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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DONALD R. SHORT, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

CC-LA JOLLA, Inc., a Delaware Corporation, CC-LA JOLLA, L.L.C., a Delaware limited liability company, and DOES 1 to 70, inclusive,

Defendants.

Case No. GIC877707

DEFENDANTS' REPLY IN SUPPORT OF DEMURRER TO PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Date: April 27, 2007
Time: 1:30 p.m.
Judge: Hon. Linda B. Quinn
Dept: 74

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

I. INTRODUCTION

Plaintiff's Opposition all but concedes that each cause of action in the First Amended Complaint ("FAC") fails to state a valid claim. Plaintiff improperly attempts to salvage the FAC by including six pages of alleged "Material Facts" *in his Opposition.* This futile attempt at amendment through briefing only highlights the deficiency of his pleading. But, as the Court is well aware, and Plaintiff himself argues, it is the facts (or lack thereof) in the FAC that are at issue and control on demurrer. Those facts are woefully deficient and fail to plead a single viable claim.

II. RESPONSE TO PLAINTIFF'S "STATEMENT OF MATERIAL FACTS"

Instead of responding to the numerous legal defects in the FAC established in Defendants' Opening Brief, Plaintiff uses 9 of the 15 pages of his Opposition to make inflammatory and inaccurate allegations against the Defendants. In addition to being factually wrong, these allegations are irrelevant to this demurrer as the vast majority of them are not pleaded in the FAC. And their outlandish nature speaks volumes about the baseless nature of Plaintiff's legal claims.[1]

What is accurate (and indisputable) is that Plaintiff Donald Short entered into a binding written contract with Defendants CC-La Jolla, Inc. and CCW-La Jolla, LLC that "constitutes the entire agreement between [Plaintiff] and [the Defendants]." (Short CCC at 30, ¶ IX I.) This contract defines all the respective rights and obligations of both parties concerning the Plaintiff's residence in the Community and his rights in respect to the receipt of long-term care. Plaintiff, however, does not want the Court to consider this agreement. His reluctance is understandable as the written contract belies his inflammatory and false allegations. For example:

- Mr. Short complains in his Opposition that funds have been loaned from a Master Trust holding residents' entrance fees to the Defendants, and that a specific reserve has not been held in that Trust. (Plaintiff's Memorandum of Points and Authorities

[1] For instance, Plaintiff does not hesitate to invade the privacy rights of other residents of the Community, who are not parties to this action, by inaccurately describing the intimate details of their medical care, with only thinly veiled attempts to conceal their identity. Such tactics make clear that Plaintiff is willing to sacrifice the privacy rights of his fellow residents in an attempt to gain some litigation advantage.

in Opposition to Demurrer ("Opp.") at 4:9-11.) Yet, this is exactly what the CCC provides for – a loan by the Master Trust to the Defendants secured by a mortgage on the Community. (Short CCC at 25, ¶ 5 ("the entrance fees in Escrow will be released to the Master Trust and the Trust will disburse those funds to [the Defendants]. [The Defendants] will, in turn, grant a mortgage on the Community to the Master Trust to secure the repayment of the Note and similar notes owed to other residents.").)

- Mr. Short also complains in his Opposition that a portion of his monthly fees are used to operate the Care Center. (Opp. at 3:10-12). But again this is exactly what the CCC allows – "[a]ll operating expenses of the Community, as well as a reserve for capital repairs and replacements and a profit to [the Defendants], are intended to be paid with operating revenue from monthly fees." (Short CCC at 3-4, ¶ IB. 2.)

These two examples evidence Plaintiff's fundamental misunderstanding of the facts. The other allegations in the Opposition similarly are contrary to the CCC, the facts, and controlling legal authority. Although it is understandable that Mr. Short does not want the Court to consider the written agreement between the parties, the law allows the Court to do so now given that it is referenced in the FAC and forms the basis of the parties' relationship.[2] *See Ascherman v. General Reinsurance Corp.*, 183 Cal. App. 3d 307, 310-11 (1986) (trial court may consider on demurrer the contract that formed the basis of the parties relationship).

