz v. Blackwell	4
189 Cal. App. 3d 91	
Hawkins v. Super. Ct.	7
89 Cal. App. 3d 413	
Hills Trans. Co. v. Southwest Forest Indus., Inc.	6
266 Cal. App. 2d 702	
Katz v. Feldman	1
23 Cal. App. 3d 500	
Lazar v. Hertz Corp.	1, 4
143 Cal. App. 3d 128	

TABLE OF AUTHORITIES

Page

<i>Lazar v. Super. Ct.</i> 12 Cal. 4th 631	1, 2, 3, 5
<i>Linear Tech. Corp. v. Applied Materials Inc.,</i> 152 Cal. App. 4th 115	3
<i>Magpali v. Farmers</i> 48 Cal. App. 4th 471	2, 3
<i>Masterson v. Sine</i> 68 Cal. 2d 222	8
<i>McCann v. Lucky Money, Inc.</i> 129 Cal. App. 4th 1382	5
<i>Medallion v. Clorox</i> 44 Cal. App. 4th 1807	2, 4
<i>Melikian v. Truck Ins. Exch.</i> 133 Cal. App. 2d 113	4
<i>Mendoza v. Continental Sales Co.</i> 140 Cal. App. 4th 1395	6
<i>Mirkin v. Wasserman</i> 5 Cal. 4th 1082	1
<i>Moradi-Shalal v. Fireman's Fund Ins. Cos.</i> 46 Cal. 3d 287	5
<i>Murphy v. BDO Seidman</i> 113 Cal. App. 4th 687	1
<i>New v. New</i> 148 Cal. App. 2d 372	5
<i>Persson v. Smart Inventions, Inc.</i> 125 Cal. App. 4th 1141	5, 6
<i>Peterson Dev. Co. v. Torrey Pines Bank</i> 233 Cal. App. 3d 103	9
<i>Potter v. Ariz. S. Coach Lines Inc.,</i> 202 Cal. App. 3d 126	6
<i>Richelle L. v. Roman Catholic Archbishop of San Francisco</i> 106 Cal. App. 4th 257	6
<i>Schauer v. Mandarin Gems of Cal., Inc.</i> 125 Cal. App. 4th 949	9, 10

TABLE OF AUTHORITIES

Page

<i>Slivinsky v. Watkins-Johnson Co.</i> 221 Cal. App. 3d 799	4
<i>Stansfield v. Starkey</i> 220 Cal. App. 3d 59	2, 3
<i>Stenger v. Anderson</i> 66 Cal. 2d 970	7
<i>Tarman v. State Farm Auto. Ins. Co.</i> 2 Cal. App. 4th 153	3
<i>Tenzer v. Superscope, Inc.</i> 39 Cal. 3d 18	2
<i>Thompson v. Cannon</i> 224 Cal. App. 3d 1413	5
<i>Ting v. AT&T</i> 319 F. 3d 1126	4
<i>Wolf v. Super. Ct.</i> 107 Cal. App. 4th 25	5, 6

STATUTES

Cal. Civ. Code § 1754	4
Cal. Civ. Code § 1780	5
Cal. Civ. Code § 1782	4
Cal. Civ. Proc. Code § 430.10	4
Cal. Civ. Proc. Code § 430.70	4
Cal. Civ. Proc. Code § 1856	8, 9
Cal. Health & Safety Code § 1793.6	4
Cal. Health & Safety Code § 1793.19	4
Cal. Health & Safety Code § 1793.21	4
Cal. Health & Safety Code § 1793.27	4
Cal. Health & Safety Code § 1793.29	4
Health & Safety Code § 1771.8(c)	4
Health & Safety Code § 1771(c)	10

TABLE OF AUTHORITIES

Page

Health & Safety Code § 1787	8, 9
Health & Safety Code § 1793.5	2, 10

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs make many bold assertions in their Second Amended Complaint (“SAC”), yet they
4 fail to account for the written contracts that define the legal relationships between the parties. By this
5 omission, Plaintiffs seek to obscure the dispositive fact that the Defendants’ actions are entirely
6 consistent with the terms of these agreements – each Plaintiff’s Continuing Care Residency
7 Agreement (“CCRA”) and the Master Trust Agreement (“MTA”) that each Plaintiff joined. It is
8 these contracts, which Plaintiffs have incorporated by reference in the SAC, and not Plaintiffs’
9 fanciful allegations, that define the parties’ legal rights and obligations. Simply put, Plaintiffs seek
10 improperly to redraft the agreements that they willfully executed over five years ago to gain a
11 financial windfall.

12 Perhaps most telling is that the SAC fails to allege that Plaintiffs have been denied any rights
13 provided for in their CCRAs or the MTA. Plaintiffs do not allege that their monthly fees have
14 increased beyond what was allowed under their CCRAs, that the Defendants have failed to comply
15 with their obligations under the CCRAs regarding the use and repayment of any entrance fees, that
16 any of the Plaintiffs do not reside in their luxury La Jolla apartments, or that they have been denied
17 long-term care in the Care Center. Nor do Plaintiffs even acknowledge that their CCRAs and the
18 MTA plainly state that each Plaintiff’s entrance fees will be loaned from the Master Trust to the
19 Defendants—the very act that Plaintiffs contend is at the heart of a covert conspiracy to defraud them
20 of their life savings.

