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

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

12  
13 DONALD R. SHORT, JAMES F. GLEASON,  
CASEY MEEHAN, MARILYN SHORT,  
14 PATTY WESTERVELT, AND DOTTIE  
YELLE, INDIVIDUALLY AND ON BEHALF  
15 OF ALL OTHERS SIMILARLY SITUATED

16 Plaintiffs,

17 v.

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

20 Defendants.  
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Case No. GIC877707

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO  
STRIKE PLAINTIFFS' SECOND  
AMENDED 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

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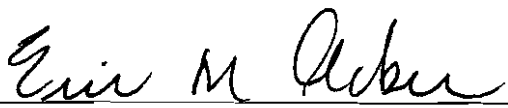
**NOTICE OF HEARING ON MOTION TO STRIKE**

TO PLAINTIFFS AND ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT on October 5, 2007, at 10:30 a.m., or as soon thereafter as counsel may be heard before the Honorable Yuri Hofmann in Department C-60 of the Superior Court of California, County of San Diego, 330 West Broadway, San Diego, California, 92101, Defendants CC-La Jolla, Inc., CCW-La Jolla, L.L.C., CC-Development Group, Inc., and Classic Residence Management Limited Partnership (collectively, "Defendants"), will and hereby do move to strike portions of the Second Amended Complaint ("SAC") filed by Plaintiffs Donald R. Short, James F. Gleason, Casey Meehan, Marilyn Short, Patty Westervelt, and Dottie Yelle (collectively, "Plaintiffs"). The Motion to Strike shall be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support of Defendants' Motion to Strike Plaintiffs' Second Amended Complaint, and the Defendants' Request for Judicial Notice, the pleadings and papers on file with the Court, and any other evidence and argument that may be presented to the Court at the hearing of this matter.

Dated: July 13, 2007

ERIC M. ACKER  
MORRISON & FOERSTER LLP

By:   
Eric M. Acker

Attorneys for DEFENDANTS  
CC-LA JOLLA, INC.,  
CCW-LA JOLLA, L.L.C.,  
CC-DEVELOPMENT GROUP, INC.,  
AND CLASSIC RESIDENCE  
MANAGEMENT LIMITED  
PARTNERSHIP

1 **MOTION TO STRIKE**

2 Pursuant to California Code of Civil Procedure Section 436, the Court may strike “any  
3 irrelevant, false or improper matter inserted in a pleading.” Cal. Civ. Proc. Code § 436(a). Here,  
4 Plaintiffs have improperly pleaded: (1) allegations related to the Master Trust Agreement (“MTA”)  
5 because Plaintiffs have failed to take the steps required by the MTA before instituting an action with  
6 respect to the Trust; (2) fraud claims based on vague statements, statements of opinion and future  
7 predictions; and (3) a negligent misrepresentation claim based on alleged promises of future conduct.  
8

9 Accordingly, Defendants CC-La Jolla, Inc., CCW-La Jolla, L.L.C., CC-Development Group,  
10 Inc., and Classic Residence Management Limited Partnership (collectively, “Defendants”) hereby  
11 move to strike the following portions of the SAC:

- 12 • Paragraphs 15, 16, 45, 46, 48, 100, 102, 106, 110, 111, 122, 123, 124, 125, 133, 135, 136,  
13 146(c), 146(d), 158, 165(b), and 171 in their entirety;
- 14 • The words “The defendants’ agents represented to plaintiffs and all residents, both orally  
15 and in writing, that a portion of their entrance fees would be held in trust for pre-paid  
16 lifetime health care” in paragraph 35;
- 17 • The words “living accommodations would be peaceful and quiet, that the living  
18 accommodations would be luxurious . . .” in paragraphs 109 and 134;
- 19 • The words “[p]erhaps most important of all, La Jolla Village Towers offers a vibrant,  
20 active lifestyle with the peace of mind that comes from knowing your potential long-term  
21 care needs will be expertly met . . .” in paragraphs 113 and 138;
- 22 • The words “fee increases, if any, will take place once a year” in paragraph 137;
- 23 • The words “diverting trust assets for their own benefit, loaning trust assets without  
24 interest” in paragraph 173;
- 25 • The words “by using trust funds” in paragraph 192.

