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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: August 17, 2007
Time: 10:30 a.m.
Judge: Hon. Yuri Hofmann
Dept: 60
Action Filed: December 29, 2006
Trial Date: Not yet set

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT

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I. INTRODUCTION

This case involves a massive actual and constructive fraud perpetrated by wealthy heirs of the Hyatt hotel fortune against more than 300 vulnerable, elderly San Diegans residing at a continuing care retirement community. (Second Amended Complaint ("SAC"), filed June 13, 2007, ¶ 11.) Through numerous publications, marketing brochures, oral presentations, letters, memos, and contracts, the caregiver defendants made knowingly false "continuing care promises" to the elderly plaintiffs and the 300 other elderly residents of La Jolla Village Towers ("LJVT"). (SAC, ¶ 12.) These continuing care promises were calculated to induce trust and reliance in defendants to fulfill lifetime health care promises in exchange for total payments of approximately $85 million. (SAC, ¶ 13.) Relying on those promises, LJVT residents—whose average age exceeds 83 years—paid "entrance fees" ranging from $218,000 to more than $700,000 into a trust created by defendants to be used in part for pre-paid life-time health care. (SAC, ¶ 14.) Defendants have abandoned numerous, material continuing care promises made to the plaintiffs, and have exhausted the entire trust fund by means of contractually-unauthorized "cash disbursements" to individual owners of LJVT. (SAC, ¶ 15.) None of the $85 million trust fund remains to be used, as promised, for pre-paid long-term medical care. (SAC, ¶ 15.) Incredibly, defendants have begun charging the plaintiffs and all of the other elderly residents for long-term health care a second time, and several other residents a third time. (SAC, ¶ 17.)

Although defendants have attempted to conceal their misconduct behind relatively complex financial transactions and illegally withheld documents required to be disclosed to the plaintiffs and the other residents (SAC, ¶¶ 86-94), the plaintiffs have successfully uncovered several of defendants' hidden financial schemes, and have adequately pleaded claims for relief. Therefore, defendants' demurrer should be overruled.

II. STATEMENT OF MATERIAL FACTS

Because plaintiffs have pleaded their claims with such detail, they refer the Court to the SAC for a statement of the material facts. Additionally, a condensed version of those facts is attached as Appendix A.

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III. STANDARD FOR DEMURRERS

"'A demurrer tests the legal sufficiency of factual allegations in a complaint. [Citation.]'" (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1168, quoting *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 42-43.) In ruling on demurrers, the court must "treat[] the demurrer as admitting all facts properly pleaded." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810.) "[I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." (*Aubry, supra*; *Fox, supra.*) "And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry, supra*; *Fox, supra.*)

IV. THE DEMURRER SHOULD BE OVERRULED BECAUSE PLAINTIFFS ALLEGE FACTS SUFFICIENT TO SUPPORT EACH OF THEIR CLAIMS.

A. Plaintiffs Have Standing To Bring Claims for Violations of the Health and Safety Code.

Defendants first assert that "there is no private right of action" for violation of Health and Safety Code section 1771.8." (Demurrer, p. 4:7-9.) Defendants claim that only "[t]he State Department of Social Services, the California Attorney General and local district attorneys, not private litigants, are authorized to bring actions under Chapter 10, including Section 1771.8." (Demurrer, p. 4:13-15.) Defendants are simply incorrect.

First, "[t]he general rule is that '[f]or every wrong there is a remedy.'" (*Faria v. San Jacinto Unified School District* (1996) 50 Cal.App.4th 1939, 1947, citing Civ. Code, § 3523.) "In accordance with that principle, '[t]he violation of a statute gives to any person within the statute's protection a right of action to recover damages caused by its violation.'" (*Ibid.*, citation omitted.)

Second, even assuming that Chapter 10 of the Health and Safety Code contains purely regulatory statutes, "[t]he question of whether a regulatory statute creates a private right of action depends on legislative intent." (*Thornburg v. El Centro Regional Medical Center* (2006) 143 Cal.App.4th 198, 204.) "In determining legislative intent, [courts] first examine the words themselves because the statutory language is generally the most reliable indicator of legislative

intent." (*Ibid.*)

Here, there is no doubt that the Legislature intended to allow private actions under Chapter 10 of the Health and Safety Code; *it expressly encouraged such actions*. For example, section 1793.5, subdivision (d), provides: "[a]n entity that abandons . . . its obligations under a continuing care contract . . . shall be liable *to the injured resident* for treble the amount of damages *in a civil action brought by* or on behalf of *the resident* in any court having proper jurisdiction." (Italics added.) "The court may . . . award all costs and attorney fees to the injured resident . . . ." (*Ibid.*) Subdivision (f) prohibits defendants from "issu[ing], deliver[ing], or publish[ing] . . . any printed matter, oral representation, or advertising material which does not comply with the requirements of this chapter . . . ." And subdivision (h) provides that "[a] violation under this section is an act of unfair competition as defined in Section 17200 of the Business and Professions Code."