21 Yet, even ignoring Plaintiffs’ factual misstatements, and their failure to acknowledge the plain
22 language of the binding contracts that define their legal rights, the SAC still is deficient. Although it
23 is the Plaintiffs’ third attempt to state a valid claim, 10 of the 11 causes of action in the SAC are
24 deficient on their face and therefore subject to demurrer.¹

25 ¹ Plaintiff Donald Short filed his original complaint on December 29, 2006. He then filed his
26 First Amended Complaint (“FAC”) on January 9, 2007. (Defendants’ Request for Judicial Notice in
27 Support of Demurrer and Motion to Strike Plaintiffs’ Second Amended Class Action Complaint
28 (“RJN”) Ex. M.) The Plaintiffs voluntarily amended the FAC by filing the SAC on June 13, 2007,
pursuant to a stipulation between the parties. This last amendment occurred after the Plaintiffs were
served with Defendants Demurrer to the FAC on March 9, 2007.

II. FACTUAL BACKGROUND

A. The La Jolla Village Towers Community.

Plaintiffs Donald R. Short, James F. Gleason, Casey Meehan, Marilyn Short, Patty Westervelt, and Dottie Yelle (collectively, "Plaintiffs") are residents of the continuing care retirement community known as the La Jolla Village Towers ("the Community"), located in the Golden Triangle area of San Diego, California. (SAC ¶ 1.) Defendants CC-La Jolla, Inc., CCW-La Jolla, LLC, CC-Development Group, Inc., and Classic Residence Management Limited Partnership (collectively, "the Defendants") own and operate the Community. (*Id.* at ¶¶ 2-6.) The Community provides its senior residents with both luxury senior living and, when necessary, additional levels of care such as assisted living and skilled nursing care. (*Id.* at ¶ 7.) Each of the residents of the Community, including Plaintiffs, paid an entrance fee and executed a CCRA upon entering the Community. (*Id.* at ¶¶ 33, 34, 182, 183; SAC Ex. 14; RJN Ex. A-C.) Residents also pay a monthly fee while they reside in the Community. (SAC ¶¶ 33, 40; SAC Ex. 14 at 3-4; RJN Ex. A-C.)

Under each CCRA, the resident is entitled to live in a private apartment in the Community and, if necessary, the co-located Care Center for the remainder of their lives or until they decide to leave. (SAC Ex. 14 at 19-20; RJN Ex. A-C.) Residents move to the Care Center when it is determined, based on consultation with the resident, their physician and their family, that the level of care they require cannot be safely provided in a private apartment. (SAC Ex. 14 at 15-16; RJN Ex. A-C.) When they entered the Community, all residents, including Plaintiffs, selected a long-term care plan that provides either a defined or an unlimited number of days of long-term care in the Care Center. (SAC Ex. 14 at 8-9; RJN Ex. A-C.) This long-term care includes skilled nursing, assisted living and Alzheimer's care in the Care Center. (SAC Ex. 14 at 9-11; RJN Ex. A-C.)

B. Plaintiffs' Continuing Care Residency Agreements.

Plaintiffs came to the Community and entered into their respective CCRAs with the Defendants years apart: Patty Westervelt, Casey Meehan and Dottie Yelle signed their CCRAs in March 2000; Donald and Marilyn Short signed their CCRA in August 2001; and James Gleason signed his CCRA in April 2002. (SAC Ex. 14 at 33; RJN Ex. A-C.) These CCRAs set forth each Plaintiff's "legal rights and obligations toward[s]" the Defendants. (SAC Ex. 14 at 1, ¶ B; RJN Ex.

1 A-C.) Under their CCRAs, each Plaintiff agreed to pay a monthly fee to live in the Community,
2 including after they move to the Care Center, and agreed that the Defendants “may increase or
3 decrease [that fee] upon thirty (30) days’ advance notice.” (SAC Ex. 14 at 3, ¶ I.B.2; RJN Ex. A-C.)
4 Each CCRA also provides that “[a]ll operating expenses of the Community, as well as a reserve for
5 capital repairs and replacements and a profit to [the Defendants], are intended to be paid with
6 operating revenue from monthly fees.” (SAC Ex. 14 at 4, ¶ I.B.2; RJN Ex. A-C.) The CCRAs make
7 clear that each Plaintiff’s entrance fee was a loan to the Defendants, secured by a promissory note, to
8 be earned by the Defendants over time. (SAC Ex. 14 at 23-24, ¶ VII.E; RJN Ex. A-C.) Based on the
9 long-term care plan that each Plaintiff selected, the amount of an entrance fee that will be repaid to
10 Plaintiffs or their heirs decreases by 2% every month they reside in the Community, up to the total
11 amount of the loan. (SAC Ex. 14 at 23, ¶ VII.E.2; RJN Ex. A-C.) In return, each Plaintiff is entitled
12 to reside in a private apartment as long as they are able to do so, and then receive long-term care in
13 the Care Center. (SAC Ex. 14 at 23, ¶ VII.E.2; RJN Ex. A-C.) The CCRA also makes clear that each
14 of the Plaintiff’s “rights under this Agreement are limited to those expressly granted in it.” (SAC Ex.
15 14 at 26, ¶ III.D; RJN Ex. A-C.) Moreover, the CCRA “constitutes the entire agreement between
16 [each Plaintiff] and [the Defendants] and may not be amended unless executed in writing by [the
17 Defendants].” (SAC Ex. 14 at 30, ¶ IX.I; RJN Ex. A-C.)

