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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

DONALD R. SHORT, JAMES F. GLEASON, CASEY MEEHAN, MARILYN SHORT, PATTY WESTERVELT, AND DOTTIE YELLE, individually, and on behalf of all others similarly situated, Plaintiffs, v. CC-LA JOLLA, Inc., a Delaware Corporation, CC-LA JOLLA, L.L.C., a Delaware limited liability company, CC-DEVELOPMENT GROUP, INC., CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP, an Illinois Limited Partnership, and DOES 1 to 110, inclusive, Defendants.	CASE NO: GIC877707 Date: December 14, 2007 Time: 10:30 a.m. Judge: Hon. Yuri Hofmann Dept: 60 Action Filed: December 29, 2006 Trial Date: Not yet set MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

> "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impractical to bring them all before the court, one or more may sue . . . for the benefit of all." (Code Civ. Proc., § 382.)

This is such a case. The plaintiffs, residents of a "residential care facility for the elderly," have paid life savings in excess of $80 million in exchange for lifetime care promises, and seek to redress claims of financial fraud they allege were committed by the defendant providers of that care. The claims of the plaintiffs and all 349 putative class members are predominately based on identical written communications *from the defendants to the entire class*. All members of the putative class:

- live in the same facility, which is owned and operated by the same defendants;
- paid a substantial entrance fee for pre-paid lifetime health care to the same defendants;
- signed identical residency agreements with the same defendants;
- were provided identical documents from defendants related to that residency;
- have been subject to the same percentage increases in monthly fees, including an increase in monthly fees to pay for pre-paid lifetime health care a second time;
- received identical memoranda from the same defendants;
- received identical letters from the same defendants;
- received identical marketing brochures from the same defendants;
- were exposed to the same advertising by the same defendants;
- had 24-hour emergency medical response from a licensed nurse withdrawn on the same day by the same defendants;
- had identical material information withheld from them by the same defendants;
- have suffered through the same construction of a defendants' adjacent new building and closure of a common swimming pool, exercise room, art studio, computer center, card room, picnic tables, putting green, walking paths, and living room; and
- are receiving or will receive health care at the same care center owned and operated by the same defendants.

In short, the theories and evidence presented in this case are predominately identical for all

plaintiffs and the putative class. And, as the Court may recall from the November 2, 2007 hearing, there are dozens of other residents with identical claims who will bring separate lawsuits if the class is not certified.[1]

The essential issue to be decided by this motion is *not* whether plaintiffs will prevail, but whether their claims and the claims of the other residents can be *more efficiently managed* if the Court permits the case to proceed as a class action. Because all legal requirements for certification are satisfied, the Court should grant the motion to certify each of the two sub-classes set forth in the accompanying motion.

II. LEGAL STANDARDS FOR DETERMINING THIS MOTION

The California Supreme Court has explained that "[t]he decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]" (*Fireside Bank v. Superior Court* (*Fireside Bank*) (2007) 40 Cal.4th 1069, 1089, italics added.)

The standards for class certification in California are well established. "Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.'" (*Sav-On Drug Stores, Inc. v. Superior Court* (*Sav-On*) (2004) 34 Cal.4th 319, 326.) The party seeking class certification has the burden to establish "(1) . . . a sufficiently numerous, ascertainable class, (2) . . . a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." (*Fireside Bank, supra*, 40 Cal.4th at p. 1089; *Sav-On, supra*, 34 Cal.4th at p.

[1] Declaration of Michael A. Conger at paragraph 9. (Conger Dec., ¶ 9.) The 85 resident petitions are attached at Exhibit 1 to the accompanying Notice of Lodgment. (NOL, Exh. 1.)

326.) In turn, "the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' [Citation.]" (*Fireside Bank, supra*; *Sav-On, supra.*)

Whether certification of a class is appropriate is "essentially a procedural [question] that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440.) "A largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action." (*Fireside Bank, supra*, 40 Cal.4th at p. 1074.) "The virtue of this sequence is that it promotes judicial efficiency, by postponing merits rulings until such time as all parties may be bound, and fairness, by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable rulings." (*Ibid.*) "The rule stands as a barrier against the problem of 'one-way intervention,' whereby not-yet-bound absent plaintiffs may elect to stay in a class after favorable merits rulings but opt out after unfavorable ones." (*Ibid.*)

The critical inquiry on a class certification motion is whether "the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On, supra*, 34 Cal.4th at p. 327, italics added.) "A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be *advantageous to the judicial process and to the litigants*.' [Citations.]" (*Sav-On, supra*, 34 Cal.4th at p.326, italics added.) In order to determine whether common questions of law or fact predominate, "the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman and Broad Home Corp.* (*Hicks*) (2001) 89 Cal.App.4th 908, 916, italics added, fn. omitted, citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810-811.)

"[*W*]*hen the same material misrepresentations have actually been communicated to each member of a class*, an inference of reliance arises to the entire class." (*Mirkin v. Wasseran* (1993)

5 Cal.4th 1082, 1095, italics in original.) "[T]his . . . mean[s] that actual reliance can be proved on a class-wide basis when each member had read or heard the same misrepresentations." (*Ibid.*) "The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence. The fact that reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814.) "[I]f the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." (*Ibid.*, fn. omitted.) Similarly "an inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation." (*Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355,363.) "Like the circumstances discussed in *Vasquez* and *Occidental*, [concealment] permits an inference of common reliance. . . .[because] fail[ure] to disclose . . . would have been material to any reasonable person contemplating the purchase . . . ." (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (*Mass. Mutual*) (2002) 97 Cal.App.4th 1282, 1293.)

