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F I L E D
Clerk of the Superior Court

AUG 06 2007

By: **G. MENDOZA**, Deputy

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN DIEGO**

10 DONALD R. SHORT, JAMES F. GLEASON,)
CASEY MEEHAN, MARILYN SHORT, PATTY)
11 WESTERVELT, AND DOTTIE YELLE,)
individually, and on behalf of all others similarly)
12 situated,)

13 Plaintiff,

14 v.

15 CC-LA JOLLA, Inc., a Delaware Corporation, CC-)
LA JOLLA, L.L.C., a Delaware limited liability)
16 company, CC-DEVELOPMENT GROUP, INC.,)
CLASSIC RESIDENCE MANAGEMENT)
17 LIMITED PARTNERSHIP, an Illinois Limited)
Partnership, and DOES 1 to 110, inclusive,)

18 Defendants.
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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' OPPOSITION TO
DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT
OF DEMURRER TO PLAINTIFF'S
SECOND AMENDED CLASS
ACTION COMPLAINT

21 Plaintiffs oppose Defendants' Request for Judicial Notice in Support of Demurrer and
22 Motion to Strike Plaintiff[s'] Second Amended Class Action Complaint ("RJN") because (1) the
23 residency agreements and master trust agreement are incomplete, (2) they were obtained by
24 fraud, (3) controlling law prohibits the use of such disputed documents at this stage of the
25 litigation, and (4) the Court should not take judicial notice of unauthenticated fragments of
26 irrelevant legislative history.

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1 **A. Judicial Notice of the Meaning of Incomplete Residency Agreements**
2 **and the Concealed Master Trust Agreement Is Prohibited.**

3 Much of defendants' demurrer relies on portions of plaintiffs' residency agreements even
4 though those residency agreements contain only a portion of the parties "continuing care
5 contract." (Health & Saf. Code, § 1770, subds. (c)(8), (c)(10).¹) Moreover, defendants' attempt
6 to convert the demurrer into an evidentiary hearing is not permitted.

7 "For a court to take judicial notice of the meaning of a document submitted by a
8 demurring party based on the document alone, without allowing the parties an opportunity to
9 present extrinsic evidence of the meaning of the document, would be improper." (*Fremont*
10 *Indemnity Company v. Fremont General Corporation* (2007) 148 Cal.App.4th 97, 114-115.) "A
11 court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a
12 document submitted in support of a demurrer." (*Id.* at p. 115.) "In short, a court cannot by
13 means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the
14 demurring party can present documentary evidence and the opposing party is bound by what the
15 evidence appears to show." (*Ibid.*) "Thus, a court ruling on a demurrer cannot decide a question
16 that may depend on disputed facts by means of judicial notice." (*Ibid.*) "This rule applies not
17 only with respect to interpretation of a contract, but with respect to its enforceability." (*Ibid.*)
18 "A court ruling on a demurrer cannot take judicial notice that a contract submitted in support of a
19 demurrer is binding and enforceable if the plaintiff claims the contract is unenforceable due to
20 fraud" (*Ibid.*) Here, plaintiffs make such claims.

21 Further, the residency agreement provided by defendants is not the entire agreement
22 governing the parties' relationship. *First*, the residency agreement itself is incomplete and does
23 not even contain all of the *written* terms which comprise the residency agreement. For example,
24 defendants fail to provide the Court with *any* of the numerous appendices expressly incorporated
25 into the residency agreements. (See, e.g., RJN, Exh. A, p. 30 ["This Agreement[] includ[es] all
26 Attached Appendices"], p. 2 [Appendix A missing], p. 3 [Appendices B, C and G missing], p. 5
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28 ¹ All further statutory references will be to the Health and Safety Code unless
otherwise stated.

1 [Appendix D missing], p. 8 [Appendix E missing], p. 23 [Appendix F missing].) Nor do the
2 defendants' supply the Resident Handbook, incorporated into the residency agreements at pages
3 one and 25. Importantly, the Resident Handbook included some of the continuing care promises
4 on which plaintiffs relied and which defendants have abandoned. (See, e.g., RJN, Exh. A
5 [Gleason residency agreement p. 5 [referring to "Resident Handbook"], p. 15 [promise to
6 provide residents health-related services at "Wellness Center"], p. 25 [referring to
7 "ADDITIONAL RIGHTS OF RESIDENT" contained in "Community Polic[ies]"; Second
8 Amended Complaint ["SAC"], Exh. 8 [Resident Handbook promising residents that "[d]uring
9 non-office hours and on weekends, [Wellness Center] licensed nursed are on call].²) Nor do
10 defendants provide or attach "Deposit Subscription Escrow" or "Reservation Agreements" (*id.*,
11 pp. 3-4).