26 ///

27 ///

1 WHEREFORE, Defendants request that the Court grant Defendants' Motion to Strike  
2 Plaintiffs' Second Amended Complaint in its entirety.

3  
4 Dated: July 13, 2007

ERIC M. ACKER  
MORRISON & FOERSTER LLP

6  
7 By:   
Eric M. Acker

8 Attorneys for DEFENDANTS  
9 CC-LA JOLLA, INC.,  
10 CCW-LA JOLLA, L.L.C.,  
11 CC-DEVELOPMENT GROUP, INC.,  
12 AND CLASSIC RESIDENCE  
13 MANAGEMENT LIMITED  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Significant portions of Plaintiffs' Second Amended Complaint ("SAC") contain irrelevant, false and improper allegations. Specifically, the SAC is rife with allegations regarding the allegedly improper transfer of entrance fees paid by Plaintiffs from a Master Trust to the Defendants. Plaintiffs, however, failed to satisfy the mandatory contractual preconditions in the Master Trust Agreement ("MTA") before bringing an action related to the Master Trust. This failure to comply with the MTA acts as a complete bar to Plaintiffs' allegations regarding the Master Trust.

Plaintiffs' fraud claims also contain numerous irrelevant and improper allegations. First, Plaintiffs improperly rely on alleged misrepresentations that are either statements of opinion, future predictions, or too vague to be actionable. Case law is clear that none of these statements can support a fraud claim. In addition, Plaintiffs' claim for negligent misrepresentation is based improperly on alleged promises regarding future conduct. Such statements cannot support a negligent misrepresentation claim.

Therefore, the Defendants' Motion to Strike should be granted in its entirety.

### **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 ("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.* ¶¶ 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.* ¶ 7.) Each of the residents of the Community, including Plaintiffs, paid an entrance fee and executed a Continuing Care Residency Agreement ("CCRA") upon entering the

1 Community. (SAC ¶¶ 33, 34, 182, 183; SAC Ex. 14; Defendants' Request for Judicial Notice in  
2 Support of Demurrer and Motion to Strike Plaintiffs' Second Amended Class Action Complaint  
3 ("RJN") Ex. A - C.) Residents also pay a monthly fee while they reside in the Community. (SAC ¶¶  
4 33, 40; SAC Ex. 14 at 3-4.)

5 Under each CCRA, the resident is entitled to live in a private apartment in the Community  
6 and, if necessary, the co-located Care Center for the remainder of their lives or until they decide to  
7 leave. (SAC Ex. 14 at 19-20.) Residents move to the Care Center when it is determined, based on  
8 consultation with the resident, their physician and their family, that the level of care they require  
9 cannot be safely provided in a private apartment. (*Id.* at 15-16.)

#### 10 11 **B. Plaintiffs' Continuing Care Residency Agreements.**

12 The Plaintiffs' CCRAs set forth each Plaintiff's "legal rights and obligations toward[s]" the  
13 Defendants. (SAC Ex. 14 at 1, ¶ B; RJN Ex. A - C.) Under their CCRA, each Plaintiff agreed to pay  
14 a monthly fee to live in the Community, including after they move to the Care Center, and agreed that  
15 the Defendants "may increase or decrease [that fee] upon thirty (30) days' advance notice." (SAC  
16 Ex. 14 at 3, ¶ IB.2; RJN Ex. A-C.) Each CCRA also provides that "[a]ll operating expenses of the  
17 Community, as well as a reserve for capital repairs and replacements and a profit to [the Defendants],  
18 are intended to be paid with operating revenue from monthly fees." (SAC Ex. 14 at 3-4, ¶ IB.2; RJN  
19 Ex. A-C.) The CCRAs make clear that each Plaintiff's entrance fee was a loan to the Defendants,  
20 secured by a promissory note, to be earned by the Defendants over time. (SAC Ex. 14 at 23-24, ¶ VII  
21 E; RJN Ex. A-C.) Based on the long-term care plan that each Plaintiff selected, the amount of the  
22 entrance fee that will be repaid to Plaintiffs or their heirs decreases by 2% every month they reside in  
23 the Community, up to the total amount of the loan. (SAC Ex. 14 at 23, ¶ VII E2; RJN Ex. A-C.) In  
24 return, each Plaintiff is entitled to reside in a private apartment as long as they are able to do so, and  
25 then receive long-term care in the Care Center. (SAC Ex. 14 at 15, ¶ VI A; RJN Ex. A-C.) The  
26 CCRA also makes clear that each of the Plaintiff's "rights under this Agreement are limited to those  
27 expressly granted in it." (SAC Ex. 14 at 26, ¶ VIII D; RJN Ex. A-C.) Moreover, the CCRA  
28