And the Legislature has left no room for doubt that the provisions of the Health and Safety Code are to be liberally interpreted to help protect these elderly plaintiffs. (§ 1770, subd. (b) ["[b]ecause elderly residents both often expend a significant portion of their savings . . . and expect to receive care at their continuing care retirement community for the rest of their lives"], subd. (c) ["there is a need for disclosure . . . concerning the operations of the continuing care retirement community"], subd. (g) ["authority to enter into continuing care contracts granted by the State Department of Social Services is neither a guarantee of performance by providers nor an endorsement of any continuing care contract provisions"]; § 1771.7 [residents' rights]; § 1771.8, subd. (a) [express legislative intent to provide residents sufficient information regarding financial operations in light of their "unique and valuable perspective," to "reduc[e] conflict" and because "[CCRCs] are strengthened when residents know their views are heard and respected"]; § 1775, subd. (e) [liberal construction "for protection of persons attempting to obtain . . . continuing care"]; SAC, ¶ 85, and authorities there cited.)

In *Thornburg* the court held a private right of action allowed patients to sue to stop medical care providers from charging more than 10 cents a page for copies under Evidence Code section 1158. Of critical importance to the court was the lack of administrative remedies or

enforcement procedures in the statute. "[T]he absence of such an administrative remedy is telling." (*Thornburg, supra*, 143 Cal.App.4th at p. 205.) "Indeed, it distinguishes section 1158 from the cases the hospital relies upon [including] *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.App.4th [287]."[1] Because section 1771.8 contains neither administrative remedies nor enforcement procedures, a private right of action exists.

B. Plaintiffs Have Sufficiently Pleaded Fraud.

1. Plaintiffs' claims are sufficiently specific.

Defendants next assert that plaintiffs have failed to plead fraud with sufficient specificity. (Demurrer, pp. 5:15-7:7.) To the contrary, plaintiffs complaint is quite specific regarding 15 false representations, including how, when, where and to whom these representations were made. (SAC, ¶¶ 100-113.)

Moreover, with regard to defendants' advertising and marketing misrepresentations, the California Supreme Court has "observe[d] . . . certain exceptions which mitigate the rigor of the rule requiring specific pleading of fraud." (*Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 217.) "Less specificity is required when 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy . . . .'" (*Ibid.*, citation omitted.) "[I]n such a case . . . , considerations of practicality enter in." (*Ibid.*)

In *Committee on Children's Television*, the allegations of fraud were based on advertisements defendants had placed "in various media over a span of four years—mis-representations which, while similar in substance, differ in time, place, and detail of language and presentation." (*Ibid.*) In relieving the plaintiffs from alleging fraud with greater specificity, the Supreme Court reasoned: "[a] complaint which sets out each advertisement verbatim, and specified the time, place, and medium, might seem to represent perfect compliance with the specificity requirement, but as a practical matter, it would provide less effective notice and be less useful in framing the issues than would a shorter, more generalized version." (*Ibid.*) "For plaintiffs to provide an explanation for every advertisement would be obviously impractical." (*Id.*

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[1] *Moradi-Shalal* is the only case the defendants rely upon. (Demurrer, p. 5:1.)

at p. 218.)

Defendants also assert that those plaintiffs who moved into LJVT after some of the representations were made could not possibly have relied on those earlier statements. (Demurrer, p. 6:6-20.) However, defendants simply overlook allegations that the 1998 statements were repeated to all plaintiffs and relied on by them. (SAC, ¶¶ 47, 99, 123.) This reliance cause plaintiffs to pay substantial entrance fees and forego any refund of those fees during the 90-day cancellation period and the 50-month partial refund period. (SAC, ¶¶ 38, 117-118, 141-142.)

2. *Plaintiffs sufficiently pleaded that the representations were false when made.*

Defendants next incorrectly contend that plaintiffs have an obligation to assert more than knowledge of falsity—which the defendants concede plaintiffs do in paragraph 115—but that "[n]owhere do Plaintiffs allege a *single fact* supporting this conclusory claim." (Demurrer, p. 7:21.) Again, defendants simply overlook allegations of the SAC.

For example, plaintiffs allege: "Unknown to residents, on April 28, 1998, the very same day the defendants delivered a memorandum encouraging residents not to leave, stating '[p]lease rest assured that we will work diligently to manage expenses and that, as an affiliate of Hyatt Corporation, La Jolla Village Towers will reap the benefits of group purchasing volume discounts,' the defendants entered into a sweetheart 50-year contract with a Hyatt affiliate which effectively allows the defendants' owners to funnel residents' cash to themselves under the guise of 'necessary operating expenses.'" (SAC, ¶ 73.) And plaintiffs allege that: "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: '[p]lease be assured that we are looking at all our expenses and systems to find ways of reducing the impact of such increases . . . .' (Exh. 3.)" In fact, this was never done. Despite telling plaintiffs that their entrance fees would be placed into a trust and a portion of entrance fees would be used for long-term health care, defendants borrowed all entrance fees at zero percent interest for 50 years and retained none of the entrance fees to provide for long-term care. (SAC, ¶¶48-50.) And

defendants repeatedly told plaintiffs and other residents that long-term care would be provided at no additional cost. (SAC, ¶¶ 45, 111, 113.) However, because Care Center operating losses are charged to all residents—including Care Center residents—this repeated representation is simply untrue. These allegations easily demonstrate that defendants intentionally deceived the elderly plaintiffs. The representations were repeated both at the time of other events demonstrating their falsity, and indeed *after* defendants knew the representations were false.