12 The master trust agreement (RJN, Appendix D) is also incomplete. At page three of the
13 master trust agreement, at paragraph 1.12, it refers to the "Loan Documents" as "[t]he Note, the
14 Mortgage, the Loan Agreement and all documents and instruments attached as exhibits
15 thereto" At paragraph 5.3, the master trust agreement purports to authorize the trustee to
16 "execute and deliver the Loan Agreement." The loan agreement—which was concealed from the
17 plaintiffs just like the master trust agreement (SAC, ¶ 171)—was the vehicle used by defendants
18 to pilfer the entire trust fund (i.e., zero interest loan for 50 years) which defendants told plaintiffs
19 was to be used in part for pre-paid long-term health care. (SAC, ¶¶ 13-16, 35, 37, 45, 48-50,
20 146(d), 158, 171, 173.)

21 *Second*, the residency agreement omits numerous additional written and verbal
22 continuing care promises which are part of the parties' continuing care contract. Section 1771,
23 subdivision (c)(8), states that a "'continuing care contract' means a contract that includes a
24 continuing care promise made in exchange for an entrance fee, the payment of periodic charges,
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27 ² Plaintiffs have alleged that: "defendants promised that residents of the
28 independent living apartment building would receive 24-hour emergency medical response from
nursing staff. However, residents are being provided only 24-hour emergency medical response
from a concierge or a security guard and are told to call 911 for medical emergencies." (SAC, ¶¶
58-59.)

1 or both types of payments.”³ Here the parties’ “continuing care contract” includes many more
2 “continuing care promises” than are contained in the fraudulently-obtained residency
3 agreements. (See, e.g., SAC, Exhs. 1-13.) These promises include: (1) the creation of the trust
4 fund for pre-paid long-term health care, (2) the high quality and lack of additional cost of that
5 long-term health care, (3) specific services and facilities which would be provided to residents,
6 (4) expansion of the common law covenant of quiet enjoyment, and (5) efforts defendants would
7 take to minimize the necessity of any future monthly fee increases. The parties’ complete
8 relationship includes these important “continuing care promises.” None of these materials have
9 been provided to the court in this attempt to convert a demurrer into an evidentiary hearing.

10 Finally, the residency agreements were procured fraudulently. Plaintiffs would not have
11 entered into the residency agreements had defendants not deceived them on several material
12 matters, including pre-paid long-term health care and 24-hour emergency medical assistance.
13 (For example, Marilyn Short had suffered a stroke before the Shorts decided to move into LJVT,
14 and the 24-hour emergency medical responses was a critical promise on which they paid an
15 entrance fee of \$500,346 to defendants.) Therefore, controlling law prevents the court from
16 taking judicial notice of the residency agreement at this stage of the litigation.

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21 ³ Section 1771, subdivision (c)(8), provides: “[c]ontinuing care contract’ means a
22 contract that includes a *continuing care promise* made in *exchange for an entrance fee*, the
23 payment of periodic charges, or both types of payments. A continuing care contract may consist
24 of one agreement or a series of agreements and other writings incorporated by reference.”
(Italics added.) Section 1771, subdivision (c)(10), provides:

25 “[c]ontinuing care promise’ means a promise, express or implied, by a provider
26 to provide one or more elements of care to an elderly resident for the duration of
27 his or her life or for a term in excess of one year. Any such promise or
28 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.”

1 **B. The Court Should Not Take Judicial Notice of Unauthenticated,**
2 **Fragments of Irrelevant Legislative History.**

3 1. *The defendants have not authenticated the legislative*
4 *materials of which they request judicial notice.*

5 Courts do not take judicial notice of matters that are not properly authenticated, including
6 legislative history materials (*Quelimane Co. v. Stewart Title Guaranty Co. (Quelimane)* (1998)
7 19 Cal.4th 26, 45, fn. 9 [denying judicial notice of unauthenticated legislative history materials]).
8 (Evid. Code, §§ 1401, 1530.) Because Exhibits I-L of the defendants' request for judicial notice
9 are unauthenticated, their request for judicial notice of those documents should be denied.

