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CC-Palo Alto, Inc. a Delaware corporation;
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an Illinois limited partnership; and CC-Development
Group, Inc., a Delaware corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BURTON RICHTER, an individual; **LINDA COLLINS CORK**, an individual; **GEORGIA L. MAY**, an individual; **THOMAS MERIGAN**, an individual; **ALFRED SPIVACK**, an individual; and **JANICE R. ANDERSON**, an individual; on behalf of themselves and all other similarly situated, and derivatively on behalf of **CC-PALO ALTO, INC.**

Plaintiffs,

v.

CC-PALO ALTO, INC., a Delaware corporation; **CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP**, an Illinois limited partnership; and **CC-DEVELOPMENT GROUP, INC**., a Delaware corporation, **PENNY PRITZKER**, an individual, **NICHOLAS J. PRITZKER**, an individual, **JOHN KEVIN POORMAN**, an individual, **GARY SMITH**, an individual, **STEPHANIE FIELDS**, an individual, and **BILL SCIORTINO**, an individual,

Defendants.

v.

CC-PALO ALTO, INC., a Delaware corporation,

v.

Nominal Defendant.

Case No.: C 14-00750 EJD

DEFENDANTS CC-PALO ALTO, INC., CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP AND CC-DEVELOPMENT GROUP, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS VERIFIED FIRST AMENDED DIRECT CLASS ACTION AND CREDITOR DERIVATIVE COMPLAINT

Date: May 14, 2015
Time: 9:00 a.m.
Dept.: 4, 5th Floor
Judge: The Hon. Edward J. Davila

Trial Date: Not set.

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 14, 2015 at 9:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 280 South First St., Courtroom 4, 5th Floor, San Jose, California, defendants, CC-Palo Alto, Inc., Classic Residence Management Limited Partnership, and CC-Development Group, Inc. will move the Court to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This motion will be based on this Notice of Motion, the Memorandum of Points and Authorities, the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.

DATED: February 20, 2015

McMANIS FAULKNER

/s/ James McManis
JAMES McMANIS
WILLIAM FAULKNER
HILARY WEDDELL

Attorneys for Defendants,
CC-Palo Alto, Inc. a Delaware corporation; Classic Residence Management Limited Partnership, an Illinois limited partnership; and CC-Development Group, Inc., a Delaware corporation

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INTRODUCTION

Defendants, CC-Palo Alto, Inc. ("CC-PA"), Classic Residence Management Limited Partnership ("CRMLP"), and CC-Development Group, Inc. ("CC-DG") (collectively, "defendants"), bring this motion to dismiss plaintiffs' First Amended Complaint ("FAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiffs' FAC (without exhibits) now spans 70 pages. Despite the addition of 37 pages, plaintiffs still have not demonstrated standing, nor do the FAC's allegations state a viable claim. Instead, plaintiffs rely on artful pleading in an attempt to fix the deficiencies identified by the Court when it dismissed the original complaint. However, the facts have not changed since the filing of the original complaint, and the FAC does not contain any new allegations sufficient to bestow standing. Plaintiffs' strained effort to revive their lawsuit speaks volumes—by its silence.

Indeed, plaintiffs' second attempt to manufacture a dispute falls short of adequately pleading any acts on which a valid claim could rest. Furthermore, plaintiffs have not alleged they have suffered any damage as a result of defendants' alleged conduct. Plaintiffs are simply displeased with the terms of the Residency Contracts they signed. This action is an attempt to change, rather than interpret, the Residency Contracts. No amount of creative pleading can overcome the applicable law and plain language of the agreements. Because plaintiffs have not stated a claim, have not suffered any injury, and do not face the threat of a concrete injury in the immediate future, this lawsuit should be dismissed once and for all.

STATEMENT OF FACTS

The FAC contains the following allegations: Defendant CC-PA owns and operates Vi at Palo Alto, a retirement community where plaintiffs reside. FAC, ¶¶ 35, 54-72. CC-DG is the parent company of CC-PA. FAC, ¶ 36. CRMLP is a general partner of CC-DG and provides the day-to-day management and operation at Vi at Palo Alto. FAC, ¶ 46. Penny Pritzker, Nicholas J. Pritzker, John Kevin Poorman, Gary Smith, Stephanie Fields, and Bill Sciortino are individuals that have served as directors of CC-PA at some point since 2005. FAC, ¶¶ 37-43.