18 **C. The Master Trust Agreement.**

19 In June 2000, a Master Trust was established by Defendant CCW La Jolla, LLC. (SAC ¶ 171;
20 RJN Ex. D.) The Master Trust was created to hold the entrance fees paid by residents of the
21 Community until those funds were loaned by the trustee, First Union National Bank, to CCW La
22 Jolla, LLC. (SAC ¶ 171; RJN Ex. D at ¶ 2.1; SAC Ex. 14 at 24, ¶ VII.E.5; RJN Ex. A-C.) Each
23 Plaintiff signed a Joinder In Master Trust Agreement (“Joinder”), under which they joined the MTA
24 as though they were original parties to that agreement, and agreed to be bound by all of its terms.
25 (SAC ¶ 171; RJN Ex. E-H at ¶¶ A.1, A.3.) Each Plaintiff’s CCRA plainly states that their entrance
26 fees would be loaned to Defendant CCW La Jolla, LLC from the Master Trust. (SAC Ex. 14 at 24,
27 ¶ VII.E.5; RJN Ex. A-C.) Defendant CCW La Jolla, LLC granted a mortgage on the Community to
28 the Master Trust to secure repayment of the loan, and also provided each resident, including each

1 Plaintiff, with a note equal to the amount each Plaintiff contributed to the Master Trust. (SAC Ex. 14
2 at 24, ¶ VII.E.5; RJN Ex. A-C, E-H.)

3 **III. TEN OF PLAINTIFFS' ELEVEN CAUSES OF ACTION IN THE SECOND**
4 **AMENDED COMPLAINT FAIL TO STATE A VIABLE CLAIM**

5 Each of the following causes of action in the SAC fails to state a cognizable legal claim.²

6 **A. Plaintiffs Have No Standing to Bring a Cause of Action for Violation of Health**
7 **and Safety Code Section 1771.8.**

8 Plaintiffs' first cause of action for "Violation of Statute" alleges that Defendants violated
9 several provisions of Section 1771.8 of Chapter 10 of the California Health and Safety Code.³ This
10 claim fails because there is no private right of action for a violation of this statute.

11 Section 1771.8(c)-(f) and (i)-(p) provide requirements for meetings with residents,
12 notification of increases in monthly fees, participation of a resident representative at board meetings,
13 and publication of financial statements and annual reports to residents of continuing care facilities.
14 Cal. Health & Safety Code § 1771.8(c)-(f) and (i)-(p). The State Department of Social Services, the
15 California Attorney General and local district attorneys are authorized to bring actions under Chapter
16 10, including Section 1771.8. See Cal. Health & Safety Code §§ 1793.6, 1793.19, 1793.21, 1793.27,
17 1793.29 and 1793.31. There are no provisions that provide for a private right of action to enforce

18 ² A complaint or any cause of action is subject to demurrer when it fails to state facts
19 sufficient to constitute a cause of action. Cal. Civ. Proc. Code § 430.10(e). A demurrer should be
20 sustained if the complaint fails as to any single essential element of a cause of action. *Consumer*
21 *Cause, Inc. v. Arkopharma, Inc.*, 106 Cal. App. 4th 824, 827 (2003). In ruling on a demurrer, the
22 Court may consider the complaint's allegations and matters that are judicially noticeable. Cal. Civ.
23 Proc. Code § 430.70. The "face of the complaint" includes matters in exhibits attached to the
24 complaint and incorporated by reference. See *Frantz v. Blackwell*, 189 Cal. App. 3d 91, 94 (1987);
25 *Barnett v. Fireman's Fund Ins. Co.*, 90 Cal. App. 4th 500, 505 (2001) ("[W]e rely on and accept as
26 true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effects
27 of the exhibits."). The Court may not consider "contentions, deductions or conclusions of fact or law
28 alleged" in the complaint. *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 713 (1967). Moreover, all
presumptions and inferences from the pleadings are always construed against the pleader and all
doubts are resolved against him because the pleader is presumed to have stated his or her claims as
favorably as possible. *Melikian v. Truck Ins. Exch.*, 133 Cal. App. 2d 113, 115 (1955).

26 ³ Chapter 10 of the Health & Safety Code governs continuing care contracts. Specifically,
27 Plaintiffs allege that Defendants violated section 1771.8(c)-(f) and (i)-(p) of Chapter 10. (SAC ¶¶ 87-
28 95.)

1 Section 1771.8. *See Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 300 (1988) (no
2 private right of action where the statutes do not indicate the intent to create such a right). Moreover,
3 the legislative history of Section 1771.8 makes clear that the legislature intended state agencies, not
4 private litigants, to enforce this statute. (RJN Ex. I (“The specific sanctions for failure to comply
5 with this bill are suspension or revocation of the provider’s certificate of authority or final certificate
6 of authority.”); RJN Ex. J (“The bill would also authorize DSS to assess penalties for specified
7 violations of the provisions of this bill.”); RJN Ex. K (“DSS is responsible for approving, monitoring,
8 and regulating continuing care providers.”), RJN Ex. L (considering, and not adopting, model Ohio
9 law that provides for a private right of action).) This cause of action therefore fails for lack of
10 standing.