III. PLAINTIFF FAILS TO STATE A SINGLE COGNIZABLE CAUSE OF ACTION.

A. Plaintiff Fails to State Facts Sufficient to Sustain a Cause of Action for Violation of the Health and Safety Code.

Plaintiff argues that he properly has alleged a cause of action for violation of four sections of Chapter 10 of the Health and Safety Code by stating in the FAC that "the caregiver defendants have 'failed to comply with numerous mandatory provisions of Health and Safety Code sections . . . 1771.8, subdivisions (c)-(h), 1787, 1788 and 1793.5.'" (Opp. at 10:24-26 (quoting FAC, ¶ 19).) Plaintiff asserts that this is sufficient to state a claim because these four sections contain "express

[2] Ironically, Plaintiff himself asks the Court to consider the CCC in ruling on this demurrer. (Opp. at 14:8-10.)

requirements defendants must fulfill," and he has alleged "that defendants have failed to comply with them." (Opp. at 10:27-11:2.)

Plaintiff misses the point. Paragraph 19 of the FAC that Plaintiff relies upon to support this claim states a *legal conclusion*, it contains no *factual allegations*. Neither it, nor any of the first twenty paragraphs of the FAC incorporated into the "Violation Of Statute" cause of action, contain any *facts* that, if true, would support a claim that sections 1771.8(c)-(h), 1787, 1788 or 1793.5 have been violated. To state a statutory cause of action, a plaintiff must "specifically allege every *fact* that would give rise to liability." *County of Los Angeles v. California State Water Res. Control Bd.*, 143 Cal. App. 4th 985, 1001-02 (2006) (emphasis added) (citing *Covenant Care, Inc. v. Super. Ct.*, 32 Cal. 4th 771, 790 (2004); *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 795 (1985)); *see also Shields v. County of San Diego*, 155 Cal. App. 3d 103, 113 (1984) ("when seeking to establish a statutory cause of action, general allegations are insufficient."). Plaintiff fails to state any facts in the first claim of the FAC, let alone specifically allege every fact, that he contends would create liability under the Health and Safety Code.[3]

Moreover, Plaintiff's Opposition fails to establish he has standing to bring a civil action to enforce any of these statutes. He does not point to any section within Chapter 10 that allows for a private right of action to enforce sections 1771.8, 1787 or 1788. This is in contrast to the multiple sections that allow enforcement of Chapter 10 by the State Department of Social Services, the Attorney General and local district attorneys. *See* Cal. Health & Safety Code §§ 1793.6, 1793.19, 1793.21, 1793.27, 1793.29 and 1793.31. He relies on language in section 1793.5(d) regarding "damages assessed in any civil action" to argue that a private right of action exists for this subsection. (Opp. at 9:25-27.) However, even if a private right of action does exist to enforce this misdemeanor

[3] In essence, Plaintiff's position is that he has stated a claim because he has pointed to four statutory sections that require multiple acts, and then alleged that the Defendants have violated those statutes. Even putting aside the law requiring that statutory causes of action be alleged with particularity, *see Covenant*, 32 Cal. 4th at 790, Mr. Short's position makes no sense. For example, section 1788 is seven pages long and contains 35 subdivisions, with multiple subparts, regarding the requirements for continuing care contracts. Under Mr. Short's theory, a plaintiff simply could allege that a defendant "has violated Section 1788," without any specific factual allegations, to state a valid claim. A defendant and a court then would be left to guess which of the 35 subdivisions, or any of the subparts, the defendant allegedly failed to satisfy. The law does not allow such an illogical result.

offense statute, Plaintiff has failed to allege facts to support a violation of it. The FAC does not allege that the Defendants have "abandon[ed] a continuing care retirement community." Cal. Health & Safety Code § 1793.5(d). It is undisputed that the Defendants still own the Community and that its residents continue to live in the Community and to receive long-term care. Mr. Short also has not alleged that the Defendants "abandon[ed] [their] obligations under a continuing care contract." *Id.* The FAC contains no breach of contract claim and Plaintiff does not allege any violation of Mr. Short's CCC.

B. Plaintiff Fails to State Any Cause of Action for Fraud.

Plaintiff does not (and cannot) dispute the specific requirement for fraud claims of "pleading facts which show how, when, where, to whom, and by what means the [allegedly false] representations were tendered." *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 645 (1996); *see also Charnay v. Cobert*, 145 Cal. App. 4th 170, 185 n. 14 (2006). Instead, relying on *Comm. On Children's Television v. General Foods, Corp.*, 35 Cal. 3d 197, 216 (1983), he argues that he should be excused from pleading the alleged fraud with particularity because the Defendants allegedly "possess all of their own advertisements and publications." (Opp. at 11:20-12:9.) This argument is meritless.

