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

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN DIEGO
12

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

17 Plaintiffs,

18 v.

19 CC-LA JOLLA, INC., CCW-LA JOLLA, L.L.C.,
CC-DEVELOPMENT GROUP, INC., AND
20 CLASSIC RESIDENCE MANAGEMENT
LIMITED PARTNERSHIP,
21

22 Defendants.
23
24

Case No. GIC877707

**DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT
OF DEMURRER AND MOTION
TO STRIKE PLAINTIFF'S
SECOND AMENDED CLASS
ACTION COMPLAINT**

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

25 Defendants CC-LA JOLLA, INC., CCW-LA JOLLA, L.L.C., CC-DEVELOPMENT
26 GROUP, INC., AND CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP
27 (collectively "Defendants") hereby request, pursuant to Evidence Code Sections 452 and 453, that the
28 Court take judicial notice of the following documents in consideration of Defendants' Demurrer to

1 Plaintiffs' Second Amended Class Action Complaint ("Demurrer") and Defendants' Motion to Strike
2 Plaintiffs' Second Amended Complaint ("Motion to Strike"): (1) the Continuing Care Residency
3 Agreements between Defendants and each Plaintiff, attached hereto as Exhibits A – C; (2) the Master
4 Trust Agreement, attached hereto as Exhibit D; (3) the Joinders in Master Trust Agreements between
5 Defendants and each Plaintiff, attached hereto as Exhibits E – H; (4) relevant legislative history for
6 Health & Safety Code section 1771.8, attached hereto as Exhibits I – L; and (5) a copy of the
7 Plaintiff's First Amended Complaint filed in this Court on January 9, 2007, attached hereto as Exhibit
8 M.

9 The California Code of Civil Procedure specifically authorizes a court to consider, as ground
10 for demurrer or a motion to strike, any matter which the court may judicially notice under the
11 Evidence Code. Cal. Civ. Proc. Code §§ 430.30(a), 437(a) and (b). Evidence Code section 452(h)
12 provides that judicial notice may be taken of "[f]acts and propositions that are not reasonably subject
13 to dispute and are capable of immediate and accurate determination by resort to resources of
14 reasonably indisputable accuracy." Cal. Evid. Code §§ 452(h), 453.

15 The Continuing Care Residency Agreements ("CCRAs") are offered to assist the Court in its
16 consideration of Defendants' Demurrer and Motion to Strike. There is no dispute regarding the
17 accuracy or authenticity of the CCRAs. The Plaintiffs reference each Plaintiff's CCRA in their
18 Second Amended Complaint ("SAC") (SAC ¶¶ 108, 133, 172(b), 172(d), 182, 183, 184, 185, 186(a)-
19 (g), 195), and attached a copy of one CCRA (between Defendants and Plaintiffs Donald and Marilyn
20 Short) as an "exemplar" of all CCRAs to their SAC. (SAC Exhibit 14.) This is not sufficient. The
21 CCRAs signed by each Plaintiff should be considered by the Court because the CCRAs form the
22 basis of the relationship between the parties from which Plaintiffs' claims arise, including Plaintiffs'
23 claim for breach of contract. (SAC ¶¶ 182, 183, 184, 185, 186(a)-(g).) The CCRAs contain the
24 material terms governing the parties' relationships. Because these items were omitted from the SAC,
25 it is proper for this Court to take judicial notice of them in ruling on the Demurrer and Motion to
26 Strike. *Gilmore v. The Lycoming Fire Ins. Co.*, 55 Cal. 123, 124-25 (1880) (material terms of
27 contract may not be omitted from pleadings); *Ascherman v. General Reinsurance Corp.*, 183 Cal.
28 App. 3d 307, 310-11 (1986) (trial court properly considered contract on demurrer that formed basis of

1 the parties' relationship, but was not attached to the complaint). Therefore, this Court should take
2 judicial notice of the following CCRAs: the CCRA signed by Plaintiff James F. Gleason in April
3 2002 (attached as Exhibit A); the CCRA signed by Plaintiffs Casey Meehan and Dottie Yelle in
4 March 2000 (attached as Exhibit B); and the CCRA signed by Plaintiff Patty Westervelt in March
5 2000 (attached as Exhibit C).