1 “constitutes the entire agreement between [each Plaintiff] and [the Defendants] and may not be  
2 amended unless executed in writing by [the Defendants].” (SAC Ex. 14 at 30, ¶ IX I; RJN Ex. A-C.)

3  
4 **C. The Master Trust Agreement.**

5 In June 2000, a Master Trust was established by Defendant CCW La Jolla, LLC. (SAC ¶ 171;  
6 RJN Ex. D.) The Master Trust was created to hold the entrance fees paid by residents of the  
7 Community until those funds were loaned by the trustee, First Union National Bank, to CCW La  
8 Jolla, LLC. (SAC ¶ 171; RJN Ex. D at ¶ 2.1; SAC Ex. 14 at 24, ¶ VII.E.5; RJN Ex. A-C.) Each  
9 Plaintiff signed a Joinder In Master Trust Agreement (“Joinder”), under which they joined the MTA  
10 as though they were original parties to that agreement, and agreed to be bound by all of its terms.  
11 (SAC ¶ 171; RJN Ex. E - H at ¶¶ A.1, A.3.) Each Plaintiff’s CCRA plainly states that their entrance  
12 fees would be loaned to Classic Residence by Hyatt. (SAC Ex. 14 at 24, ¶ VII.E.5.) Defendant  
13 CCW La Jolla, LLC granted a mortgage on the Community to the Master Trust to secure repayment  
14 of the loan, and also provided each resident, including each Plaintiff, with a note equal to the amount  
15 each Plaintiff contributed to the Master Trust. (SAC Ex. 14 at 24, ¶ VII.E.5; RJN Ex. E - H.)

16 The terms of the Joinders provide that each Plaintiff “agreed to make a contribution to the  
17 Trust created by the provisions of the MTA dated June 29, 2000 for the purpose of providing  
18 permanent financing for the Retirement Center.” (RJN Ex. E-H at Recital C.) The Joinders also  
19 provide that:

20 *[Residents] hereby adopt and agree to be bound by all the provisions of*  
21 *the Master Trust Agreement and agree that the Contribution Amount*  
22 *deposited in trust with the Trustee pursuant of this Joinder in Master*  
23 *Trust Agreement shall be . . . distributed as an integral part thereof in*  
*accordance with the provisions of said Master Trust Agreement and all*  
*of the provisions of said Master Trust Agreement are incorporated*  
*herein.*

24 (RJN Ex. E-H at ¶ 3 (emphasis added).)  
25  
26  
27  
28

1 **III. ARGUMENT**

2 **A. The Court Should Strike Plaintiffs' Claims Related to the Master Trust Because**  
3 **Plaintiffs Failed to Meet the Preconditions Required by the MTA to Bring an**  
4 **Action With Respect to the Trust.**

5 Plaintiffs have failed to satisfy the preconditions required by the MTA to bring an action with  
6 respect to the Master Trust. The Court therefore should strike all Plaintiffs' claims related to the  
7 Master Trust.