10 2. *Courts do not take judicial notice of matters*
11 *irrelevant to dispositive issues.*

12 Courts do not take judicial notice of matters irrelevant to the dispositive issues in
13 litigation. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 1; *Ketchum v.*
14 *Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1; *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7
15 Cal 4th 1057, 1063, overruled on another ground in *In re Tobacco Cases* (Aug.2, 2007,
16 S129522) ____ Cal.4th ____, ____ [2007 Cal. Lexis 8189, *34].) The Court should deny the
17 defendants' request for judicial notice of selected legislative materials (RJN, Exhs. I-L) because
18 those documents have no bearing upon the issue in dispute, viz., whether there is a private right
19 of action for violation of Health and Safety Code section 1771.8. (Demurrer, p. 4:7-9.)

20 The defendants argue that the legislative materials show that the Legislature authorized
21 state agencies to enforce the statute. (Demurrer, p. 5:2-9.) However, that fact, even if true, does
22 not support the inference that the Legislature intended to deny a remedy to the class of persons
23 that the statute was obviously designed to protect. That is like arguing, because the Legislature
24 gave health departments the statutory duty to inspect foods and restaurants, victims of food
25 poisoning have no private right of action. The defendants' Exhibits I-L shed no light on the
26 disputed issue.

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1 3. ***The Court should not take judicial notice of fragments***
2 ***of legislative history.***

3 A court's task in interpreting an ambiguous statute "'is to ascertain the intent of the
4 Legislature'" [Citations.]" (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049,
5 1062.) While legislative history may be helpful in accomplishing that task, it is perilous to
6 assume that the task may be performed without the *complete* legislative history. The Court
7 should deny the defendants' request for judicial notice of Exhibits I-L because those fragmentary
8 documents do not even purport to comprise the entire legislative history of Health and Safety
9 Code section 1771.8.

10 4. ***A memorandum from a single legislator to legislative***
11 ***counsel—which was not before the entire legislative***
12 ***body—is not a proper subject of judicial notice.***

13 Exhibit K to the defendants' request for judicial notice is a memorandum from
14 Assemblywoman Susan A. Davis to Mr. Bion M. Gregory, Legislative Counsel. Judicial notice
15 of that document is improper because the defendants have not shown that it was available to and
16 presumably reviewed by the Legislature when the adoption of amendments to AB 1255 were
17 under consideration. (*Quelimane, supra*, 19 Cal.4th at pp. 45-46, fn. 9.) As the Supreme Court
18 has explained, courts may "take judicial notice of the legislative history of a statute in order to
19 ascertain the purpose and meaning of an ambiguous statute." (*Id.* at p. 45, fn. 9.) "This includes
20 reports of Senate and Assembly Committees[,] because it is reasonable to infer that all members
21 of the Legislature considered them when voting on the proposed statute." (*Id.* at pp. 45-46, fn. 9;
22 see *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (Kaufman)* (2005) 133
23 Cal.App.4th 26, 31-37.) However, "the views of individual legislators as to the meaning of a
24 statute rarely, if ever, are relevant" (*Quelimane, supra*, at p. 46, fn. 9.) The statements of
25 individual legislators, including a bill's author, that are not communicated to the Legislature as a
26 whole are not subject to judicial notice. (*Quintano v. Mercury Casualty Co., supra*, 11 Cal.4th at
27 p. 1062, fn. 5 and related text; *Kaufman, supra*, pp. 30, 38; *Collins v. Department of*
28 *Transportation* (2003) 114 Cal.App.4th 859, 870, fn. 11.) The memorandum from
Assemblywoman Davis to Mr. Gregory is a piece of legislative scrap, not legislative history.

1 **5. *Exhibits J and L do not even support the defendants' arguments.***

2 The defendants' Exhibit J does not even purport to pertain to a bill enacting or amending
3 Health and Safety Code section 1771.8. That statute was originally enacted in 1998 as former
4 Health and Safety Code section 1771.9. The defendants' Exhibit J purports to be a Department
5 of Finance analysis of AB 827, with an amendment date of April 17, 1995—three years before
6 section 1771.8 was even enacted.

7 Even if the Court could properly take judicial notice of Exhibit L, it does not support the
8 defendants' argument that the Legislature considered, but did not adopt, a "model Ohio law that
9 provides for a private right of action." (Demurrer, p. 5:8-9.) The last page of Exhibit L is an
10 unauthenticated document entitled, "Section 173.13." It bears a *handwritten* notation "Ohio." It
11 is not even referenced in the other pages of Exhibit L. More importantly, nothing indicates that
12 such a document, or any Ohio statute, was considered or rejected by the Legislature of
13 California.

14 For all of these reasons, defendants' request for judicial notice should be denied.

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16 Dated: August 6, 2007

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18 By:


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