6 The Master Trust Agreement ("MTA") and the Joinders in Master Trust Agreements
7 ("Jinders")¹ are also offered to assist the Court in its consideration of Defendants' Demurrer and
8 Motion to Strike. Plaintiffs base, in part, six of their eleven claims for relief in the SAC upon the
9 Master Trust (claims for fraud, elder abuse, violation of the Consumer Legal Remedy Act, breach of
10 fiduciary duty and constructive fraud) and reference the Master Trust and MTA throughout the SAC.
11 (SAC ¶¶ 15, 16, 146(c)-(d), 165(b), 171.) There is no dispute regarding the accuracy or authenticity
12 of the MTA or each Plaintiff's respective Joinder to the MTA. It therefore is proper for the Court to
13 take judicial notice of these documents in ruling on the Motion to Strike. *See CPF Agency Corp. v.*
14 *R&S Towing*, 132 Cal. App. 4th 1014, 1019 (2005) (limiting recitation of facts to those appearing in
15 plaintiff's first amended complaint and to matters that are subject to judicial notice, according to Code
16 Civ. Proc. § 437); *see also Garcia v. Sterling*, 176 Cal. App. 3d 17, 21 (1985) ("a court may strike
17 false, i.e., untrue, matters contained in a pleading whenever their falsity or untruthfulness is revealed
18 by facts which are judicially noticed"); *Ascherman*, 183 Cal. App. 3d at 310-11 (1986) (trial court
19 properly considered contract on demurrer that formed basis of the parties' relationship, but was not
20 attached to the complaint); *Gilmore*, 55 Cal. at 124-25 (1880) (material terms of contract may not be
21 omitted from pleadings). As such, this Court should take judicial notice of the following documents:
22 the MTA (attached as Exhibit D); the Joinder to the MTA signed by Plaintiff James F. Gleason in
23 April 2002 (attached as Exhibit E); the Joinder to the MTA signed by Plaintiffs Casey Meehan and
24 Dottie Yelle in March 2000 (attached as Exhibit F); the Joinder to the MTA signed by Plaintiff Patty
25 Westervelt in March 2000 (attached as Exhibit G); and the Joinder to the MTA signed by Plaintiffs
26 Donald and Marilyn Short in August 2001 (attached as Exhibit H).

27 ¹ The Joinders are the contracts by which each Plaintiff became a grantor to the Master Trust
28 and accepted the terms and conditions of the MTA. (SAC ¶ 171.)

1 In addition, the legislative history of Section 1771.8 of Chapter 10 of the California Health
2 and Safety Code will assist the Court in its consideration of Defendants' Demurrer. The Plaintiffs'
3 First Cause of Action is for alleged violations of this statute. (SAC ¶¶ 83-96.) This legislative
4 history will aid the Court in its determination of whether or not there is a private right of action for a
5 violation of Section 1771.8. Thus, it is proper for the Court to take judicial notice of it. *Kaufman &*
6 *Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 31-38 (2005) (court
7 may take judicial notice of various documents other than the statute itself, such as different versions
8 of the statute before enactment; legislative committee reports; conference committee reports; reports
9 of the legislative analyst; ballot pamphlets for initiatives, etc.). Specifically, Defendants offer four
10 pieces of legislative history. The first is Social Services Department, Health and Welfare Agency's
11 Bill Analysis of AB 1255, 1997 Leg. (CA 1997) at 4, ("Continuing Care Retirement Communities"),
12 attached hereto as Exhibit I. *See Id.* (enrolled bill reports may be instructive on matters of legislative
13 intent). The second is the Department of Finance Bill Analysis, AB 827 ("Fiscal Summary"),
14 attached hereto as Exhibit J. *Id.* The third piece of legislative history is Senate Health and Human
15 Services Committee Analysis, SB 1082, Background and Discussion, No. 2 ("Continuing Care
16 Retirement Communities"), attached hereto as Exhibit K. *See In re Raymond E.*, 97 Cal. App. 4th
17 613, 617 (2002) (granting judicial notice of Senate Committee on Health and Human Services
18 analysis of bill). The final piece of legislative history offered is the Memorandum and Draft
19 Amendments by Assemblywoman Susan A. Davis, attached hereto as Exhibit L. *See Zipton v.*
20 *WCAB*, 218 Cal. App. 3d 980, 989 (1990) (noting importance of amendment to bill); *see also People*
21 *v. Quattrone*, 211 Cal. App. 3d 1389, 1396 (1989) (noting succession of amendments to bill).

22 Finally, for this Court's convenience and consideration, Defendants attach a copy of
23 Plaintiffs' First Amended Complaint ("FAC") filed with this Court on January 9, 2007, as Exhibit M.
24 The FAC is referenced by Defendants in the accompanying Demurrer because Plaintiffs attempt,
25 improperly, to allege additional, and different, theories in their SAC in an attempt to establish a
26 fiduciary relationship between the parties. *Hills Trans Co. v. Southwest*, 266 Cal. App. 2d 702, 713
27 (1968) ("A pleader may not attempt to breathe life into a complaint by omitting relevant facts which
28 made his previous complaint defective.").

1 Accordingly, Defendants respectfully request that the Court take judicial notice of the
2 attached: (1) CCRAAs between Defendants and each Plaintiff (Exhibits A - C); (2) Master Trust
3 Agreement (Exhibit D); (3) Joinders to the Master Trust Agreement between Defendants and each
4 Plaintiff (Exhibits E - H); (4) the legislative history of Section 1771.8 of Chapter 10 of the California
5 Health and Safety Code (Exhibits I - L); and (5) the Plaintiffs' First Amended Complaint (Exhibit
6 M).

7 Dated: July 13, 2007

MORRISON & FOERSTER LLP

8
9 By:



Eric M. Acker

Attorney for Defendants

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11 CC-LA JOLLA, INC., CCW-LA
12 JOLLA, L.L.C., CC-
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