

1 ERIC M. ACKER (BAR NO. 135805)
Email: EAcker@mofo.com
2 LINDA L. LANE (BAR NO. 211206)
Email: LLane@mofo.com
3 MORRISON & FOERSTER LLP
12531 High Bluff Drive, Suite 100
4 San Diego, California 92130-2040
Telephone: 858.720.5100
5 Facsimile: 858.720.5125

6 Attorneys for Defendants
CC-LA JOLLA, INC. and CCW-LA JOLLA, L.L.C.
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO
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11 DONALD R. SHORT, individually, and on
behalf of all others similarly situated,
12

13 Plaintiff,

14 v.

15 CC-LA JOLLA, Inc., a Delaware Corporation,
CC-LA JOLLA, L.L.C., a Delaware limited
liability company, and DOES 1 to 70, inclusive,
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17 Defendants.
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Case No. GIC877707

**DEFENDANTS' REPLY IN
SUPPORT OF REQUEST FOR
JUDICIAL NOTICE IN SUPPORT
OF DEMURRER TO PLAINTIFF'S
FIRST AMENDED CLASS
ACTION COMPLAINT**

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

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

1 In his Opposition to Defendants' Request for Judicial Notice in Support of Demurrer to
2 Plaintiff's First Amended Complaint ("RJN"), Plaintiff fails to provide this Court with any concrete
3 reason that the Short CCC attached to the RJN should not be judicially noticed by the Court.
4 Plaintiff's Opposition does not dispute the accuracy or authenticity of the CCC. In fact, Plaintiff's
5 own FAC and Opposition to Defendants' Demurrer reference the CCC attached to the RJN. (Opp. at
6 15; FAC ¶ 64.) Plaintiff cannot contend that the Short CCC does not constitute the full and complete
7 "Continuing Care Residency Agreement," including all appendices; Plaintiff does not distinguish the
8 cases cited by Defendants which allow the Court to take judicial notice of such documents; and,
9 perhaps most surprisingly, in his Opposition, *Plaintiff himself refers to the Short CCC and asks the*
10 *Court to refer to the CCC in reference to his arguments.* For these reasons and the reasons stated in
11 the initial RJN, this Court should grant Plaintiff's Request for Judicial Notice.

12 Plaintiff does not (and cannot) contest that the Short CCC attached to the RJN constitutes the
13 full and complete "Continuing Care Residency Agreement" entered into between the parties.
14 Although Plaintiff attempts to evade this issue by claiming that the contract attached to the RJN only
15 constitutes a *portion* of the "continuing care contract" between the parties because he contends that
16 many additional oral promises were made by Defendants, this claim is irrelevant as to whether the
17 document attached to the RJN constitutes a full and complete document. The "Table of Contents" for
18 the Short CCC (attached as Exhibit A to the RJN) shows that the contract consists of 32 pages of
19 contract provisions, and Appendices A-G. All of these pages and appendices have been attached to
20 the original RJN for the Court's review.¹ In fact, the Short CCC itself states the following:

21 I. Entire Agreement

22 This Agreement [earlier defined as the "Continuing Care
23 Residency Agreement"], including all attached Appendices, constitutes
24 the entire agreement between You and Classic Residence by Hyatt and
25

26 ¹ Plaintiff attempts to argue that the CCC attached to the RJN is incomplete. For instance,
27 Plaintiff argues that the Master Trust Agreement is not attached to the CCC. The Short CCC makes
28 clear that the Master Trust Agreement is a separate document. (Short CCC at 24.) The same is true
of the other documents referenced in Short's Opposition.

1 may not be amended unless executed in writing by Classic Residence
2 by Hyatt.

3 (Short CCC at 30.) Therefore, any argument by Plaintiff that this contract is not full and complete is
4 contrary to the terms of the agreement itself.

5 In his Opposition, Plaintiff ignores the law cited by Defendants. This law establishes that a
6 Court can properly take notice of a contract on demurrer that forms the basis of the parties'
7 relationship but is not attached to a complaint. *See Gilmore v. The Lycoming Fire Ins. Co.*, 55 Cal.
8 123, 124-25 (1880) (material terms of contract may not be omitted from pleadings); *Ascherman v.*
9 *General Reinsurance Corp.*, 183 Cal. App. 3d 307, 310-11 (1986) (trial court properly considered
10 contract on demurrer that formed basis of the parties' relationship, but was not attached to the
11 complaint). Instead, Plaintiff relies on *Fremont Indemnity Co. v. Fremont General Corp.*, 148 Cal.
12 App. 4th 97, 114-115 (2007), which finds that a court cannot take judicial notice of the "proper
13 interpretation of a document" submitted in support of a demurrer. *Id.* Here, Defendants are not
14 asking the Court to interpret the Short CCC. Instead, Defendants are merely attaching the Short CCC
15 because it was referenced in Plaintiff's own FAC. Moreover, in the FAC Plaintiff does not contend
16 that the Short CCC is unenforceable or in need of interpretation. And Plaintiff's FAC never requests
17 the Short CCC be set aside.

18 In addition, Plaintiff's own FAC references the Short CCC (FAC ¶ 64), and his Opposition to
19 Defendants Demurrer also relies on the CCC and references it for the Court's attention. (Opp. at 14.)
20 Plaintiff cannot have it both ways. Because he references the CCC, both in his FAC and in his
21 Opposition, it is only proper that the Court consider it now on demurrer. Thus, this Court should
22 grant Defendants' Request for Judicial Notice.

23 Dated: April 20, 2007

MORRISON & FOERSTER LLP

24 By:  for EMA

Eric M. Acker

25 Attorneys for Defendants
26 CC-LA JOLLA, INC. AND CCW-LA
27 JOLLA, L.L.C.
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