III. FACTUAL BACKGROUND

This case involves a claim of actual and constructive fraud perpetrated against approximately 349 vulnerable, elderly San Diegans residing at a continuing care retirement community. (Third Amended Complaint ("TAC"), filed August 28, 2007, ¶ 11.) Through numerous publications, impressive marketing brochures, oral presentations, letters, memos, and contracts, the caregiver defendants made identical "continuing care promises" to the elderly plaintiffs and the other elderly residents of La Jolla Village Towers ("LJVT"), located at 8515 Costa Verde Boulevard in San Diego. (TAC, ¶ 12.) These continuing care promises were material and calculated to induce trust and reliance in defendants to fulfill lifetime health care promises in exchange for total payments of approximately $80 million. (TAC, ¶ 13, NOL, Exh. 3, column (f); NOL, Exh. 4 [deposition of defendants' chief financial officer Gary Smith, pp. 26:23-27:3 [approximately $80 million paid into master trust].) Relying on those promises, LJVT

residents—whose average age exceeds 83 years—paid "entrance fees" ranging from $176,700 to $1,222,000[2] upon moving into an independent living apartment. (TAC, ¶ 14.) Defendants have abandoned numerous, material continuing care promises made to the plaintiffs, and have exhausted the entire trust fund, in part by means of contractually-unauthorized "cash disbursements" to individual owners of LJVT. (TAC, ¶ 15, Exh 14, p. 24 [authorizing use of master trust funds only for "repaying secured indebtedness relating to the loan that financed the construction of the community and other liabilities related to the Community]; NOL, Exh. 5 [acknowledging that entrance fees were utilized, in part, for profit]; NOL, Exh. 4, CFO Smith's deposition, pp. 29:9-24 ["all the money paid into the master trust would immediately get loaned" to defendants], pp. 39:19-40:5 [terms of loan were zero percent interest for 50 years], p. 38:17-25 [distribution to defendant CC Development Group, Inc. of $2,104,394 from master trust].) None of the $80 million trust fund remains to be used, as promised, for pre-paid long-term medical care. (TAC, ¶ 15, NOL, Exh. 5 ["no community income is recognized from entrance fees"].) In fact, defendants have begun charging the plaintiffs and all of the other elderly putative class member residents for long-term health care a second time. (NOL, Exh. 5 [independent living monthly fees "cover operating expenses of . . . the Care Center"]; Gleason Dec., ¶ 6.)

"Continuing care retirement communities ["CCRCs"] are an alternative for the long-term residential, social, and health care needs of California's elderly residents, and seek to provide a continuum of care, minimize transfer trauma, and allow services to be provided in an appropriately licensed setting." (Health & Saf. Code, § 1770, subd. (a).[3]) CCRCs are regulated, in part, by sections 1770 through 1793.62, which "state[] the *minimum* requirements to be imposed upon any entity offering or providing continuing care." (§ 1770, subd. (f), italics added; § 1775, subd. (d); TAC, ¶ 21.) These minimum requirements "appl[y] equally to for-profit and nonprofit provider entities." (§ 1770, subd. (e); TAC, ¶ 22.) Section 1775, subdivision (e), states that "[t]his chapter shall be liberally construed for the protection of persons attempting to obtain

[2] See NOL, Exh. 3, a spreadsheet provided by defendants in response to plaintiffs' special interrogatory number 1. (Conger Dec., ¶ 13; NOL, Exh. 2, p. 3:11-26.) Resident number 226 paid an entrance fee of $176,700. Resident 339 paid an entrance fee of $1,222,000.

[3] All further statutory references will be to the Health and Safety Code unless otherwise stated.

or receiving continuing care." (TAC, ¶ 26.)

Section 1771, subdivision (c)(8), provides: "'[c]ontinuing care contract' means a contract that includes a *continuing care promise* made *in exchange for an entrance fee*, the payment of periodic charges, or both types of payments. A continuing care contract may consist of one agreement or a series of agreements and other writings incorporated by reference." (Italics added.) Section 1771, subdivision (c)(10), provides:

> "'[c]ontinuing care promise' means a promise, express or implied, by a provider to provide one or more elements of care to an elderly resident for the duration of his or her life or for a term in excess of one year. Any such promise or representation, whether part of a continuing care contract, other agreement, or series of agreements, or contained in any advertisement, brochure, or other material, either written or oral, is a continuing care promise." (TAC, ¶¶ 23-25.)

At LJVT, defendants operate a 21-story, 227-unit "independent living" apartment building. (TAC, ¶ 27.) At a separate, adjoining location (4171 Las Palmas Square), the defendants operate a "care center" providing assisted living, memory support/Alzheimer's care, and skilled nursing care. (*Ibid.*) A second, connecting 21-story independent living apartment building is under construction. (Gleason Dec., ¶ 7.) Admission to LJVT is limited to persons age 62 or older who pass a physical examination and meet defendants' income and asset criteria, and it begins with acceptance into the independent living apartment building. (TAC, ¶ 27; NOL, Exh. 6, deposition of defendants' sales director Kelly Parkins Aguirre, pp. 106:5-109:7.)