11 **B. Plaintiffs Fail To State Any Cause of Action for Fraud.**

12 Plaintiffs next allege fraud. The second cause of action alleges intentional misrepresentation,
13 the third cause of action alleges negligent misrepresentation and the fourth cause of action alleges
14 intentional concealment. Each of these claims fail.⁴

15 **1. Plaintiffs’ Misrepresentation and Concealment Claims Are Not**
16 **Pled with the Requisite Particularity as to Each Individual**
17 **Plaintiff.**

18 The California Supreme Court has made clear the standard for alleging fraud against a
19 corporate entity:

20 In California, fraud must be pled specifically; general and conclusory allegations do
21 not suffice. Thus the policy of liberal construction of pleadings . . . will not
22 ordinarily be invoked to sustain a pleading defective in any material respect. This
23 particularity requirement necessitates pleading facts which show how, when, where, *to*
24 *whom*, and by what means the representations were tendered. A plaintiff’s burden in
25 asserting a fraud claim against a corporate employer is even greater. In such a case,
26 the plaintiff must allege the names of the persons who made the allegedly fraudulent
27 representations, their authority to speak, *to whom they spoke*, what they said or wrote,
28 and when it was said or written.

24 *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 645 (1996) (citations and quotations omitted) (emphasis added);
25 *see also Charnay v. Cobert*, 145 Cal. App. 4th 170, 185 n.14 (2006) (plaintiff must plead “how,

27 ⁴ In addition to the grounds set forth in this Demurrer, many of the fraud allegations should
28 also be stricken from the SAC as discussed in the Defendants’ concurrently filed Motion to Strike.

1 when, where, to whom, and by what means the representations were tendered” (citations and
2 quotations omitted)); *Murphy v. BDO Seidman*, 113 Cal. App. 4th 687, 692 (2003) (same). An
3 allegation of fraud must meet this particularity requirement for each individual plaintiff in a case. *Cf.*
4 *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1092 (1993) (each plaintiff must plead and prove actual
5 reliance on an individual basis).

6 Plaintiffs’ fraud allegations in their second, third and fourth causes of action are deficient
7 because they fail to provide detail specific to any individual Plaintiff. In the second and third causes
8 of action for intentional and negligent misrepresentation, Plaintiffs recite fifteen examples of alleged
9 “continuing care promises” made over a nine-year period beginning in April 1998.⁵ (SAC ¶¶ 100-
10 113, 124-138.) They fail to state how, where, when, and by what means each *representation*
11 *allegedly was made to each individual Plaintiff*, or even that *any specific Plaintiff actually received*
12 *the statements at all*. Instead, the SAC jumps to the all-encompassing conclusion that every Plaintiff
13 relied on all of these statements – whether made in 1998 or 2007. (*Id.* at ¶¶ 117, 142.) Plaintiffs’
14 own allegations establish that this conclusion cannot be accurate, as three of the six Plaintiffs did not
15 reside in the Community until years after several of these statements allegedly were made. *See Katz*
16 *v. Feldman*, 23 Cal. App. 3d 500, 504 (1972) (“a party may not allege inconsistent facts in his
17 pleading in the same case”).⁶ The lack of particularity as to each Plaintiff leaves Defendants to guess
18 whether each Plaintiff even had a chance to rely on the statements, let alone actually suffer damages.
19 This general and unfocused pleading clearly fails to satisfy the *Lazar* standard of specificity. *Lazar*,
20 12 Cal. 4th at 645.

21
22
23 ⁵ The SAC provides specific dates or months for only nine of the fifteen representations
alleged. For the other six, it provides either a multi-year timeframe or no timeframe at all.

24 ⁶ It would have been impossible for Plaintiffs Jim Gleason, Don Short and Marilyn Short to
25 have heard or relied on alleged representations made in 1998 (SAC ¶¶ 100, 101, 124, 125), as they
26 did not enter the Community until 2001 or 2002. (SAC Ex. 14; RJN Ex. A.) Similarly, Plaintiffs
27 Westervelt, Meehan and Yelle, who signed their CCRAs in March 2000 (RJN Ex. B-C), could not
28 have relied on statements made in 2001, 2003 and 2007 (SAC ¶¶ 102, 104, 105, 105 [sic], 107, 113,
126, 128, 129, 130, 132, 138), in deciding whether to enter the Community and to pay an entrance
fee.

1 Plaintiffs switch gears in their fourth cause of action and allege that Defendants allegedly
2 concealed “true facts” from them. (SAC ¶¶ 146, 151.) Plaintiffs fail to allege who within the
3 Defendant entities failed to disclose those facts and when the facts should have been disclosed.⁷
4 They also fail to state why the alleged failure to disclose those facts resulted in Plaintiffs’ collective
5 reliance and alleged harm, let alone any individual Plaintiff’s reliance and alleged harm. Again, this
6 defective pleading gives Defendants no notice of the impact, if any, of each alleged concealment on
7 each individual Plaintiff. Plaintiffs therefore fail to satisfy *Lazar*. See *Lazar*, 12 Cal. 4th at 645.

8 **2. Plaintiffs’ Misrepresentation Claims Fail to Plead with**
9 **Particularity that the Representations Were False When Made.**

10 A cause of action for fraud must specifically plead that each alleged misrepresentation was
11 false *when made* and *when it was relied upon*. *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 74 (1990)
12 (complaint failed to allege falsity of representation regarding tax exemption “in each of the six years .
13 . . individual [Plaintiffs] relied upon it”). Also, a plaintiff must allege *facts* showing that a promise of
14 future conduct was made without intent to perform. *Magpali v. Farmers*, 48 Cal. App. 4th 471, 481
15 (1996) (“[S]omething more than nonperformance is required to prove the defendant’s intent not to
16 perform his promise.” (quoting *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 30-31 (1985)); see also
17 *Medallion v. Clorox*, 44 Cal. App. 4th 1807, 1816-17 (1996) (no actionable misrepresentation where
18 complaint failed to state facts conveying that defendant intended to make a false statement).