8 The MTA is very clear regarding what is required before an individual resident ("Grantor")  
9 may file a legal action with respect to the Trust. It states:

10 **11.1 Institution of Proceedings.** Except as otherwise expressly  
11 provided in this must [sic] Agreement, and as otherwise provided by  
12 law, *no Grantor shall have any right by virtue, or by availing, of any*  
13 *provisions of the Trust to institute any suit, action or proceeding in*  
14 *equity or at law upon or under or with respect to the Trust unless not*  
15 *less than a majority of the Grantors shall have made written request*  
16 *upon the Trustee to institute such action, suit or proceeding in its own*  
17 *name as Trustee hereunder and shall have offered to Trustee payment*  
18 *of, or such reasonable indemnity as it may require against the costs,*  
19 *expenses and liability to be incurred therein or thereby, and the Trustee*  
20 *for 60 days after its receipt of such notice, request, and offer of*  
21 *indemnity, shall have failed to institute any such action, suit or*  
22 *proceedings; it being understood and intended, and being expressly*  
23 *covenanted by the Grantors and the Trustee, that no one or more of the*  
24 *Grantors shall have any right in any manner whatever by virtue or by*  
25 *availing of any provision of the Trust to affect, disturb or to enforce*  
26 *any right under this Trust except in the manner herein provided and for*  
27 *the equal, ratable and common benefit of all Grantors.*

19 (RJN Ex. D at ¶11.1 (emphasis added).)

20 Thus, before instituting any action with "respect to the Trust," a Plaintiff must establish that:  
21 (1) a majority of the grantors made a written request upon the Trustee to institute an action; (2) the  
22 majority of grantors offered payment or indemnity to the Trustee for the costs and liabilities of the  
23 action; and (3) the Trustee failed to institute any such action within sixty (60) days of the written  
24 request. (*Id.*) The Plaintiffs have not met any of these mandatory conditions. Neither they, nor a  
25 majority of the residents whose <sup>entrance</sup> ~~extreme~~ fees initially <sup>were</sup> ~~was~~ deposited in the Master Trust, made a  
26 written request upon the Trustee to institute an action. Neither they, nor a majority of the residents  
27 whose entrance fees initially were deposited in the Master Trust, offered payment or indemnity to the  
28

1 Trustee for the costs, expenses and liability of such an action. And the Trustee did not then fail to  
2 institute the action within sixty days of the Plaintiffs' request.

3 Because none of the mandatory conditions for bringing an action with respect to the Trust  
4 have been fulfilled, the Plaintiffs may not base any of their claims in the SAC, in whole or in part, on  
5 the Master Trust. *See Great W. Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407,  
6 1420 (1999) (defendant could not be sued because plaintiff did not comply with provisions in the  
7 parties' contract detailing preconditions of suit); *Wiz Tech., Inc. v. Coopers & Lybrand LLP*, 106 Cal.  
8 App. 4th 1, 11-12 (2003) (affirming summary judgment for auditor because plaintiff failed to follow  
9 contractual preconditions for bringing action). Each of the allegations in the SAC regarding the  
10 Master Trust therefore are irrelevant and should be stricken.

11 Specifically, Defendants request that the Court strike the following portions of the SAC:

12 The defendants have exhausted the entire trust fund, including making  
13 "cash disbursements" to individual owners of La Jolla Village Towers.  
(SAC ¶ 15.)

14 None of the \$85 million trust fund remains to be used, as promised, for  
15 pre-paid lifetime health care. (SAC ¶ 16.)

16 The defendants' agents represented to plaintiffs and all residents, both  
17 orally and in writing, that a portion of their entrance fees would be held  
in trust for pre-paid lifetime health care. (SAC ¶ 35.)

18 The defendants' continuing care promises included: (1) creating a trust  
fund for pre-paid lifetime health care . . . . (SAC ¶ 45.)

19 Instead of using residents' trust fund entrance fees for pre-paid lifetime  
20 health care, the defendants have disbursed approximately \$85 million  
21 from the trust fund to themselves in the form of an interest-free loan not  
due until December 31, 2044. (SAC ¶ 48.)