Defendants charge residents in two ways. (TAC, ¶ 33.) *First*, all residents pay an "entrance fee," ranging from $176,700 to $1,222,000 (NOL, Exh. 3) upon moving into an independent living apartment. (§ 1771, subd. (e)(3) ["'entrance fee' means the sum of any . . . consideration made . . . by a person entering into a continuing care contract"].) *Second*, defendants charge residents a "monthly fee," ranging from $1,997 to $5,347.[4]

Prospective residents, including the entire putative class, were attracted by defendants' advertising and impressive marketing brochures. (NOL, Exhs. 7-18.) These marketing documents were intended by defendants to be read and relied on by prospective residents, i.e., to induce them to move in to LJVT. (NOL, Exh. 6, Parkins Aguirre deposition, pp. 201:12-203:19

[4] NOL, Exh. 3. Resident number 188, who paid an entrance fee of $133,475, also pays a monthly fee of $1,997. Resident number 339, who paid an entrance fee of $1,222,000, also pays a monthly fee of $5,347.

[defendants expect prospects for residency will read and rely on marketing material and "and believe that they're true"].) Each of these representations, "whether contained in any advertisement, brochure, or other material, either written or oral, is a continuing care promise." (§ 1771, subd. (c)(10).) These statutory continuing care promises included the following five categories of material representations: (1) "setting aside" a portion of each resident's entrance fee into a trust fund to be used for pre-paid long-term health care, (2) repeatedly assuring residents that they would receive 24-hour emergency response from an on-site licensed nurse, (3) assuring the fixed-income residents that defendants would do their utmost to minimize the necessity of any future monthly fee increases, (4) assuring the "expert," "exceptional," "high quality, and "outstanding" nature of the pre-paid long-term health care to be received by residents in the care center, and (5) specifying services and facilities which would be provided to residents and expanding the common law covenant of quiet enjoyment. (TAC, ¶ 45.)

A. Plaintiffs and All Putative Class Members Were Falsely Told That Portions of Their Substantial Entrance Fees Would Be "Set Aside" and Were Pre-Payments for Lifetime Care in the Care Center, Where They Could Transfer, When the Need Arose, for No Additional Cost.

The defendants widely distributed to all residents the following written statements:

- "At La Jolla Village Towers . . . your entrance fee includes coverage for assisted living, memory support/Alzheimer's care and skilled nursing care. Residents who move to the on-site care center continue to pay the same monthly fee they would have paid for their independent living home." (NOL, Exh. 15.)
- "The entrance fee includes the apartment you select and the promise of temporary or long-term care in our future care center. . . . The monthly fee represents the cost of providing you with a range of services and amenities, such as weekly housekeeping, linen service, all utilities [etc.]." (TAC, Exh. 14, appendix C.)
- "Residents who are approved for continuing care and who transfer to the care center will continue to pay the same monthly fee they would have paid for their independent living apartment . . . care is included for an unlimited period." (NOL, Exh. 13.)
- "Care at these rates, which are typically lower than the care center market rates, is available for an unlimited period." (NOL, Exh. 12.)
- A portion of their entrance fee would be "set aside to cover additional costs associated with the higher levels of care" in the care center. (NOL, Exh. 19.)
- "[R]esidents . . . are protected against rising long-term care costs and enjoy the peace of mind knowing they have planned wisely for their future." (NOL, Exh. 11.)
- "We have determined that 8 percent of the entrance fee will be utilized to cover long-term

care expenses." (NOL, Exh. 20.)

- "For those residents who have selected the . . . Standard Care Plan . . . 8% of your total entrance fee paid is considered to be for pre-paid Long Term Care. [¶] For those residents who have selected the Unlimited Care Plan . . . approximately 23% of your total entrance fee paid is considered to be for pre-paid Long Term Care, as well as the entire $18,000 for the second person covered."[5] (NOL, Exh. 21 [Memo to "All Residents" dated November 14, 2000]; NOL, Exh. 22 [Memo to "All Residents" dated December 6, 2001].)

- "Based upon our estimate, the medical cost percentage for 2003 for entrance fees . . . paid by you during 2003 may be 44.2%." (NOL, Exh. 23.)

- "Each of our plans provides residents . . . with the peace of mind for the future should any health care needs arise. . . . If you and/or your spouse move to the care center, you will pay just one monthly fee—the monthly fee for independent living. Your lifetime benefits will cover the difference in the cost between the independent living monthly fee and the daily rates for the care center." (NOL, Exhs. 7, 10.)

- "[E]ntry fee[s] cover custodial care at the Care Center" (NOL, Exh. 19, p. 3 [Memorandum dated June 6, 2003 from executive director Hayes to all residents].)

- "[T]he monthly fee paid by a resident . . . does not increase if that resident moves to the care center, the resident will typically pay less for care center services that he or she would pay . . . without a continuing care contract." (TAC, ¶¶ 98, 123, Exh. 11.)

- "[B]ecause La Jolla Village Towers operates as a Continuing Care Retirement Community, residents receive long-term care benefits to help defray the cost of care. Under our continuing care plans, residents will be able to move to our on-site care center, offering high-quality assisted living, memory support/Alzheimer's care, and skilled nursing care if the need should arise, at virtually no increase in their monthly fee." (TAC, ¶¶ 98, 123, Exh. 7.)

- "Should the need for assisted living, Alzheimer's/memory support care or skilled nursing

[5] Defendants offer three levels of long-term health care plans, each providing for a greater number of pre-paid days in the care center: (1) the "Standard Continuing Care Plan," (2) the "Modified Continuing Care Plan," and (3) the "Extensive Continuing Care Plan." (TAC, Exh. 14, pp. 8-9.) The higher the number of pre-paid care center days, the higher the entrance fee. For example, under the "Modified Continuing Care Plan," the entrance fee is increased $12,000 for "each 100 additional care benefit days of coverage . . . ." (TAC, Exh. 14, p. 9.) And residents choosing the "Extensive Continuing Care Plan," also called the "Unlimited Long-Term Care Plan," are charged an additional $18,000 entrance fee for "Second Person Coverage," i.e., a spouse or domestic partner. (TAC, Exh. 14, Closing Worksheet.)