In *Children's Television*, plaintiffs alleged that the makers of childrens' cereal engaged in a national advertising campaign, over a number of years, to convince children to persuade their parents to purchase sugared cereal. Plaintiffs alleged that although the commercials changed every 60 days, they retained constant themes and false representations. *Id.* at 788. Plaintiffs also alleged that the defendants, but not the plaintiffs, knew the exact times, dates and places of the advertisements broadcast. *Id.* The Court found there was "no doubt as to what advertisements are at issue, nor as to what deceptive practices are called into question", and therefore that the complaint was "sufficient to notify the defendants of the claim made against them, and to frame the issues for litigation." *Id.* at 793. Under these unique facts, the Court relaxed the fraud pleading standards requiring plaintiff to allege the exact time, place and source of each misrepresentation. *Id.* at 793-94.

In contrast, here, Plaintiff simply has recited eight statements that he claims were made by the Defendants at some point during the last eight years in unspecified "publications and

advertisements." (FAC ¶ 22, 32.) The Defendants are not aware as to (i) what specific publications or advertisements Plaintiff is referring, (ii) when Mr. Short contends these publications or advertisements were distributed, (iii) specifically whom he contends reviewed the statements, (iv) who distributed the alleged publications and advertisements, and (v) what was that person's authority, if any, to do so.[4] In sum, unlike in *Children's Television*, there is great uncertainty regarding what alleged publications and advertisements are at issue. Moreover, Plaintiff does not even address in his Opposition the fact that the FAC fails to describe at all, let alone with the required specificity, the supposedly omitted "important facts" alleged in paragraphs 41-43. Thus, the FAC is not sufficient to notify the Defendants of the claims against them. Plaintiff, therefore, should not be allowed to circumvent the settled fraud pleading standard. He should be required to allege his fraud claim with the requisite specificity.

In addition, Plaintiff does not dispute the law requiring him to allege reliance and actual damage to support a fraud claim, yet he fails to respond to the fact that the FAC does neither. As established in Defendants' Opening Brief, the FAC does not include any facts that, if true, would establish actual damages. He does not allege that his monthly fees have increased beyond what is permitted under the CCC, that the Defendants have failed to comply with their obligations under the CCC regarding repayment of his entrance fee, that he and his wife no longer reside in their luxury apartment, or that they have been denied long-term care in the Care Center. Absent these allegations, any attempt to plead fraud is deficient. *Gil v. Bank of America*, 138 Cal. App. 4th 1371, 1381 (2006) ("Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically)").

[4] As established in Defendants' Opening Brief, Plaintiff does not allege in the FAC that he ever reviewed or relied on the first eight statements allegedly contained in Defendants' "publications and advertisements." (FAC ¶¶ 22, 32.) While he alleges "on information and belief" that Defendants made other unspecified representations to him (FAC ¶¶ 23, 33), Plaintiff concedes in his Opposition that such allegations are not sufficient to state a fraud claim, (Opp. at 12, n. 12).

C. Plaintiff Fails to State a Cause of Action for Elder Abuse.

Plaintiff concedes that he has failed to allege what property allegedly was taken from him to support a cause of action for Elder Abuse. (Opp. at 12:11-16.). In addition to failing to allege what property allegedly was taken from Mr. Short, the FAC fails to allege whom within the Defendant entities is alleged to have taken any property, what "wrongful use" was intended by the Defendants or how Defendants intended to "defraud" the Plaintiff. Absent such factual allegations, Mr. Short fails to state a claim for alleged Elder Abuse.

D. Plaintiff's Failure to Comply With the Notice Requirements for a CLRA Claim Requires Dismissal of This Claim With Prejudice.

Plaintiff fails to even address, let alone distinguish, the settled authority that requires dismissal of his CLRA claim with prejudice for failure to comply with the notice requirements of Section 1782(a). These strict notice requirements direct that thirty days or more prior to the commencement of an action for damages, the consumer "shall" notify the person alleged to have committed the acts contrary to the CLRA and demand that the person correct or rectify the violation. This notice must be in writing, and must be sent certified or registered mail, return receipt requested, to the place where the transaction occurred. Cal. Civ. Code § 1782(a). Moreover, these notice requirements are to be applied strictly. *See Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 38-41 (1975) (finding that strict application of CLRA notice requirements is required in rejecting plaintiff's argument that substantial compliance is sufficient); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1195-96 (S.D. Cal. 2005) (dismissing CLRA claim with prejudice where notice letter was sent after initial complaint was filed); *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1303-04 (S.D. Cal. 2003) (dismissing CLRA claim with prejudice where plaintiff's pre-suit letter failed to comply with all requirements of Section 1782(a) and plaintiff failed to allege compliance in complaint).