3. *Plaintiffs sufficiently pleaded concealment.*

Defendants also contend that the plaintiffs' concealment claim fails because the "true facts" were disclosed to plaintiffs and because specificity is lacking. (Demurrer, p. 8:5-15, n. 8.) Each contention lacks merit.

First, plaintiffs pleaded concealment with particularity. (SAC, ¶¶ 145-153.) Plaintiffs specify six specific facts which were concealed from them and which, if known would have allowed plaintiffs to avoid injury. (SAC, ¶¶ 146, 151.) *Second*, even defendants' single evidentiary challenge to only one concealed fact—while entirely inappropriate for a demurrer—both misstates the SAC and the residency agreement. In note 9, defendants claim that plaintiffs allege "that funds from the Master Trust would be loaned to the Defendants." (Demurrer, p. 8:25-26.) Actually, plaintiffs allege: "defendants had loaned themselves approximately $80 million *interest free for 50 years* from the trust fund, *constituting the entire balance of the trust fund*." (SAC, ¶ 46(d), italics added.) These incredibly generous loan terms are simply not disclosed in any documents before the Court, and they were never disclosed to the plaintiffs.

4. *Plaintiffs sufficiently pleaded reliance and damage.*

Finally, defendants contend that plaintiffs "failed to plead justifiable reliance and damage." (Demurrer, p. 8:15-16, boldface and capitalization modified.) Defendants argue that "the SAC fails to allege that Plaintiffs were denied anything that they were entitled to receive under the CCRAs or the MTA . . . ." (Demurrer, p. 9:9-10, italics modified.) Again, defendants simply overlook allegations in the SAC.

First, as discussed above in Section IV(B)(1), the SAC details how plaintiffs' reliance on

defendants misrepresentations—many of which are contained in defendants' written memos and advertisements and attached to the SAC—caused the plaintiffs damage by (1) paying substantial entrance fees, (2) forgoing their right to exercise the 90-day cancellation clause, (3) forgoing their right to receive a partial refund of their entrance fees, which were available for more than four years after each plaintiff paid his or her entrance fee, and (4) paying increased monthly fees. (SAC, ¶¶ 38, 117-118, 141-142.) *Second*, plaintiffs have sufficiently pleaded defendants' numerous failures—contractual and otherwise. For example, the residency agreements expressly state that defendants "will provide the long-term care services described in Section B . . . ." (SAC, Exh. 14, p. 8.) "The amount You are obligated to pay for utilizing those services is determined according to the 'Long-Term Care Plan' You selected at Closing." (*Ibid.*, p. 18 [no increase in monthly fees after transfer to Care Center].) The "CCRC Closing Worksheet," in turn, demonstrates a progressively higher entrance fee is charged depending on the care plan selected." (SAC, Exh. 14, p. "Short 1468.") Yet, "defendants have begun charging the plaintiffs and the other elderly residents for lifetime health care a second time by including a charge in residents' monthly fees, and in some cases a third time by requiring residents to pay for private duty nurses." (SAC, ¶ 17.)

C. Plaintiffs Have Sufficiently Pleaded a Valid CLRA Claim.

Defendants next incorrectly contend that plaintiffs' CLRA claim fails because (1) plaintiffs failed to file a venue declaration, and (2) the CLRA does not apply to the rental or sale of residential property. (Demurrer, pp. 9:16-10:6.) *First*, plaintiffs have filed venue declarations, and defendants do not assert that venue is improper. Therefore, this technical objection has been rendered moot without any prejudice to the defendants.

Second, plaintiffs' CLRA claims primarily deal with health care issues (SAC, ¶ 165(a)-(e)) and the cost thereof. The authorities on which defendants rely do not support their proposition that the CLRA does not apply to this case. Civil Code section 1754 provides:

> "The provisions of this title shall not apply to any transaction which provides for the construction, sale, or construction and sale *of an entire residence* or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein, or for the sale of a lot or parcel of real property, including any site preparation incidental to such sale." (Italics added.)

The health care transactions at issue (SAC, ¶ 165) do not involve the construction or sale of a residence, much less an entire residence. Indeed the residency agreement provides: "[y]our rights under this Agreement . . . do not include any propriety interest in the Community . . . ." (SAC, Exh. 14, p. 26.) Thus, Civil Code section 1754 is inapplicable. Moreover, the CLRA must "'be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide sufficient and economical procedures to secure such protection.'" (*Broughton v. Cigna HealthPlans of California, Inc.* (1999) 21 Cal.4th 1066, 1077, quoting Civ. Code, § 1760.)