Defendants acknowledge that a resident's entrance fee typically comprises a substantial portion of that resident's life savings. (TAC, ¶ 36.) Indeed, one of defendants' marketing brochures state "[m]ost residents use all or a portion of the proceeds from the sale of their home to pay the entrance fee." (*Ibid.*; NOL, Exh. 12) Thus, once the entrance fee is paid in exchange for the promise of lifetime health care, the already vulnerable elderly residents become even more vulnerable, because they typically cannot afford to move out, forfeit their substantial entrance fee, and pay an additional entrance fee to a different CCRC or other nursing home facility. (TAC, ¶¶ 37-39.) In other words, LJVT residents depend on defendants to treat them fairly, and have no realistic alternative if they are cheated financially or mistreated. (TAC, ¶ 39.)

care arise, a resident . . . continue[s] to pay the same monthly fee charged for his or her independent living home . . . [which] does not increase if that individual moves to the care center" (TAC, ¶¶ 100, 125, Exh 12.)

- "[R]esidents' entrance fees or monthly fees [will not] be adversely affected if the Care Center does not do well financially [because] [t]he Care Center will be treated as a separate entity for budgeting purposes [and] CC-Development Group, Inc.[,] will fund any shortfalls which occur in the day-to-day operation of the Care Center." (TAC, Exh. 2, p. 2.)

- "Perhaps most important of all, La Jolla Village Towers offers . . . the peace of mind that comes from knowing your potential long-term care needs will be expertly met at our on-site care center at virtually no extra cost." (TAC, ¶ 45, Exh. 13.)

And each putative class member's identically-worded residency agreement stated that the entrance fee would be held in trust. (TAC, Exh. 14, p. 24.)

However, despite all of these continuing care promises, defendants force all residents to pay for "all operating expenses of the . . . Care Center." (NOL, Exh. 5.) Further, defendants have acknowledged that none of the $80 million collected from entrance fees remains, that all entrance fees have been expended, and that "entrance fees [are] utilized for capital expenditures, interest expense, any financial service obligations, and profit," but not for pre-paid long term health care. (NOL, Exh. 5.)

B. Plaintiffs and All Putative Class Members Were Falsely Told They Would Be Provided 24-Hour Emergency Response From a Licensed Nurse.

The defendants widely distributed to all residents the following written statements:

- "Wellness services . . . are available [to independent living residents] through our on-site wellness center[6] under the supervision of a licensed vocational nurse. . . . Our wellness center staff is also available around the clock to respond to medical emergencies." (NOL, Exh. 14, p. 1.)

- "Once our proposed on-site care center has been completed, residents will be entitled to receive long-term care right on our campus [and] wellness services will continue to be available through our on-site wellness center under the supervision of a licensed vocational nurse." (NOL, Exh. 14, p. 2.)

- "Office hours for the Wellness Center are 8:00 a.m. to 4:30 p.m. Monday to Friday. During non-office hours and on weekends, licensed nurses are on call." (NOL, Exh. 24 [memorandum to all residents from executive director Hayes dated August 6, 2003

[6] The wellness center—not to be confused with the care center—is located in the independent living building and is used to provide nursing care to independent living residents. The care center, located in an adjoining building, provides nursing care to patients admitted to assisted living, skilled nursing, and the memory support unit.

announcing revisions to the Resident Handbook].[7])

And in a four-page advertising supplement defendants published in late March 2000 in the San Diego Union-Tribune, the Los Angeles Times, and the Orange County Register, in an article entitled "Frequently Asked Questions," defendants stated:

> "**Q. When is a nurse available?**"
>
> "**A.** A nurse is on duty 24 hours a day, seven days a week. If he or she is not at the Wellness Center, residents can call the front desk staff, who will contact the nurse on the two-way radio."
>
> "**Q. How do I use the call lights?**"
>
> "**A.** The call lights are located in the bedroom(s) and bathroom(s) of each apartment. When you push the button . . . the Wellness Center nurse [is notified] immediately . . . ." (NOL, Exh. 7, pp. 6-7, boldface in original.[8])

However, defendants no longer have a licensed vocational nurse available to respond to emergencies for independent living residents at night. Instead, residents now are instructed to call 911 for medical emergencies. (NOL, Exh. 26, deposition of Donald R. Short, p. 300:8-10 ["we are now told that if we have a medical emergency in the middle of the night to call 911, which is what anybody can do"].)

C. Plaintiffs and All Putative Class Members Were Falsely Told They Could "Rest Assured" Hyatt Would Diligently Act To Minimize Future Monthly Fee Increases.

On April 28, 1998, the first day defendants acquired the 21-story apartment building, they began class-wide misrepresentations. In a letter dated April 28, 1998, to all residents, defendants'

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[7] All residents were told that the Resident Handbook was a part of the parties' contract:

> "Many of you asked if the Resident Handbook would still be in effect once you sign the Continuing Care Residency Agreement. Yes, the Resident Handbook is incorporated in the Agreement and sets forth certain day-to-day operating policies of the community. Upon signing your Residency Agreement you will sign a receipt acknowledging you have received the Resident Handbook." (NOL, Exh. 25, p. 2 [March 10, 2000 letter to all residents].)

Indeed, the first page of each putative class member's identical residency agreement acknowledges receipt of the Resident Handbook. (TAC, Exh. 14.)