Plaintiff argues that he provided the required notice to the Defendants in a letter dated April 10, 2006, yet he fails to provide the Court with a copy of that letter. A review of that letter makes it obvious why. The letter does not mention the CLRA, does not allege any violations of the CLRA, addresses only one of the myriad of allegations in Plaintiff's Opposition, and does not satisfy the

delivery requirements of Section 1782(a). (*See* Declaration of Linda Lane in Support of Reply in Support of Demurrer ("Lane Decl."), Exhibit A.) Accordingly, as in *Laster* and *Von Grabe*, because Plaintiff has failed to satisfy the notice requirements of Section 1782(a), his CLRA claim should be dismissed with prejudice.[5]

E. Plaintiff Fails to Allege a Cause of Action for Breach of Fiduciary Duty.

In order to properly state a claim for breach of fiduciary duty, Plaintiff's FAC must, first and foremost, establish the existence of a fiduciary relationship. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 483 (1998). It fails to do this. Instead, the FAC clearly states that solely, "[b]y entering into the continuing care contract with the plaintiff," the fiduciary relationship arises. (FAC ¶ 64.) This is insufficient as established in Defendants' Opening Brief. (Opening Brief at 11-12.) Plaintiff's claim fails on this basis alone. And his attempts to cure the deficiencies of the FAC in his Opposition are futile.[6]

Plaintiff does not address the law establishing that no fiduciary relationship arises in the face of an arms-length contract. *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1162 (2005); *Thompson v. Cannon*, 224 Cal. App. 3d 1413, 1418 (1990); *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1399 (2005); *Wolf v. Super. Ct.*, 107 Cal. App. 4th 25, 31 (2003) (rejecting claim of fiduciary relationship and stating "[e]very contract requires one party to repose an element of trust and confidence in the other to perform."); *New v. New*, 148 Cal. App. 2d 372, 382-83 (1957) ("Being of universal prevalence, [the implied covenant of good faith and fair dealing] cannot create a fiduciary relationship; it affords basis for redress for breach of contract and that is all."). Nor does

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[5] Plaintiff requests leave to amend in order to allow him to comply with Section 1782(a). (Opp. at 13:17-20.) This request should be denied. *See Outboard Marine*, 52 Cal. App. 3d at 38-41 (finding that letter sent after initial complaint filed not sufficient to comply with Section 1782(a)); *Laster*, 407 F. Supp. 2d at 1195-96 (rejecting plaintiff's request for leave to amend to comply with Section 1782(a)).

[6] In his Opposition, Plaintiff states that Defendants "do not contest that Mr. Short failed to correctly plead breach or damages." (Opp. at 13, n.13.) Defendants take issue with the primary element for pleading breach of fiduciary duty – the existence of a fiduciary relationship. If this element is missing, the entire claim fails. However, the other elements of this claim are deficient as well. Specifically, as in every other claim for relief, Defendants have completely failed to allege damages with any particularity.

Plaintiff contend that the Short CCC is anything other than an arms-length contract. This alone dooms his claim.

Plaintiff nonetheless argues in his Opposition (however, notably, none of these grounds are set forth in his FAC) that a fiduciary relationship exists between the parties for two separate reasons: (1) because the parties are in a "trustee/beneficiary" relationship; and (2) because the parties are in a "confidential" relationship. Both positions are meritless.

First, Plaintiff contends that a fiduciary relationship exists here because "the residency agreement creates an express trustee/beneficiary relationship."[7] (Opp. at 14.) Plaintiff's argument demonstrates his complete misunderstanding of the facts. Plaintiff and Defendants are not in a trustee/beneficiary relationship because the Defendants are not the trustee of the Master Trust. The trustee is Wachovia Bank, National Association, formerly First Union National Bank. (*See* Lane Decl., Exhibit B at 1.) Plaintiff and Defendants are both beneficiaries of the Master Trust. Plaintiff's argument therefore simply is factually wrong.