In *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 654, the court applied the CLRA to a nursing home, and reversed the granting of the nursing home's summary judgment because an issue of fact existed regarding whether the written, signed contract violated Civil Code section 1770 by representing that a transaction involved rights, remedies, or obligations which it did not have or involve, an issue also raised by the plaintiffs. (SAC, ¶¶ 164, 165.)

Defendants also cite two cases for the proposition that the CLRA "does not apply to rental agreements."[2] However, the CLRA expressly applies to "the sale or lease of goods or services to any consumer . . . ." (Civ. Code, § 1770, subd. (a).) Plaintiffs' CLRA claims relate to *health care services*, including the cost of those services. The CLRA expressly applies to those transactions.

D. Plaintiffs Have Sufficiently Pleaded a Claim for Breach of Fiduciary Duty.

Defendants argue that the SAC fails to state facts sufficient to constitute a cause of action for breach of fiduciary duty, essentially because the relationship between a continuing care provider and a resident in the provider's care is not a *de jure* fiduciary relationship. (Demurrer,

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[2] Both cases are misstated and distinguishable. In *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 142, the plaintiff "concede[d] he did not rent his car as a 'consumer' as that term is defined in Civil Code section 1761, subdivision (d), under the [CLRA]." Here, plaintiffs make no such concession and are, in fact, "consumers" within the meaning of that statute. The defendants do not contend otherwise. In *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1147-1148, in the context of a preemption analysis, the court noted that "[b]ecause the CLRA applies to such a limited set of transactions . . . it is not a law of 'general applicability.'" Because the CLRA does not apply to every contract, the Federal Arbitration Act preempted its application in that case. Indeed, the only passage of that case cited by defendants (Demurrer, p. 9:24-25 ["The CLRA is also inapplicable to rental agreements"]) is supported only with a citation to *Lazar*, in which the inapplicability of the CLRA was conceded.

pp. 11-13.) That is a novel and important issue, but it is not one that can properly be decided by general demurrer, because the plaintiffs have alleged facts demonstrating (1) a *de facto* fiduciary relationship between the plaintiffs and the defendants and (2) a *de jure* fiduciary relationship between (a) the plaintiffs, as beneficiaries of an express trust, and (b) the defendants, as agents for the trustee of that trust.

1. *A fiduciary relationship may exist as a matter of law (*de jure*) or as a matter of fact (*de facto*).*

"A fiduciary relationship is '"any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . . ."' [Citations.]" (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29; see BAJI (2002 9th ed.) No. 12.36 ["A fiduciary or a confidential relationship exists whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another"].)

As the defendants recognize (Demurrer, pp. 11-12), certain relationships—which we refer to as *de jure* fiduciary relationships—are fiduciary *as a matter of law,* such as the relationships of (1) partners and joint venturers, (2) spouses, (3) trustee and beneficiary, (4) attorney and client, (5) doctor and patient, (6) priest and parishioner, (7) principal and agent, (8) guardian and ward, (9) conservator and conservatee, and even (10) majority and minority shareholders (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108). (See, e.g., *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (*GAB*) (2000) 83 Cal.App.4th 409, 416.)

However, *other* relationships—which we refer to as *de facto* fiduciary relationships—may be fiduciary *as a matter of fact*, when trust and confidence is reasonably reposed by one party, who is in a relatively dependent or vulnerable position, in the integrity and fidelity of another, who is in a relatively dominant position of control. "It is settled by an overwhelming weight of

authority that the principle [as to confidential relationship] extends to every possible case in which a fiduciary relation exists *as a fact*, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it *need not be legal*. It may be moral, social, domestic, or merely personal. Hence, the rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.'" (*Pryor v. Bistline* (1963) 215 Cal.App.2d 437, 446, italics added, quoting 23 Am.Jur. at p. 764; *Bolander* v. *Thompson* (1943) 57 Cal.App.2d 444, 447.)

The existence of a *de facto* fiduciary relationship founded upon agreement (the "repose" and "acceptance" of a confidence) is a question of fact, not law. (*GAB, supra,* 83 Cal.App.4th at p. 417; *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 383.)

2. *The plaintiffs have alleged a de facto fiduciary relationship with the defendants.*

The defendants' general demurrer entirely overlooks that the plaintiffs have sufficiently alleged facts establishing a *de facto* fiduciary relationship between the plaintiffs and the defendants (SAC, ¶ 172, pp. 29-30), its breach (*id.*, ¶ 173, p. 30), and resulting damages (*id.*, ¶ 174, p. 31). For that reason alone, their general demurrer to the seventh cause of action for breach of fiduciary is unmeritorious and should be denied. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 ["it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory"]; Weil & Brown, Cal. Prac. Guide: Civil Proc. Before Trial (The Rutter Group 2007), p. 7-20, at ¶ 7:42.2 ["A general demurrer does not lie to only *part* of a cause of action. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by demurrer"], citing *Kong v. City of Hawaiian Gardens Redevelop. Agency* (2003) 108 Cal.App.4th 1028, 1046.)