[8] Defendants told members of the resident marketing committee, used by defendants to assist in their marketing efforts (TAC, ¶ 47), that this particular advertisement "has really been keeping the office busy." (NOL, Exh. 7, p. 1.)

chief operating officer Mary G. Leary touted the advantages to residents of becoming a member of defendants' "family of senior living communities." (TAC, Exh. 1, p. 1.) "Please rest assured that we will work diligently to manage expenses and that, as an affiliate of Hyatt Corporation, [LJVT] will reap the benefits of group purchasing volume discounts." (TAC, Exh. 1, p. 2.)

Unknown to residents, that *very same day* the defendants entered into a sweetheart 50-year contract[9] with a Hyatt affiliate which effectively allows the defendants' owners to funnel residents' cash to themselves under the guise of necessary operating expenses, which residents must then pay pursuant to the residency agreement. (TAC, ¶ 73; NOL, Exh. 27 [April 28, 1998 management and marketing agreement]; TAC, Exh. 14, p.4 [monthly expenses include all operating expenses].) Notably, the management and marketing agreement, which was never provided to the residents, was signed by both parties—defendant CC-La Jolla, LLC (the defense entity which owns LJVT) and defendant Classic Residence Management Limited Partnership (the defense entity which operates LJVT)—*by the same person.* (NOL, Exh. 27, p. 29.)

Each putative class member signed the identical residency agreement (NOL, Exh. 3), which provided residents a 90 day cancellation period. (TAC, Exh. 14, p. 18 [cancellation period of 90 days].) And each putative class member signed an identical promissory note which reduced the amount of any entrance fee refund over the ensuing 50-month period. (TAC, Exh. 14, pp. Short 1469-1470 [promissory note repayment schedule "less . . . a charge of two percent (2%) of the Entrance Fee for each month" or residency after the cancellation period].) Therefore, it was in defendants' financial interest to keep all residents in the dark regarding this aspect of their financial scheme.

In furtherance of this common scheme, the defendants continued to falsely proclaim to all

[9] The contract's original term is 25 years with five, five-year renewal options at Classic Residence's (the operator and recipient of resident funds paid via monthly fees) option. (NOL, Exh. 27, p. 4.) Pursuant to that agreement, residents must pay for marketing (p. 10, ¶ 3.6), management (p. 12, ¶ 4.2(a)), commissions (p. 4, ¶ 4.4), and administrative services (p. 15, ¶ 7.2). Worse, because the six percent management fee charged is a percentage of monthly fees, each time the defendants raise monthly fees they automatically increase their management fee by the same percentage.

residents that it was trying to minimize any annual monthly fee increases.[10] However, defendants' chief operating officer Gary Smith confirmed in his deposition that (1) defendants have never even attempted to obtain a lower bid for management services, and (2) defendants have never considered keeping the management fee it pays itself the same dollar amount rather than paying itself an increase. (NOL, Exh. 4, CFO Smith's deposition, pp. 132:17-133:16.)

Defendants also told all residents "fee increases, if any, will take place once a year. This has been Hyatt's experience with their other [CCRCs]. In some cases there has been a refund but no increase over 3 [percent]." (NOL, Exh. 31.) And defendants provided residents projections anticipating only three percent increases in monthly fees. (NOL, Exh. 32.)

Yet defendants have increased monthly fees—including the amount the defendants pay themselves for management fees—by more than 49 percent since January 1, 2000. (NOL, Exh. 33 [defendants' supplemental response to special interrogatory number two].)

D. Plaintiffs and All Putative Class Members Were Falsely Told That the Pre-Paid Lifetime Care They Would Receive at the Care Center Would Be "Expert," "Exceptional, "High Quality," and "Outstanding."

The defendants widely distributed to plaintiffs and putative class members the following written statements:

- "***Exceptional Care*** [¶] In the Care Center at La Jolla Village Towers, the highest value will be placed on delivering exceptional care [by a]n expert staff . . . ." (NOL, Exh. 9 [LJVT newsletter summer 1999], emphasis in original].)
- "Under our continuing care plans, residents will be able to move to our on-site care center, offering high-quality assisted living, memory support/Alzheimer's care and skilled nursing

[10] NOL, Exh. 28 [December 20, 2000 letter to all residents from executive director Vicky Simpson: "You can rest assured that I, along with the entire staff, am always diligently working to minimize the impact of such increases"]; TAC, Exh. 3 [December 26, 2001 letter to all residents from executive director James Hayes: "Please be assured that we are looking at all our expenses and systems to find ways of reducing the impact of such increases"]; NOL, Exh. 29 [December 15, 2003 letter to all residents from executive director Steve Brudnick: "Please be assured that it is our goal to continue to operate the community in a fiscally responsible manner"]; NOL, Exh. 30 [November 14, 2005 letter to all residents from executive director Steve Brudnick: "Please be assured that it is our goal to continue to operate the community in a fiscally responsible manner"].

The fact that four different executives of defendants used some variation of the "please rest assured" theme permits a reasonable inference that these words were intentionally chosen to induce trust and reliance.

care . . . " (NOL, Exh. 8 [marketing brochure], p. 6.)

- "Perhaps most important of all, La Jolla Village Towers offers . . . the peace of mind that comes from knowing your potential long-term care needs will be expertly met at our on-site care center at virtually no extra cost." (TAC, ¶ 45, Exh. 13 [letter to residents].)

Defendants continue to openly state that the nursing care provided at their care center is "outstanding." (NOL, Exhs. 34 [letter dated August 29, 2007 from care center administrator Jonathan Bliss], Exh. 35 [letter dated September 5, 2007 from Mr. Bliss].)