19 Plaintiffs’ allegations plainly fail to meet these standards. The SAC only concludes that
20 “[t]he defendants knew that the promises and representations were false when they made them.”
21 (SAC ¶ 115.) Nowhere do Plaintiffs allege a *single fact* supporting this conclusory claim. To the
22 contrary, Plaintiffs allege that various continuing care promises were “*abandoned by the defendants*.”
23 (SAC ¶¶ 45, 46 (emphasis added).) Clearly, a promise cannot be “abandoned” unless the maker
24 intended to fulfill it when it was made. Plaintiffs’ lack of factual specificity regarding Defendants’
25 intent is fatal and cannot be cured by allegations – however specific – that the representations never

26 ⁷ The only date associated with any of these allegedly undisclosed facts is April 28, 1998 – a
27 date more than three years before three of the six of the Plaintiffs lived in the Community. (SAC
28 ¶ 146a.)

1 came to fruition. *Magpali*, 48 Cal. App. 4th at 481. Further, as in *Stansfield*, Plaintiffs fail to allege
2 that the representations were false at the moment of each Plaintiff's allegedly detrimental reliance.
3 *Stansfield*, 220 Cal. App. 3d at 74. These empty and unfocused allegations of falsity cannot support
4 Plaintiffs' intentional or negligent misrepresentation claims.⁸

5 **3. Plaintiffs' Concealment Claim Fails to Plead with Particularity**
6 **that Defendants Intended to Deceive Plaintiffs.**

7 Similarly, a cause of action for concealment must also plead facts supporting an allegation
8 that a defendant intended to deceive a Plaintiff. *Linear Tech. Corp. v. Applied Materials, Inc.*, 152
9 Cal. App. 4th 115, 132-33 (2007) (elements of concealment claim must be pled with specificity); *see*
10 *also Lazar*, 12 Cal. 4th at 638, 645 (finding that concealment satisfies the misrepresentation element
11 of fraud and that all fraud claims must be pled with specificity). Plaintiffs fail to plead any facts
12 supporting their allegation that "defendants intended to deceive Plaintiffs and others similarly
13 situated by concealing these facts." (SAC ¶ 149.)⁹ This factual deficiency undermines the claim of
14 concealment.

15 **4. Plaintiffs Fail to Properly Allege Justifiable Reliance and**
16 **Damage.**

17 A valid fraud claim requires allegations of actual damage resulting from the plaintiff's
18 justifiable reliance on the misrepresentation or concealment of material facts. *Charnay*, 145 Cal.
19 App. 4th at 184. Plaintiffs do not satisfy this standard.

20 In an attempt to plead damage, Plaintiffs use the same conclusory language for their two
21 misrepresentation claims and their concealment claim – "Plaintiffs and other residents similarly

22 ⁸ Plaintiffs' negligent misrepresentation claim (third cause of action) simply cannot be based
23 on alleged false promises of *future* conduct. *See Tarman v. State Farm Auto. Ins. Co.*, 2 Cal. App.
24 4th 153, 159 (1991) ("The specific intent requirement also precludes pleading a false promise claim
as a negligent misrepresentation"). Defendants thus have moved to strike all such allegations in the
SAC.

25 ⁹ Again, Plaintiffs' conclusory allegations are belied by their CCRAs. Plaintiffs allege that
26 one of the "true facts" concealed from them was that funds from the Master Trust would be loaned to
27 the Defendants. (SAC ¶ 146d.) Each of the Plaintiff's CCRAs, however, plainly states that their
entrance fees would be first deposited in the Master Trust, and then be loaned to Classic Residence
by Hyatt. (SAC Ex. 14 at 24; RJN Ex. A-C.)

1 situated were harmed by the defendants” misrepresentations or concealment “by paying entrance
2 fees and monthly fee increases they would not otherwise have paid.” (SAC ¶¶ 118, 143, 150.) This
3 is not sufficient. The SAC does not include any *facts* that, if true, would establish justifiable reliance
4 and actual damages. Plaintiffs do not allege that their monthly fees have increased beyond what was
5 allowed under their CCRAs; that Defendants have failed to comply with their obligations under the
6 CCRAs regarding repayment of any Plaintiff’s entrance fee; that any Plaintiff does not reside in his
7 or her luxury apartment; that any Plaintiff has been denied long-term care in the Care Center; or that
8 the loan of funds from the Master Trust to CCW-La Jolla LLC was inconsistent with the MTA or the
9 CCRAs. In other words, *the SAC fails to allege that Plaintiffs were denied anything that they were*
10 *entitled to receive under their CCRAs or the MTA*, and Plaintiffs do not seek recession of those
11 contracts. Plaintiffs thus have failed to sufficiently allege justifiable reliance and damage. *See*
12 *Medallion*, 44 Cal. App. 4th at 1818-19 (alleged false promises caused no damage where defendant
13 performed its contractual duties and plaintiff received the full value of the bargain); *Slivinsky v.*
14 *Watkins-Johnson Co.*, 221 Cal. App. 3d 799, 807 (1990) (no justifiable reliance where plaintiff
15 received the full benefit of her fully-integrated employment agreement).