Plaintiff next argues that a fiduciary relationship exists between the parties because a "confidential relationship" allegedly exists between the parties. (Opp. at 14.) In support of this theory, Plaintiff relies on *Richelle L.*, a case involving sexual relations between a parishioner and her priest, *Vai*, a case involving the division of community property between ex-spouses, and *Barbara A.*, a case involving sexual relations between a client and her attorney.[8] (Opp. at 14-15.) These cases establish that, "[w]hen a confidential relationship is found to exist, the one in whom confidence was reposed may be held to a higher standard of disclosure and fairness than in *an arm's-length relationship.*" *Richelle L. v. Roman Catholic Archbishop of San Francisco*, 106 Cal. App. 4th 257, 272 (2003) (emphasis added). A confidential relationship "is particularly likely to exist where there

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[7] As support for his statement, Plaintiff cites the CCC attached to Defendants' Request for Judicial Notice. Plaintiff then objects to the use of this same contract and Defendants' Request for Judicial Notice. Plaintiff cannot have it both ways – his citation to the same document that he now contends the Court cannot view is curious, at best.

[8] Plaintiff does not cite a single case establishing that a fiduciary relationship (or a confidential relationship) exists between a continuing care facility and a resident.

is a family relationship or one of friendship or such a relation of confidence as that which arises between physician and patient or priest and penitent." *Vai v. Bank of America*, 56 Cal. 2d 329, 338 (1961); *see also Barbara A. v. John G.*, 145 Cal. App. 3d 369 (1983). The facts of the very cases cited by Plaintiff evidence the weakness of his argument. Those cases involve parishioner/priest relationships, spousal relationships, trustee/beneficiary relationships, and lawyer/client relationships. Here, the relationship of the parties is a commercial relationship defined by a written contract. Plaintiff's attempt to characterize it as a "confidential relationship" requires a stretch of the imagination not required of this Court.

F. Plaintiff's UCL Claim is Deficient.

Finally, Plaintiff fails to address the fatal defects in his UCL claim. As made clear in Defendants' Opening Brief, the UCL claim in the FAC fails to state any facts, that if true, would constitute unlawful conduct. There are no factual allegations in either paragraphs 69-72 of the FAC (that constitute the UCL claim) or paragraphs 1-15 of the FAC (incorporated by reference in the UCL claim) to support an assertion that a specific statute has been violated. (FAC ¶¶ 1-15, 69-72.) In response, Plaintiff states that he has alleged a violation of section 1793.5 to support his UCL claim. This is simply not true. First, there is no allegation in the UCL claim that it is based on a violation of section 1793.5. (*Id.*) Moreover, nowhere in the FAC does Plaintiff allege facts that, if true, would constitute a violation of section 1793.5. The FAC does not allege that Defendants have accepted deposits and proposed to provide care without a current and valid permit. *See* Cal. Health & Safety Code § 1793.5(a). The FAC does not allege that Defendants have accepted deposits and failed to place those deposits in an escrow account. *See* Cal. Health & Safety Code § 1793.5(b). The FAC does not allege that Defendants have executed a continuing care contract without holding a current and valid certificate of authority. *See* Cal. Health & Safety Code § 1793.5(c). And, contrary to Plaintiff's assertion in the Opposition (Opp. at 15:20-22), Plaintiff has not alleged that Defendants have abandoned the Community or their obligations under Plaintiff's CCC. *See* Cal. Health & Safety Code § 1793.5(d) ("An entity that abandons a continuing care retirement community or . . . its

obligations under a continuing care contract is guilty of a misdemeanor.") Thus, the FAC does not sufficiently plead a cause of action under the unlawful prong of the UCL.

Moreover, Plaintiff fails in his Opposition even to address the fact that the FAC does not allege that Plaintiff has suffered "injury in fact and has lost money or property as a result of" any alleged unfair competition, as required by Proposition 64. Cal. Bus. & Prof. Code §§ 17204, 17535; *see also Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 227 (2006). Absent such an allegation, Plaintiff's UCL claim fails as a matter of law.

IV. CONCLUSION

For each of the foregoing reasons, Plaintiff's entire FAC, and each cause of action therein, fail to state facts sufficient to constitute any claim against the Defendants and should be dismissed.

Dated: April 20, 2007

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