However, plaintiffs are prepared to prove at trial that the quality of the care provided at defendants' care center is not only far below the *higher* standard promised by defendants, but below the general standard of care for such facilities. (Conger Dec., ¶ 12; TAC, ¶¶ 51-55.)

E. Plaintiffs and All Putative Class Members Were Falsely Told They Would Enjoy Retirement Living at Its Finest, Including Several Amenities, Since Withdrawn, and a Peaceful, Quiet Living Environment.

All plaintiffs and putative class members were told by defendants, in writing, that they would enjoy "luxury senior living at its finest," "a relaxed, easy going lifestyle," "luxurious surroundings," and "almost unlimited opportunities for relaxation," "the finest elements of retirement living," and peace and quiet. (NOL, Exhs. 7-18; TAC ¶ 45.) "This warm and gracious setting brings together the finest elements of retirement living—all designed for your comfort and backed by the sterling reputation of Hyatt." (NOL, Exh. 8, p. 2.) "We firmly believe that people shouldn't have to compromise their standards as they grow older." (NOL, Exh. 7.) "[T]hey should enjoy gracious surroundings as well as security and peace of mind . . . ." (*Ibid.*) And all were also told they would enjoy specific amenities, such as a heated indoor swimming pool, an exercise room, an art studio, a billiards room, a computer center, picnic tables, putting green, walking paths, and a card room, to name a few. (NOL, Exhs. 7-18.)

However, these amenities have been discontinued. All putative class members have suffered not only the closure of the pool, exercise room, art studio, computer center, and card room, but all have had the park-like entrance closed.[11] (NOL, Exhs. 36-37; TAC, ¶¶ 60-71;

[11] The putative class does not include any residents who moved in after the construction of Tower II began on November 3, 2005.

Gleason Dec., ¶¶ 8-9.) And all have similarly endured the same noise, dust, and a frigid lobby and mail room. (NOL, Exh. 38; Gleason Dec., ¶ 10.)

IV. ALL APPLICABLE CLASS CERTIFICATION CRITERIA UNDER CODE OF CIVIL PROCEDURE SECTION 382 ARE MET.

A. The Proposed Class Is Readily Ascertainable

"Whether the class is 'ascertainable' within the meaning of Code of Civil Procedure section 382 'is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying the class members." (Weil & Brown, Cal. Practice Guide: Civil Proc. Before trial (The Rutter Group 2007), ¶ 14:11.1, p. 14-8, quoting *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.) Here, the putative class is readily ascertainable.

On February 28, 2007, Mr. Short served defendants a special interrogatory which asked the defendants to identify each resident of LJVT (by number to maintain privacy) since January 1, 1997, and for each identify which version of the residency agreement he or she signed, as the date of residency, the amount of entrance fee paid and monthly rent. (NOL, Exh. 3.) On September 20, 2007, after almost six months' extension of time to respond, the defendants served their response to this interrogatory, and that response, as provided by the defendants, is lodged as Exhibit 3. (Conger Dec., ¶ 13.) Examination of this information demonstrates that there are approximately 349 persons who fit within the definition of the putative class.[12] The discovery responses provided by the defendants are reliable because they are required to maintain detailed records regarding each resident. (See., e.g., Cal. Admin. Code, tit., 22, § 87570 [required detailed resident records to be maintained].) Therefore, ascertaining the members of the putative class, and of each sub-class, can easily be accomplished.

B. The Claimants Are Numerous.

Although the class must be numerous in size, "there is no fixed minimum or maximum number." (Weil & Brown, *supra*, ¶ 14:21, p. 14-14; *Rose v. City of Hayward* (1981) 126

[12] The putative class excludes (1) current residents who signed either the August 1, 2005 or January 1, 2006 versions of the residency agreement, and (2) those residents who terminated their residency (as a result of relocation or death). Since the defendants provided this information, at least one member of the putative class has died. (Conger Dec., ¶ 14.)

Cal.App.3d 926, 934 [no minimum number of plaintiffs required]; *Bowles v. Superior Court* (1955) 44 Cal.2d 574, 587 [class of 10]; *Collins v. Rocha* (1972) 7 Cal.3d 232, 234 [class of 35].) Here, the named plaintiffs and 85 other residents have already stated they have similar claims. (NOL, Exh. 1.) As demonstrated above, the size of the each sub-class consists of approximately 349 residents.

C. Commonality and Community of Interest Are Present.

"'Predominant' common question[,] in essence, . . . means [that] 'each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment'; and 'the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.'" (Weil & Brown, *supra*, ¶ 14:11.6, p. 14-8, quoting *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 913-914, internal quotes omitted; *Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 117.) "'As a general rule if the defendant's liability can be determined by facts common to all members, a class will be certified even if the members must individually prove their damages.'" (Weil & Brown, *supra*, ¶ 14:11.7, p. 14-9, quoting *Hicks*, *supra*, 89 Cal.App.4th at p. 916.)