3. *The plaintiffs have also alleged the existence of a de jure fiduciary relationship between themselves, as beneficiaries of an express trust, and the defendants, as agents for the trustee.*

The defendants' general demurrer also overlooks that the plaintiffs have sufficiently alleged facts establishing a *de jury* fiduciary relationship between themselves, as beneficiaries of

an express trust, and the defendants, as agents for the trustee. (SAC, ¶ 171, p. 29.)

The relationship between the trustee and the beneficiaries of an express trust is a fiduciary relationship as a matter of law. (Prob. Code, § 16004, subd. (c), 16202.) So is the relationship between an *agent* for the trustee and the beneficiaries. (See *Crocker-Citizens National Bank v. Younger* (1971) 4 Cal.3d 202, 211 ["The rules pertaining to the rights and duties of trustees generally would be broadly applicable to trust advisors or other persons holding trust powers . . . ."].) "Acting as agents for the trustee, the defendants encouraged the plaintiffs and others similarly situated to execute, as grantors, documents entitled Joinder in Master Trust Agreement ('Joinders') under which the plaintiffs and others similarly situated agreed to contribute money to the Master Trust and be bound by the Master Trust Agreement." (SAC, ¶ 71, p. 29.)

4. *Whether the relationship between a continuing care provider and a resident in the provider's care should be held to be among those relationships that are fiduciary as a matter of law, though novel and important, cannot properly be decided by demurrer.*

Whether the relationship between a continuing care provider and a resident in the provider's care should be held to be among those relationships that are fiduciary *as a matter of law* is a novel and important legal question. There are similarities between such relationships and other *de jure* fiduciary relationships; and there are compelling reasons why it *should*. The Legislature has expressly recognized the vulnerability of elderly persons and the need to protect them. (See., e.g., *Conservatorship of Kayle* (2005) 134 Cal.App.4th 1, 5 ["legislative purpose of [Elder Abuse Act] is to afford extra protection to vulnerable portion of population"]; Welfare & Inst. Code, § 15600; Health & Saf. Code, 1770; Civ. Code, §§ 1780, subd. (b)(1), 3345.)

However, that question need not, and cannot properly, be decided by general demurrer. None of the authorities cited by the defendants holds that the relationship between a continuing care provider and a resident in the provider's care may *never* be a *de facto* fiduciary relationship.

E. Plaintiffs Have Sufficiently Pleaded a Claim for Unfair Competition.

Defendants challenge plaintiffs' unfair competition claim on the ground that they do not satisfy "pleading requirements" by failing to make certain "specific allegations." (Demurrer, pp. 12:9-13:2.) Defendants simply misconstrue the authorities in which they rely. Plaintiffs must

"plead[] facts that show the defendants' business practices are unfair." (*Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1405.) The facts alleged in the SAC satisfy the three-part "section 5 test" articulated in that case. (*Id.* at p. 1403.) *First*, the consumer injury is substantial—hundreds of thousands of dollars per plaintiff. *Second*, the injury is not outweighed by any countervailing benefits to consumers or competition, and the defendants identify none. *Third*, the consumers could not have themselves avoided injury. Indeed, the gravamen of plaintiffs' claims are for fraud and concealment, which rendered avoidance of injury impossible. Finally, section 1793.5, subdivision (h), expressly provides: "a violation under this section is an act of unfair competition as defined in Section 17200 of the Business and Professions Code." Because plaintiffs allege a violation of section 1793.5, subdivision (d) (SAC, ¶¶ 194-197 [failure to honor obligations under continuing care contract, including all continuing care promises which form the basis of that contract]), they have stated an unfair competition claim.

F. Plaintiffs Have Sufficiently Pleaded a Claim for Breach of Contract.

Defendants contend that plaintiffs "fail to allege a cause of action for breach of contract" (Demurrer, p. 13:3, boldface and capitalization modified), because the residency agreement contains an integration clause and, defendants contend, plaintiffs' breach of contract claims are all based on oral agreements which contradict the terms of the residency agreement. (Demurrer, pp. 13:4-14:9.) Defendants misconstrue the law, the residency agreement, and the basis of plaintiffs' claims.

The integration clause at issue provides: "This Agreement, including all attached Appendices, constitutes the entire agreement between You and Classic Residence by Hyatt and may not be amended unless executed in writing by Classic Residence by Hyatt." (SAC, Exh. 14, p. 30.) This clause conflicts with section 1771, subdivision (c)(8) which states that a "'continuing 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," and section 1771, subdivision (c)(10), which 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."

Section 1775, subdivision (e), states that "[t]his chapter shall be liberally construed for the protection of persons attempting to obtain or receiving continuing care." And defendants' reliance on section 1787, subdivision (d), and its asserted "approval by the Department of Social Services," is misplaced, especially at the demurrer stage. There is no evidence before this Court that any actual approval was obtained and, even if it had been obtained, the residency agreement expressly states: "Approval by the department is neither a guaranty of performance nor an endorsement of contract provisions." (RJN, Exh. A, p. 33.) Indeed, this provisions—which defendants failed to cite, is required. (§ 1788, subd. (a)(34).) Thus, as a preliminary matter, the integration clause is invalid.