22 Some of the proceeds from this loan have been used to make cash  
disbursements to individual owners. (SAC ¶ 49.)

23 That defendants had failed to leave any money in the trust fund  
24 established for pre-paid lifetime health care. (SAC ¶ 146(c).)

25 That defendants had loaned themselves approximately \$80 million  
26 interest free for 50 years from the trust fund, constituting the entire  
balance of the fund. (SAC ¶ 146(d).)

27 The use was wrongful because none of the approximately \$80 million  
28 paid to the defendants in entrance fees was set aside to pay for pre-paid  
lifetime health care and a large portion of the monthly fees were a  
scheme by the defendants to defraud money from the plaintiffs and

1 other residents under the false claim of necessary operating expenses.  
2 (SAC ¶ 158.)

3 Representing the entrance fees paid by independent living residents  
4 would be used to fund pre-paid lifetime health care. In fact, none of the  
entrance fees have been set aside to be used for this purpose.  
(SAC ¶ 165(b).)

5 The defendants created an original Master Trust Agreement in which  
6 First Union National Bank, or its successor, was the trustee. Under the  
Master Trust Agreement, the defendants had the right to borrow trust  
7 funds at no interest to themselves. Acting as agents for the trustee, the  
defendants encouraged the plaintiffs and others similarly situated to  
8 execute, as grantors, documents entitled Joinder in Master Trust  
Agreement ("Joinders") under which the plaintiffs and others similarly  
9 situated agreed to contribute money to the Master Trust and be bound  
by the Master Trust Agreement. In soliciting the Joinders on behalf of  
10 the trustees and themselves, the defendants failed to provide the  
plaintiffs and others similarly situated with copies of the Master Trust  
11 Agreement, failed to fairly disclose the terms of that trust, and  
misrepresented that the terms of the Master Trust included provisions  
12 that would guarantee that portions of the funds contributed to the trust  
would be retained to provide for the lifetime health care of the plaintiffs  
13 and others similarly situated. By soliciting the Joinders, a *de jure*  
fiduciary relationship of trust and confidence existed between the  
14 defendants, as agents for the trustee, and the plaintiffs and others  
similarly situated, as beneficiaries. (SAC ¶ 171.)

15 The Court should strike the phrase "diverting trust assets for their own  
16 benefit, loaning trust assets without interest . . . ." (SAC ¶ 173.)

17 The Court should strike the phrase "by using trust funds . . . ."  
(SAC ¶ 192.)

18  
19 **B. The Court Should Strike Portions of Plaintiffs' Fraud Allegations That Are**  
20 **Statements of Opinion, Predictions of Future Action And Vague.**

21 Plaintiffs' fraud allegations that are statements of opinion, future predictions, and vague  
22 statements are improper and should be stricken from the SAC.

23 Statements cannot support a fraud claim if they are "too vague to be capable of being proven  
24 true or false." *Gentry v. Ebay, Inc.*, 99 Cal. App. 4th 816, 835 (2002) (statement that "a positive  
25 eBay rating is worth its weight in gold" is too vague and subjective to be actionable); *see also Rochlis*  
26 *v. Walt Disney Co.*, 19 Cal. App. 4th 201, 213-4 (1993) (promises to pay salary increases or bonuses  
27 which are "appropriate" to responsibilities and performance, or that employee would have an "active  
28 and meaningful" participation in creative decisions are not actionable because they are too vague and

indefinite to be enforceable), *overruled on other grounds by Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994). Opinions also are not actionable in fraud claims. *Gentry*, 99 Cal. App. 4th at 835. A “representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment.” *Id.* Actions for fraud also may not be based on broken promises, unless the promiser did not intend to perform at the time the promise was made. *Magpali v. Farmers Group, Inc.*, 48 Cal. App. 4th 471, 481 (1996) (“[S]omething more than nonperformance is required to prove the defendant’s intent not to perform his promise.” (quoting *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 30-31 (1985))); *see also Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 159 (1991).