1. Common issues of fact predominate.

Here, as set forth in the TAC (¶¶ 76-82),[13] the material facts set forth above, and the documents lodged with this motion, common issues of fact predominate. Indeed, every continuing care promise made by the defendants was in the form of widely distributed brochures, advertisements, letters, memoranda, handbooks, etc., to plaintiffs and putative class members. And all plaintiffs and putative class members signed the identical residency agreements and related documents. All putative class members live in the same facility and entered it under common financial terms, i.e., payment of a substantial entrance fee and agreement to pay an ongoing monthly fee. And each have been subject to the same percentage increases in those monthly fees. Each was promised 24-hour emergency medical response from a licensed nurse—a

[13] The defendants, which challenged virtually every aspect of both the first amended complaint and second amended complaints with two demurrers and a motion to strike, never challenged the sufficiency of plaintiffs' class allegations.

critically important service to elderly citizens, and each had such service withdrawn on the same date. The putative class has lived through the prolonged closure of the same heated, indoor swimming pool, water aerobics classes, exercise room, art studio, computer center, card room, picnic area, putting green, walking paths, living room and other common areas. (Gleason Dec., ¶¶ 8-10.) Each has endured the same dust, cold, noise, disruption, safety and health hazards of the construction. Each is receiving or will receive care from the same care center pursuant to the identical version of the defendants' residency agreement. (TAC, Exh. 14, pp. 8-12, 15-18.) And each had the same material information withheld, including (1) the master trust agreement, (2) the 50-year management and marketing contract, (3) the 50-year, zero percent interest loan from the master trust,[14] (4) defendants' intent to charge care center operating expenses to independent living monthly fees.

Common issues of fact will need to be decided. Among them: Did defendants make these representations of fact? Were they false? Did the defendants know they were false when made? Did the defendants intend to defraud LJVT residents? Are those residents entitled to rescission? Damages? Was material information concealed? Was the concealment with an intent to defraud? Was the appropriation of the entrance fees and monthly fee increases wrongful use with an intent to defraud sufficient to constitute financial elder abuse? Were defendants' management, marketing, and administrative fees excessive. Were the commissions defendants took from entrance fees (approximately $4 million) authorized? Excessive? Does a fiduciary duty exist? Was it violated? Did defendants breach LJVT residents' contract, including continuing care promises?

The defendants themselves have demonstrated that common issues of fact predominate. *First*, in their answer, filed October 29, 2007, the defendants raise *identical* defenses as to all six

[14] In one of defendants' more brazen deceptions, they told all residents "[r]emember that the use of your entrance fee is protected by a trustee and that entrance fees are *only* to pay off loans and other trustee-approved expenses." (NOL, Exh. 39 [June 1998 questions and answers memorandum to all residents], emphasis in original.) In fact, the concealed master trust agreement and loan from that trust, all prepared by defendants, afforded the trustee no discretion and required the trustee to loan the entire corpus of the trust, at zero percent interest with no principle repayment obligation for 50 years, to defendants immediately upon receipt of a resident's entrance fee. (NOL, Exh. 4, deposition of CFO Smith, p. 29:22-25 ["all the money that was paid into the master trust would immediately get loaned"].)

plaintiffs. Indeed, not a single defense is asserted against fewer than all plaintiffs. Thus, the defendants' answer demonstrates that the defenses—which are identical as to these six plaintiffs—will be similar as to the entire class. *Second*, the defendants' responses to plaintiffs' form interrogatory 15.1 raises identical facts, documents and witnesses to the claims asserted by all plaintiffs. (NOL, Exh. 40, pp. 4:11-12:23.) If the facts, documents and witnesses supporting defendants' defenses are identical as to all plaintiffs, who moved to LJVT over a six-year period from 1996 to 2002 (Conger Dec., ¶ 15), they will be substantially similar, if not identical, for the remainder of the class.

The putative class believes its claims are factually similar. 85 putative class members have stated he or she has "similar claims to the plaintiffs' claims."[15] Each has stated he or she is "familiar with [this lawsuit] because I have received and read the plaintiffs second amended complaint, with exhibits." (NOL, Exh. 1; Conger Dec., ¶ 9.)

Finally, the more than 20,000 documents produced in this case will be the same documents relevant to claims by the putative class. (Conger Dec., ¶ 16.) For all of these reasons, common issues of fact predominate.

2. *Common issues of law predominate.*

Common issues of law also predominate. Included among them: Does a de jure fiduciary duty exist between a continuing care provider and its residents? Are the residency agreements ambiguous? Does the integration clause of the defendants' standard form residency agreement (TAC, Exh. 14, p. 30) trump section 1771, subdivision (c)(10)? Should parol evidence be permitted? Are provisions of the residency agreement unconscionable? Is the plaintiff class entitled to injunctive relief? What is the correct calculation of prejudgment interest for plaintiffs' damages and rescission claims?

3. *The class representatives have claims similar to and are subject to similar defenses as the other class residents.*

The "class representative's claim must be 'typical' but not necessarily identical to the claims of other class members. (Weil & Brown, *supra*, ¶ 14:29, p. 14-22.) It is sufficient that the

[15] NOL, Exh. 1. The LJVT residents who have signed petitions indicating a desire to join this case and have it certified as a class reviewed the second amended complaint, with exhibits. The second and third amended complaints asserted identical facts, had identical exhibits attached, and asserted almost identical causes of action.

representative be *similarly situated* that he or she will have the *motive to litigate* on behalf of all class members. (*Ibid.*, italics in original, citing *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) "Thus, it is not necessary that the class representative have personally incurred *all* of the damages suffered by each of the other class members. (Weil & Brown, *supra*, ¶ 14:29, p. 14-22, italics in original, citing *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.) "[I]t has never been the law in California that the class representative must have *identical* interests with the class members. The only requirements are that common questions of law and fact *predominate* and that the class representative be *similarly* situated." (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347, italics in original.) This standard is met because plaintiffs have asserted claims which arise from common facts.