16 **C. Plaintiffs Fail to State a Cause of Action for Violation of the Consumers Legal**
17 **Remedies Act.**

18 In their sixth cause of action, four of the six Plaintiffs attempt to assert a claim under the
19 California Consumer Legal Remedies Act (“CLRA”).¹⁰

20 The Plaintiffs’ CCRAs, however, are not the type of transactions that the CLRA is intended to
21 cover. Pursuant to those contracts, all Plaintiffs are provided residency in the Community for the rest
22 of their lives. Yet, the CLRA does not apply to the rental or sale of residential property. Cal. Civ.
23 Code § 1754 (expressly excluding from its coverage any “transaction which provides for the
24 construction, *sale*, or construction and sale of an entire residence . . .”) (emphasis added); *Ting v.*
25 *AT&T*, 319 F. 3d 1126, 1148 (9th Cir. 2003) (“The CLRA is also inapplicable to rental
26 agreements.”); *Lazar v. Hertz Corp.*, 143 Cal. App. 3d 128, 142 (1983) (a customer who rented an

27 ¹⁰ Plaintiff Donald Short and Patty Westervelt do not join this claim because they failed to
28 comply with the notice requirements of the CLRA. *See* Cal. Civ. Code § 1782(a).

1 automobile is not a “consumer” covered by the CLRA). Therefore, regardless of whether Plaintiffs
2 characterize their transactions with Defendants as rentals or sales of residences, such transactions fall
3 outside the CLRA

4 Moreover, Plaintiffs have failed to satisfy a mandatory requirement for bringing a CLRA
5 claim by not filing an affidavit establishing proper venue “concurrently with the filing of the
6 complaint.” Cal. Civ. Code § 1780(c).¹¹ This failure mandates dismissal of this cause of action. *Id.*

7 **D. Plaintiffs Fail to Allege a Cause of Action for Breach of Fiduciary Duty.**

8 A cause of action for breach of fiduciary duty requires: “[1] the existence of a fiduciary
9 relationship, [2] breach of that duty and [3] damages.” *Charnay*, 145 Cal. App. 4th at 182 (citations
10 omitted). The SAC fails to establish the existence of a fiduciary relationship between Plaintiffs and
11 Defendants.

12 Under California law, no fiduciary relationship arises in purely commercial situations.
13 *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1398 (2005); *see also Persson v. Smart*
14 *Inventions, Inc.*, 125 Cal. App. 4th 1141, 1162 (2005), *Wolf v. Super. Ct.*, 107 Cal. App. 4th 25
15 (2003); *Thompson v. Cannon*, 224 Cal. App. 3d 1413, 1418-19 (1990). Courts have refused to imply
16 a fiduciary relationship to parties engaged in an arms-length business transaction. *Persson*, 125 Cal.
17 App. 4th at 1162; *Thompson*, 224 Cal. App. 3d at 1418-19; *McCann*, 129 Cal. App. 4th at 1399;
18 *Wolf*, 107 Cal. App. 4th at 31 (rejecting claim of fiduciary relationship and stating “[e]very contract
19 requires one party to repose an element of trust and confidence in the other to perform.”); *New v.*
20 *New*, 148 Cal. App. 2d 372, 382-83 (1957) (“Being of universal prevalence [the implied covenant of
21 good faith and fair dealing] cannot create a fiduciary relationship; it affords basis for redress for
22 breach of contract and that is all.”).

23 In his prior complaint, Plaintiff Donald Short set forth only one basis for the existence of a
24 fiduciary relationship:

25 ¹¹ Section 1780 states, “In any action . . . , concurrently with the filing of the complaint, the
26 plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county
27 described in this section as a proper place for the trial of the action. If a plaintiff fails to file the
28 affidavit as required by this section, the court *shall*, upon its own motion or upon motion of any party,
dismiss the action without prejudice.” Cal. Civ. Code § 1780(c) (emphasis added).

1 *By entering into the continuing care contract with the plaintiff, which*
2 *required him and other residents each to pay hundreds of thousands of*
3 *dollars in “entrance fees” to the defendants, the defendants owe*
4 *plaintiff and others similarly situated a fiduciary duty.*

5 (RJN Ex. M at ¶ 64 (emphasis added).) Now realizing this was legally insufficient, Plaintiffs have
6 added additional, and different, theories to attempt to establish a fiduciary relationship. They should
7 not be permitted to do so. “A pleader may not attempt to breathe life into a complaint by omitting
8 relevant facts which made his previous complaint defective.” *Hills Trans. Co. v. Southwest Forest*
9 *Indus., Inc.*, 266 Cal. App. 2d 702, 713 (1968). A court “is not bound to accept as true allegations
10 contrary to factual allegations in a former pleading in the same case.” *Potter v. Ariz. S. Coach Lines,*
11 *Inc.*, 202 Cal. App. 3d 126, 133 n.2 (1988). The Court, therefore, should not accept these additional,
12 and inconsistent, allegations regarding a basis for a fiduciary relationship in the SAC.