The following portions of the SAC alleging fraud should be stricken because they each are either a statement of opinion; a statement that is too vague to be actionable; or a promise of future conduct without any allegations of no intent to perform when the promise was made. Specifically, Defendants request that the Court strike the following portions of the SAC:

The defendants’ continuing care promises included: (1) creating a trust fund for pre-paid lifetime health care, (2) assuring the “high quality”—and lack of additional cost—of that health care, (3) specifying services and facilities which would be provided to residents, (4) expanding the common law covenant of quiet enjoyment, and (5) assuring that the defendants would diligently seek to minimize the necessity of any future monthly fee increases.

Each of these continuing care promises has been abandoned by the defendants.

(SAC ¶¶ 45-46); *see Magpali*, 48 Cal. App. 4th at 481 (more than nonperformance or “abandonment of a promise” after the promise was made is required to prove intent not to perform).

One such representation was made on April 28, 1998, by Mary G. Leary in her capacity as chief operating officer for one or more of the defendants. In a memorandum addressed to all residents she wrote . . . residents should “rest assured that [defendants will] work diligently to manage expenses [and keep operating expenses down].”

(SAC ¶¶ 100, 124); *see Gentry*, 99 Cal. App. 4th at 835 (vague statements and opinions not actionable).

Another representation was made on December 26, 2001, in a letter to all residents written by James H. Hayes, in his capacity as executive director for one or more of the defendants. In announcing a six percent increase in monthly fees paid by residents, Mr. Hayes informed the residents that “[p]lease be assured that we are looking at all our

1 expenses and systems to find ways of reducing the impact of such  
2 increases . . . .”

3 (SAC ¶¶ 102, 126); *see id.* (vague statements not actionable).

4 The Court should strike the phrase “living accommodations would be  
5 peaceful and quiet, that the living accommodations would be luxurious  
6 . . . .”

7 (SAC ¶¶ 109, 134); *see id.* (vague statements and opinions not actionable).

8 Based on information and belief, the defendants also made numerous  
9 representations to plaintiffs, other residents, and the Department of  
10 Social Services regarding financial information pertaining to the  
11 operation of La Jolla Village Towers and the necessity for increases in  
12 the monthly fees paid by plaintiff and other residents to the defendants.  
13 These representations included that all operating expenses were  
14 reasonable and necessarily incurred by the defendants.

15 (SAC ¶¶ 110, 135); *see id.* (vague statements not actionable).

16 Another representation was made by defendants in marketing brochures  
17 provided to plaintiffs, residents, and prospective residents from 2000  
18 through 2005, which stated: “because La Jolla Village Towers operates  
19 as a Continuing Care Retirement Community, residents receive long-  
20 term care benefits to help defray the cost of care. Under our continuing  
21 care plans, residents will be able to move to our on-site care center,  
22 offering high-quality assisted living, memory support Alzheimer’s care,  
23 and skilled nursing care if the need should arise, at virtually no increase  
24 in their monthly fee.” Similar statements were made in defendants  
25 internet advertising.

26 (SAC ¶¶ 111, 136); *see id.* (vague statements not actionable).

27 The Court should strike the phrase “[p]erhaps most important of all, La  
28 Jolla Village Towers offers a vibrant, active lifestyle with the peace of  
mind that comes from knowing your potential long-term care needs  
will be expertly met . . . .”

(SAC ¶¶ 113, 138); *see id.* (vague statements not actionable).

22 **C. The Court Should Strike Allegations of Promises of Future Conduct In Plaintiffs’**  
23 **Third Cause of Action Because Such Promises Cannot Support A Negligent**  
24 **Misrepresentation Claim.**

25 California courts are clear that allegations of future promises cannot be used to support a  
26 negligent misrepresentation cause of action:

27 To maintain an action for deceit based on a false promise, one must  
28 specifically allege and prove, among other things, *that the promisor did*  
*not intend to perform at the time he or she made the promise and that it*