And the defendants fail to provide the Court with the *entire* residency agreement, including all appendices. (See Plaintiffs' Opposition to Defendants' Request for Judicial Notice.) For example, what presumably is Appendix E, the "CCRC Closing Worksheet," is completely consistent with plaintiffs' claim that a portion of the entrance fee was intended for pre-paid health care. (SAC, ¶ 186(a), Exh. 14, p. Short 1468.) That worksheet demonstrates that the Shorts paid an extra $18,000 for a "Second Person Coverage Fee [] Unlimited Long-Term Plan Only[]." And the worksheet shows that defendants charged an extra $12,000 entrance fee for each 100 days of health care purchased. "The cost for each 100 additional care center benefit days of coverage is $12,000 and is due upon closing."

Most importantly, though, defendants simply misconstrue the portion of the residency agreements on which they rely. For example, the residency agreements provide that residents are entitled to long-term care and that the cost of such care is included in the entrance fee. (SAC, Exh. 14, pp. 8-12 [entitlement to care], p. 9 [cost of "each 100 additional care benefit days of coverage is $12,000 and due upon Closing" as part of entrance fee], p. 18 [no increase in monthly fees upon transfer to care center], p. 16 [residents selecting less than unlimited care plan "will owe the difference between the daily charge . . . and regular Monthly Fee"].) And defendants'

reliance on Civil Code section 1856 is misplaced, because that statute allows parol evidence (1) to explain terms of an agreement (subd. (b)), (2) to explain course of dealing or course of performance (subd. (c)), (3) where the validity of the agreement is in dispute (subd. (f)), (4) to "explain an extrinsic ambiguity or otherwise interpret the terms of the agreement" (subd. (g)), or (5) "to establish illegality or fraud." Furthermore, "parol evidence is always admissible to interpret the written agreement." (*Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 636-637.)

G. Plaintiffs Have Sufficiently Pleaded a Cause of Action for Constructive Fraud.

The defendants argue that the SAC fails to state facts sufficient to constitute a cause of action for constructive fraud for two reasons: (1) they have failed to allege the existence of a fiduciary relationship between the parties and (2) they have failed to allege acts of constructive fraud with requisite specificity. (Demurrer, pp. 14-15.) Neither objection has merit.

"'In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damages to another. [Citations.] Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud.' [Citation.] Constructive fraud usually arises from a breach of duty where a relation of trust and confidence exists. [Citation.] Confidential and fiduciary relations are in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in another." (*Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1368-1369; SAC, ¶ 190, p. 33.)

For reasons explained above in Section IV(D), in Paragraphs 171-172 of the SAC the plaintiffs have sufficiently alleged both (1) a *de facto* fiduciary relationship between the plaintiffs and the defendants and (2) a *de jure* fiduciary relationship between (a) the plaintiffs, as beneficiaries of an express trust, and (b) the defendants, as agents for the trustee of that trust.

In paragraph 188 of the SAC, the plaintiffs incorporated by reference and realleged paragraphs 1 through 82, 98 through 120, 122 through 144, 146 through 153, 164 through 169,

and 171 through 175, in their tenth cause of action for constructive fraud. The defendants perfunctory objection of lack of specificity either overlooks the allegations incorporated by reference or fails to include any argument why the incorporated allegations are insufficiently specific. Those allegations include, for example, that the defendants "divert[ed] trust assets for their own benefit, loan[ed] trust assets without interest, violat[ed] statutes which establish mandatory procedures for raising monthly fees, fail[ed] to disclose to plaintiffs and others similarly situated the true costs of the services being provided, us[ed] related entities to supply promised services at costs above market, excessively increas[ed] monthly fees, fail[ed] to provide promised health care services, and fail[ed] to adequately secure their continuing care obligations." (SAC, ¶ 173, p. 30.)

H. Plaintiffs Have Sufficiently Pleaded a Claim for Violation of Health and Safety Code Section 1793.5.

Defendants' final argument relies on a misapplication of statute and a favorable interpretation of an adhesion contract defendants wrote. Defendants assert "[t]he written contracts at issue here are Plaintiffs' CCRA." (Demurrer, p. 15:12-13.) Yet defendants completely ignore express inclusion of "continuing care promises," which subdivision (c)(10) states include "[a]ny . . . promise or representation . . . contained in any advertisement, brochure, or other material, either written or oral, is a continuing care promise." Because the plaintiffs have expressly described numerous specific breaches of the continuing care contracts, including numerous broken continuing care promises, they have adequately pleaded a claim under section 1793.5.

VI. CONCLUSION

Plaintiffs request that the demurrer be overruled in its entirety, or if it is sustained in any respect, they be permitted leave to amend.