4. *The plaintiffs can and will adequately represent the class and have selected competent class counsel.*

The class representatives, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.) "Since the judgment rendered in a class action will bar further relief to the class members, the representative plaintiff must assert *all* claims reasonably expected to be raised by members of the class (i.e., all claims part of the 'same cause of action' asserted by the class representative)." (Weil & Brown, *supra*, ¶ 14:31, p. 14-23.)

The plaintiffs—who seek no compensation for themselves as class representatives—more than meet these tests. (NOL, Exh. 41, deposition of Casey Meehan, p. 289:11-23 ["I am much younger than many of them, and I feel I can speak for some of those who are unable to"].) Mr. Gleason is the current president of the resident council, which is elected by all LJVT residents. (Gleason Dec., ¶ 3.) Mr. Short is an elected council member. (Gleason Dec., ¶ 4.) And Ms. Westervelt is a past president of the resident council. (Gleason Dec., ¶ 5.) Plaintiffs and the experienced attorneys they hired (Conger Dec., ¶¶ 1-8; Benes Dec., ¶¶ 1-8) have identified and prosecuted all potential claims which could reasonably be expected to be raised from the same common facts alleged here. And none of the putative class members have requested that additional claims or theories be pursued. (Conger Dec., ¶ 17.)

D. The Plaintiffs' Claims Are Better Addressed in a Class Action Rather than Individual Lawsuits.

"In determining whether a class action would be 'superior' to individual lawsuits, courts usually consider: [1] [t]he interest of each member in controlling his or her case personally; [2] [t]he difficulties, if any, that are likely to be encountered in managing a class action; [3] [t]he nature and extent of any litigation by individual class members already in progress involving the same controversy; [and 4] [t]he desirability of consolidating all claims in a single action before a single court." (Weil & Brown, *supra*, ¶ 14:16, p. 14-12, citations omitted.)

Again, all of these factors favor certification. Numerous putative class members have expressed a desire to proceed collectively. (NOL, Exh. 1; Conger Dec., ¶ 9.) No difficulties in management are anticipated, and notification to the class is readily manageable. (Conger Dec., ¶ 18.) No other cases are known to be in progress. Finally, the claims presented are better asserted in a class action than in individual suits, which will occur if the class is not certified. (NOL, Exh. 1.) And there is enormous efficiency to be achieved by proceeding collectively, because the evidence, including 20,000 documents produced to date, will be the same in successive lawsuits. Because defendants have deposed each plaintiff for two or three days, certification will permit this process to be streamlined.[16] (Conger Dec., ¶¶ 10, 16, 19.) And several aspects of this case involve some convoluted and complex—albeit identical—facts: defendants' (1) complicated and numerous contracts (e.g., escrow agreement, deposit subscription agreement, joinder in master trust, promissory note, residency agreement), (2) two sets of financial statements, and (3) byzantine corporate structure. (Conger Dec., ¶ 20; NOL, Exh. 42.)

Certification will also allow the numerous similar claims of the putative class to be resolved sooner. As defendants are aware, 20 LJVT residents—no longer putative class members—have died since this case was filed. (Gleason Dec., ¶ 12.) Thus, denial of certification will effectively leave many of the claims of the elderly putative class unaddressed.

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[16] A defendant is only entitled to a "reasonable" number of depositions from unnamed plaintiffs. (*National Solar Equip. Owners' Assoc., Inc. v. Grumman Corp.* (1991) 235 Cal.App.3d 1273, 1283-1284 ["if adverse parties were allowed full discovery of every unnamed class member, there would probably be no class actions"].)

V. PLAINTIFFS' CONSUMER LEGAL REMEDIES ACT CLAIMS SHOULD BE CERTIFIED UNDER THE MANDATORY PROVISIONS OF CIVIL CODE SECTION 1781, SUBDIVISION (B).

"A class action under the CLRA is governed exclusively by the terms of Civil Code section 1781, rather than the more general provisions of Code of Civil Procedure section 382." (*Mass. Mutual, supra*, 97 Cal.App.4th at p. 1286.) The criteria for class certification under the Consumer Legal Remedies Act (CLRA) are very similar to, but not coextensive with, the criteria for class certification under Code of Civil Procedure section 382. In *Hogya v. Superior Court* (*Hogya*) (1977) 75 Cal.App.3d 122, 140, the Court of Appeal for the Fourth Appellate District, Division One, held that: "Civil Code section 1781, subdivision (b), establishes *exclusive* criteria for class certification in suits brought pursuant to the Consumers Legal Remedies Act. If the statutory criteria are satisfied, a trial court is under a duty to certify the class and is vested with no discretion to deny certification based upon *other* considerations." (Italics modified.)

Civil Code section 1781, subdivision (b), provides:

> "The court *shall* permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:
>
> (1) It is impracticable to bring all members of the class before the court.
>
> (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.
>
> (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.
>
> (4) The representative plaintiffs will fairly and adequately protect the interests of the class." (Italics added.)[17]

As demonstrated in Section IV, *ante*, each of these conditions exist.

VI. CONCLUSION

Based on the foregoing arguments and authorities, plaintiffs request that their motion for class certification be granted.

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[17] "Unlike a plaintiff proceeding under Code of Civil Procedure section 382, a plaintiff moving to certify a class under the CLRA is not required to show that substantial benefit will result to the litigants and the court." (*Mass. Mutual, supra*, at fn. 1.) "Thus, unlike Code of Civil Procedure section 382, the CLRA does not require that a plaintiff show a probability that each class member will come forward and prove his separate claim to a portion of the recovery." (*Ibid.*)

Dated: November 16, 2007

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By: _____

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