13 Yet, even after amendment, Plaintiffs’ allegations regarding the existence of a fiduciary
14 relationship still are based primarily on their CCRAs. (SAC ¶ 172(b), (d), and (e).) This is
15 insufficient. The existence of an arms-length contract evidences the lack of a fiduciary relationship.
16 *See Wolf*, 107 Cal. App. 4th at 33.¹² If Plaintiffs are correct that a CCRA creates a fiduciary
17 relationship, then “virtually every purchase and sale transaction would give rise to fiduciary duties.
18 That clearly is not the case.” *Persson*, 125 Cal. App. 4th at 1161. Moreover, no California court has
19 found a fiduciary relationship based on residency in a continuing care facility. Rather, the law
20 restricts fiduciary relationships to ones involving high levels of confidence and trust that do not, as a
21 matter of course, exist between the owner of a continuing care facility and its residents. *See, e.g.,*
22 *Mendoza v. Continental Sales Co.*, 140 Cal. App. 4th 1395, 1405 (2006) (principal and agent);
23 *Richelle L. v. Roman Catholic Archbishop of San Francisco*, 106 Cal. App. 4th 257, 276 (2003)
24 (priest and parishioner); *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 382-83 (1983) (attorney and

25
26 ¹² The CCRAs signed by the Plaintiffs disclose a profit to be paid to Defendants. (SAC Ex.
27 14 at 3-4, ¶ IB.2; RJN Ex. A-C.) A contract allowing for profit to one party negates the existence of
28 a fiduciary relationship. *Wolf*, 107 Cal. App. 4th at 33 (“[T]he contract plainly allowed an
opportunity for nonmutual profit that is absent in fiduciary relationships.”).

1 client); *Hawkins v. Super. Ct.*, 89 Cal. App. 3d 413, 419 (1979) (spousal relationship).¹³ In addition,
2 a comprehensive statutory scheme exists in California to regulate continuing care facilities. *See* Cal.
3 Health & Safety Code, Division 2, Chapter 10. And nothing in that statutory scheme creates a
4 fiduciary relationship between owners of continuing care facilities and residents of those properties.
5 Thus, a ruling finding a fiduciary relationship here would ignore the statutory scheme that regulates
6 the legal relationship created by a continuing care contract, and it would radically change the entire
7 continuing care industry. Plaintiffs fail to allege sufficient facts to support the creation of such novel
8 legal authority.

9 **E. Plaintiffs Fail to Allege a Cause of Action for Violation of the UCL.**

10 Plaintiffs allege a claim under the “unfair prong” of the California Unfair Competition Law
11 (“UCL”) in their eighth cause of action. (SAC ¶ 178 (“These violations and unlawful acts . . .
12 constitute an unfair business act or practice”)).¹⁴

13 In *Camacho*, 142 Cal. App. 4th at 1403, the court found that in order for a non-competitor,
14 consumer to state a claim under the “unfair” prong of the UCL, the plaintiff must make the following
15 specific allegations: (1) the consumer injury must be substantial; (2) the injury must not be
16 outweighed by any counter veiling benefits to consumers or competition; and (3) it must be an injury
17 that consumers themselves could not reasonably have avoided.” Plaintiffs fail to satisfy these
18 pleading requirements. *See id.*; *see also Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th
19
20

21 ¹³ Plaintiffs concede in paragraph 171 of the SAC that, pursuant to the MTA, First Union
22 National Bank, or its successor, is the trustee of the Trust. (SAC ¶ 171.) Despite making this
23 concession, Plaintiffs state, without support, that Defendants were “agents for the trustee.” (*Id.*) This
24 statement demonstrates Plaintiffs’ fundamental misunderstanding of the MTA entered into by the
25 parties. The plain terms of the MTA make clear that Plaintiffs and Defendants both are beneficiaries
of the MTA. (RJV Ex. D.) Nor, as Plaintiffs suggest, is the bare existence of a person’s advanced
age enough to establish a fiduciary relationship. (SAC ¶ 172.) *See, e.g., Stenger v. Anderson*, 66 Cal.
2d 970, 979 (1967) (involving an elderly woman “in a weakened mental and physical condition.”).

26 ¹⁴ Plaintiffs also state that Defendants have engaged in an unfair business act or practice by
27 “committing the violations of statute and other unlawful acts.” (SAC ¶¶ 177, 178.) A plaintiff
28 however cannot state a claim under the unfair prong of the UCL solely by alleging a violation of
statute. *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1403 (2006).

824, 839 (2006) (upholding sustaining of demurrer based, in part, on *Camacho*'s three-pronged standard).

F. Plaintiffs Fail to Allege a Cause of Action for Breach of Contract.

California law prohibits a party from using an alleged prior agreement or contemporaneous oral agreement to contradict written terms "intended by the parties as a final expression of their agreement with respect to such terms as are included therein." Cal. Civ. Proc. Code § 1856(a)¹⁵; *see* 250 L.L.C. v. PhotoPoint Corp., 131 Cal. App. 4th 703, 725 (2005) (Where "the parties to a written contract have agreed to it as an "integration" – a complete and final embodiment of the terms of an agreement – parol evidence cannot be used to add to or vary its terms" (quoting *Masterson v. Sine*, 68 Cal. 2d 222, 225 (1968)); *Alling v. Universal Manuf. Corp.*, 5 Cal. App. 4th 1412, 1433-36 (1992) (parol evidence rule barred evidence of oral agreements that contradicted integrated written purchase agreement).