Dated: August 6, 2007

LAW OFFICE OF MICHAEL A .CONGER

By: Michael A. Conger
Michael A. Conger
Attorney for Plaintiffs

APPENDIX A

Continuing care retirement communities ("CCRCs") offer elderly persons long-term continuing care, including housing, residential services, and nursing care. (Second Amended Complaint ["SAC"], ¶ 18.) As of April 1, 2003, California had 77 CCRCs, 71 of which were operated by nonprofit public benefit corporations. (SAC, ¶ 19.) Defendants (or affiliates) operate three of six for-profit CCRCs in California, including LJVT. (SAC, ¶ 20.)

CCRCs are regulated, in part, by Health and Safety Code sections 1770 through 1793.62, which "state[] the *minimum* requirements to be imposed upon any entity offering or providing continuing care."[1] (Health & Saf. Code, § 1770, subd. (f),[2] italics added.) (SAC, ¶ 21.) These minimum requirements "appl[y] equally to for-profit and nonprofit provider entities." (§ 1770, subd. (e).) (SAC, ¶ 22.) Section 1775, subdivision (e) states that "[t]his chapter shall be liberally construed for the protection of persons attempting to obtain or receiving continuing care." (SAC, ¶ 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

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

[2] Section 1775, subdivision (d), also provides that "[t]his chapter imposes minimum requirements upon any entity promising to provide . . . or providing continuing care."

> 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." (SAC, ¶¶ 23-25.)

At LJVT, defendants operate a 21-story, 227-unit "independent living" apartment building. (SAC, ¶ 27.) At a separate location (4171 Las Palmas Square), the defendants operate a "care center" providing assisted living, memory support/Alzheimer's care, and skilled nursing care. (*Ibid.*) Admission to LJVT is limited to persons age 62 or older who pass a physical examination and meet defendants' income and asset criteria; it begins with acceptance into the independent living apartment building. (SAC, ¶ 27.) As residents age and require assisted living, memory support, or skilled nursing care, they are permitted to move from the independent living apartment building at LJVT to the care center (SAC, ¶ 32), where they were promised they would receive "high quality" and "expert" medical care (SAC, ¶¶ 45, 51, 113, 138, 165(a)) at rates far below prevailing market rates. (SAC, ¶¶ 45, 56, 101, 111, 113.)

Defendants charge residents in two ways. (SAC, ¶ 33.) *First*, all residents pay a non-refundable entrance fee upon moving into an independent living apartment. (SAC, ¶¶ 33-34.) Residents were told, both orally and in writing, that a portion of their non-refundable entrance fee would be held in trust for pre-paid long-term health care. (SAC, ¶ 35.) 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." (SAC, 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 . . . ." (SAC, 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. (SAC, Exh. 14, Closing Worksheet.)

Defendants acknowledge that a resident's entrance fee typically comprises a substantial portion of that resident's life savings. (SAC, ¶ 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.*) Thus, once the entrance fee is paid in exchange for the promise of lifetime health care,[3] the already vulnerable elderly residents become even more vulnerable because they typically cannot afford to move out, forfeit their substantial entrance fees,[4] and pay an additional entrance fee to a different CCRC or other nursing home facility. (SAC, ¶¶ 37-39.) In other words, most LJVT residents depend on defendants to treat them fairly, and have no realistic alternative if they are cheated financially or mistreated. (SAC, ¶ 39.)

Second, defendants charge residents a "monthly fee," ranging from $3,000 to $5,500. (SAC, ¶ 40.) Residents were told, both orally and in writing, that (a) monthly fees would include *only* the operating expenses of the independent living apartment building and would *not* include any operating expenses (or losses) of the care center; and (b) any future monthly fee increases

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[3] Defendants told residents that—depending on which of three long-term health plans are selected by the resident—between 8 percent to 40 percent of the entrance fee was for pre-paid long-term health care. (SAC, ¶ 35.)

[4] Under certain circumstances, a portion of the entrance fee is refundable. However, the vast majority of entrance fees are never refunded. (SAC, ¶ 34, fn. 4.)

would be minimized by defendants' diligent efforts at managing all expenses.[5] (SAC, ¶ 41.) Additionally, section 1771.8 imposes limits on monthly fee increases and requires defendants to share financial information with residents, whose input must be considered before any fee increase decision is made. Defendants failed share financial information and to permit resident input before deciding to increase monthly fees. (SAC, ¶¶ 83-96.)

Prospective residents, such as Mr. Short, were attracted by defendants' advertising and marketing brochures, as well as oral representations from defendants' sales persons. (SAC, ¶ 43.) 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 continuing care promises included material representations (1) creating a trust fund for pre-paid long-term health care, (2) assuring the "high quality"—and lack of additional cost—of that pre-paid long-term health care,[6] (3) specifying services and facilities which would be provided to residents, (4) expanding the common law covenant of quiet enjoyment,[7] and (5) assuring that defendants would diligently seek to minimize the necessity of any future monthly fee increases.