1           *was intended to deceive or induce the promisee to do or not do a*  
2           *particular thing. Given this requirement, an action based on a false*  
3           *promise is simply a type of intentional misrepresentation, i.e., actual*  
4           *fraud. The specific intent requirement also precludes pleading a false*  
5           *promise claim as a negligent misrepresentation, i.e., "The assertion, as*  
6           *a fact, of that which is not true, by one who has no reasonable ground*  
7           *for believing it to be true." Simply put, making a promise with an*  
8           *honest but unreasonable intent to perform is wholly different from*  
9           *making one with no intent to perform and, therefore, does not*  
10           *constitute a false promise.*

11           *Tarmann*, 2 Cal. App. 4th at 159 (citations and footnotes omitted); *see also Magpali*, 48 Cal. App.  
12           4th at 481.

13           A negligent misrepresentation claim therefore cannot be based on promises of future conduct.  
14           (*Id.*) Thus, Defendants request that the Court strike the following allegations from Plaintiffs'  
15           negligent misrepresentation claim (third cause of action):

16           In numerous publications and advertisements, the defendants made  
17           continuing care promises to plaintiffs, within the meaning of Health  
18           and Safety Code section 1771, subdivision c(10). (SAC ¶ 122.)

19           These continuing care promises, or representations, were repeated by  
20           the defendants' sales and marketing personnel over several years.  
21           (SAC ¶ 123.)

22           One such representation was made on April 28, 1998, by Mary G.  
23           Leary in her capacity as chief operating officer for one or more of the  
24           defendants. In a memorandum addressed to all residents she wrote . . .  
25           residents should "rest assured that [defendants will] work diligently to  
26           manage expenses [and keep operating expenses down]." (SAC ¶ 124.)

27           Another such representation was made in August, 1998, by Mary G.  
28           Leary in her capacity as chief operating officer for one of more of the  
29           defendants. In a memorandum addresses to all residents she wrote that  
30           the monthly fees charged to residents would not include any operating  
31           losses from the care center. "The Care center will be treated as a  
32           separate entity for budgeting purposes. CC-Development Group, Inc.,  
33           will fund any shortfalls which occur in the day-to-day operation of the  
34           Care Center." (SAC ¶ 125.)

35           Each of the plaintiffs' residency agreements expressly states that  
36           residents would "receive . . . as part of Your Monthly Fee . . .  
37           'emergency call response, twenty-four (24) hours per day.'" (SAC ¶  
38           133.)

39           Each of the plaintiffs and residents were expressly told in defendants'  
40           advertisements and marketing brochures that the living  
41           accommodations would be peaceful and quiet, that the living  
42           accommodations would be luxurious, and that residents could enjoy an  
43           on-site pool, spa and self-parking garage. (SAC ¶ 134.)

1 Another representation was made by defendants in marketing brochures  
2 provided to plaintiffs, residents, and prospective residents from 2000  
3 through 2005, which stated: "because La Jolla Village Towers operates  
4 as a Continuing Care Retirement Community, residents receive long-  
5 term care benefits to help defray the cost of care. Under our continuing  
6 care plans, residents will be able to move to our on-site care center,  
7 offering high-quality assisted living, memory support Alzheimer's care,  
8 and skilled nursing care if the need should arise, at virtually no increase  
9 in their monthly fee." Similar statements were made in defendants  
10 internet advertising. (SAC ¶ 136.)

11 Another representation made to residents was that "fee increases, if  
12 any, will take place once a year." (SAC ¶ 137.)

13 Another representation was made in March 2003, in a memorandum to  
14 all residents and prospective residents from Jeff Tipton, director of  
15 sales for one or more of the defendants, stating that, "[p]erhaps most  
16 important of all, La Jolla Village Towers offers a vibrant, active  
17 lifestyle with the peace of mind that comes from knowing your  
18 potential long-term care needs will be expertly met at our on-site care  
19 center at virtually no extra cost." (SAC ¶ 138.)

## 20 CONCLUSION

21 For the foregoing reasons, Defendants respectfully request that the Court grant Defendants'  
22 Motion to Strike in its entirety.

23 Dated: July 13, 2007

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