Plaintiffs' breach of contract claim attempts to use parol evidence impermissibly to alter the rights and obligations defined by the fully-integrated CCRAs. Plaintiffs allege that each Plaintiff's contract consists not only of the CCRA, but also "all of defendants' continuing care promises, and implied covenants of good faith and fair dealing and quiet enjoyment." (SAC ¶¶ 183-84.) Specifically, Plaintiffs allege that these other promises include representations that (1) a portion of residents' entrance fees would be set aside for "pre-paid long-term care"; (2) residents who moved to the Care Center would not be charged for additional nursing care; (3) the monthly fees paid by residents living in private apartments would not include any costs of operating the Care Center; (4) a certain, undefined "standard of care" would be provided in the Care Center; (5) certain amenities, including a front entrance, picnic tables, a billiard room, exercise room and sitting rooms, would always be available; and (6) the second tower in the Community would be constructed in a certain manner. (*Id.* at ¶ 186.) The CCRAs and MTA contain none of these promises, and neither Plaintiffs

¹⁵ The Health and Safety Code is consistent with Section 1856(a) and provides that a continuing care contract approved by the Department of Social Services is "the full and complete agreement between the parties." Cal. Health & Safety Code § 1787(d). Each of the Plaintiff's CCRAs was approved by the Department of Social Services. (SAC Ex. 14 at 33; RJN Ex. A-C.)

1 (nor Defendants) accepted any of them in signing those contracts.¹⁶ The CCRAs, however, all
2 contain an integration clause that specifically provides that each CCRA is the “entire agreement”
3 between the parties and that the CCRAs may only be amended in writing. (SAC Ex. 14 at 30; RJN
4 Ex. A-C.) And state law requires that “[a]ll continuing care contracts be in writing,” Cal. Health &
5 Safety Code § 1787(a), and that each such contract contain the entire agreement between the parties,
6 *id.* at 1787(d). Plaintiffs therefore cannot base a breach of contract claim on these alleged prior
7 agreements because they are not part of the fully-integrated CCRAs or the MTA. *See 250 L.L.C.*,
8 131 Cal. App. 4th at 725-26.¹⁷

9 Without these alleged breaches of promises outside the CCRAs, this cause of action fails.¹⁸

10 **G. Plaintiffs Fail to Allege a Cause of Action for Constructive Fraud.**

11 Plaintiffs must establish the existence of a fiduciary relationship to state a cause of action for
12 constructive fraud. *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005);
13 *Peterson Dev. Co. v. Torrey Pines Bank*, 233 Cal. App. 3d 103, 116 (1991) (“It is essential to the
14 operation of the doctrine of constructive fraud that there exist a fiduciary or special relationship.”).
15 As set forth in section IV.D, Plaintiffs have failed to establish the existence of a fiduciary relationship
16 between the parties. This cause of action thus fails.

17
18
19 ¹⁶ The only CCRA term that even comes close to resembling any of the allegedly breached
20 promises is the provision guaranteeing “Emergency call response, twenty-four (24) hours per day.”
21 (SAC Ex. 14 at 6, ¶ III.A.12.) However, in their initial factual allegations, Plaintiffs enlarge and
22 distort this guarantee with parol evidence, stating that Defendants promised “24-hour emergency
23 medical response *from nursing staff*.” (SAC ¶ 58 (emphasis added).) They then allege that “residents
are being provided only 24-hour emergency medical response from a concierge or security guard and
are told to call 911 for medical emergencies.” (SAC ¶ 59.) Plaintiffs have again stated facts that, if
true, show only a breach of the parol promise, since the CCRA did not guarantee 24-hour nursing
care, only 24-hour emergency medical response. (SAC Ex. 14 at 6, ¶ III.A.12.)

24 ¹⁷ Plaintiffs do not allege that their CCRAs are invalid or illegal, and they do not seek to set
25 them aside. *See* Cal. Civ. Proc. Code §§ 1856(f), (g).

26 ¹⁸ The allegation that Defendants breached “the implied covenant of good faith and fair
27 dealing” (SAC ¶ 186) is superfluous as Plaintiffs have only alleged an action for breach of contract,
28 not an independent breach of such a covenant. *See Careau & Co. v. Sec. Pac. Bus. Credit*, 222 Cal.
App. 3d 1371, 1395 (1990).

Moreover, constructive fraud carries the same specificity requirements as a cause of action for actual fraud. *Schauer*, 125 Cal. App. 4th at 961 (finding that, in order to plead a cause of action for constructive fraud, “every element of the cause of action for fraud must be alleged in full, factually and specifically”). For the reasons stated in section IV.B, Plaintiffs have failed to meet those specificity requirements.

H. Plaintiffs Fail to Allege a Cause of Action for Violation of Health and Safety Code Section 1793.5.


In their final cause of action, Plaintiffs allege that Defendants are guilty of “‘abandon[ing] ... [their] obligations under a continuing care contract.’” (SAC ¶ 195 (quoting Cal. Health & Safety Code § 1793.5(d)).) Section 1793.5(d) makes such an abandonment a misdemeanor criminal offense. Cal. Health & Safety Code § 1793.5(d). A “continuing care contract” is defined by statute as a written contract. Cal. Health & Safety Code §§ 1771(c)(8), 1787(a). The written contracts at issue here are Plaintiffs’ CCRA’s. However, nowhere in the SAC do Plaintiffs set forth a breach or “abandonment” by Defendants of any of the provisions of their CCRA’s. *See section IV.F supra*. Such an allegation is a prerequisite to this cause of action. *See Covenant Care, Inc. v. Super. Ct.*, 32 Cal. 4th 771, 790 (2004) (“statutory causes of action must be pleaded with particularity”) (citing *Lopez v. S. Cal. Rapid Trans. Dist.*, 40 Cal. 3d 780, 795 (1985)).

IV. CONCLUSION

For each of the foregoing reasons, Defendants respectfully request that their Demurrer be sustained in its entirety.

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