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[5] Defendants written statements include: (1) "[p]lease be assured that we are looking at all our expenses and systems to find ways of reducing the impact of such [monthly fee] increases"; (2) "[p]lease rest assured that we will work diligently to manage expenses and that, as an affiliate of Hyatt Corporation, [LJVT residents] will reap the benefits of group purchasing volume discounts"; and (3) "we are as sensitive about [monthly fee] increases as you are. We are working diligently to ensure [LJVT] operates efficiently . . . ." (SAC, ¶ 41.)

[6] "Perhaps most important of all, [LJVT] 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." "[LJVT] 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 . . . at virtually no increase in their monthly fee." (SAC, ¶ 45.)

[7] "[G]racious retirement living," "luxury senior living at its finest," "a relaxed, easy going lifestyle," "luxurious surroundings," and "almost unlimited opportunities for relaxation," and peace and quiet. (SAC, ¶ 45.)

(SAC, ¶ 45.)

Each of these continuing care promises has been abandoned by defendants. (SAC, ¶ 46.) Instead of using residents' trust fund entrance fees for pre-paid long-term health care, defendants have disbursed approximately $85 million from the trust fund to themselves in the form of an undisclosed, interest-free loan not due until December 31, 2044. (SAC, ¶ 49.) And at least some of the proceeds from this loan have been used to make cash disbursements to individual owners. (SAC, ¶ 49.) No entrance fees paid by LJVT residents remain to be used for pre-paid long-term health care. (SAC, ¶ 50.) This shortfall has caused defendants to charge all plaintiffs and all other residents for long-term care a second time, and several residents a third time. (SAC, ¶ 17.)

The quality of the care provided at the care center is far lower than the "expert" and "high quality" standard promised. (SAC, ¶ 51.) Many of the nurses and caregiver staff do not speak or understand English fluently, requiring some residents—those who can afford it—to pay for additional private nursing care for their spouses. (SAC, ¶ 52.) Several independent living residents who temporarily transferred to the care center have been horrified at the substandard care they received. (SAC, ¶ 53.) Medical professionals have observed that the care center lacks adequate training and supervision of its caregiver staff. (SAC, ¶ 54.) And the care center's director has recently admitted to residents that the care center is "understaffed." (SAC, ¶ 55.) Despite this lower-than-promised level of care, residents are forced to subsidize the care center—contrary to express representations made by defendants—because care center operating losses are charged as a component of independent living monthly fees. (SAC, ¶ 56.)

Defendants have also breached their continuing care promises regarding specific services

and facilities. (SAC, ¶ 57.) Residents of the independent living apartment building were promised 24-hour emergency medical response from nursing staff. (SAC, ¶ 58.) Instead, residents now receive only 24-hour emergency medical response from a concierge or a security guard and are told to call 911 for medical emergencies. (SAC, ¶ 59.) An indoor swimming pool has been closed. (SAC, ¶ 60.) Exercise facilities have been reduced. (SAC, ¶ 61.) Other health-related recreational facilities have been closed. (SAC, ¶ 62.)

Despite promising residents "luxurious surroundings," "a relaxed, easy-going lifestyle," "luxury senior living at its finest," "and almost unlimited opportunities for relaxation," defendants have embarked on a three-year expansion plan to build a second high-rise tower adjoining LJVT, converting the area into a construction war zone. (SAC, ¶¶ 63-71.) LJVT's once beautiful front entry—with lush landscaping and easy access to walking paths to the surrounding neighborhood and shopping—has been closed and replaced with a large crane operating at least 8 hours per day. Residents are forced to use a narrow, back alley-way, congested with residents' cars, visitor's cars, delivery trucks, care center cars, busses, construction trucks, trash trucks, mail trucks and emergency vehicles, making ingress and egress very difficult. Water to apartments has been interrupted frequently, often for hours at a time. Construction noise—jack hammers, welding torches, steel erection, cranes, dump trucks and power tools—awaken residents at 7:00 a.m. Balconies promised by the defendants have been rendered useless from construction dust and noise. Numerous common-area rooms promised by the defendants have been closed. The first floor, which includes the lobby, mail room, and a (now much smaller) living room, are often exposed to the elements causing interior temperatures to drop into the 50s. Construction dust has caused residents with even minor respiratory

ailments to suffer enormously. (*Ibid.*)

Despite abandoning numerous continuing care promises, defendants have *increased* monthly fees charged to residents substantially over the past six years and have not diligently managed expenses to minimize monthly fee increases. (SAC, ¶ 72.) Unknown to residents, *on the very same day* defendants delivered a memorandum encouraging residents to remain, stating "[p]lease 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," defendants entered into a sweetheart *50-year contract* with a Hyatt affiliate which effectively allows defendants' owners to funnel cash to themselves. (SAC, ¶ 73.) Under that extraordinarily long contract, defendants have charged residents—and paid themselves—management, marketing, and administrative fees at costs at least double the prevailing market rates for more than nine years. (SAC, ¶ 74.) And, despite statutory, contractual, and fiduciary obligations to disclose this and other financial information to residents, defendants have concealed this information and have steadfastly refused to provide it to residents (a refusal continued in discovery in this litigation). (SAC, ¶ 75.)