Vi at Palo Alto is a luxury Continuing Care Retirement Community ("CCRC"), which provides senior residents with housing, meals, housekeeping, recreational and hospitality services,

long-term care, and a long-term care financial benefits program for the rest of their lives, in return for payment of an entrance fee and a monthly fee. *See* FAC, ¶ 4 and Exhs. 8, 10, 12, 14, 16, and 18 at sections 2.1 and 3. Before joining the community, each resident must sign a Continuing Care Residency Contract ("Residency Contract") with CC-PA and pay an entrance fee, a portion of which is repaid to the resident or the resident's estate when the contract terminates. FAC, ¶¶ 15, 54-72, 77. Residency Contracts terminate upon the resident's decision to leave the community or at death. FAC, ¶ 81. Upon termination of the Residency Contract, the repayable portion of the entrance fee is due at the earlier of (a) fourteen days after resale of the resident's unit, or (b) ten years after termination. *Id*. The repayment amount is dependent on when the resident entered the community, as the percentage has decreased over time. FAC, ¶ 78. Plaintiffs allege their unmatured rights to partial repayment of the entrance fees grants them status as creditors with claims against CC-PA. FAC, ¶ 11.

The FAC alleges that continuing care providers such as CC-PA are required to maintain a certain level of cash reserves for their repayment obligations or disclose their failure to do so. FAC, ¶ 84. Plaintiffs allege the marketing materials for Vi at Palo Alto did not include any such disclosure and the Residency Contracts "conceal the fact that there is no cash reserve." FAC, ¶ 88. Plaintiffs' further claim that CC-PA has transferred excess cash to its corporate parent, CC-DG, and is now "financially incapable of honoring its debts" when they become due. FAC, ¶ 21. Plaintiffs allege they were not informed that CC-PA intended to distribute excess cash to its parent company, and CC-PA's practices have "impaired the security interest underlying the loans made to CC-PA." FAC, ¶¶ 22-23. Plaintiffs allege that CC-PA is insolvent, and on this basis purport to also bring this action derivatively on behalf of CC-PA (as a nominal defendant) against CC-PA's directors and CC-DG. FAC, ¶ 11.

In addition to one-time entrance fees, each resident of Vi at Palo Alto is required to pay monthly fees. FAC, ¶ 24. Plaintiffs claim that these monthly fees "have been artificially inflated" due to three improper charges levied by defendants: increased property taxes, earthquake insurance costs, and marketing costs. FAC, ¶¶ 24-29.

Plaintiffs allege that on or about April 1, 2011, the Santa Clara County Tax Assessor gave CC-PA notice of its intent to seek an increase in the property tax assessment for Vi at Palo Alto. FAC, ¶ 116. After hearing by the Assessment Appeals Board ("AAB"), the community's property taxes were increased resulting in additional tax assessments of $1.9 million annually and an increase in back taxes in excess of $12 million. FAC, ¶ 117. On September 5, 2012, CC-PA filed an action challenging the increased tax assessment, which is still in a preliminary stage. FAC, ¶ 118. Defendants have agreed to pay the back taxes pending appeal, and plaintiffs will only pay any increased property taxes confirmed in the appeal for all years following its conclusion. FAC, ¶ 119.

Plaintiffs claim that defendants have also improperly allocated earthquake insurance coverage under the Residency Contract. FAC, ¶¶ 124-127. Plaintiffs allege that the Residency Contract provides that residents' monthly fees are intended to pay all costs of operating the community, including the costs of insurance policies, but the "same provision limits these costs to 'maintenance, repairs, and replacement of capital items (including furnishings, fixtures and equipment).'" FAC, ¶ 125. Plaintiffs assert that the buildings are not included as capital items and thus residents should not be charged for the costs of insuring them. FAC, ¶ 126. Thus, plaintiffs allege that defendants should be responsible for the portion of insurance costs attributable to insuring the buildings and improvements, while the residents should only pay to insure the community's furniture, fixtures and equipment. FAC, ¶ 127.

Plaintiffs also claim that defendants have improperly allocated marketing costs under the Residency Contract. FAC, ¶ 128. The Residency Contract states that residents' monthly fees are "intended to pay all costs of operating the community," including "marketing costs." *Id.* Plaintiffs allege that the term "marketing costs" is not defined, and a portion of these marketing costs are attributable to CC-DG's national marketing campaign. FAC, ¶¶ 128-129. Thus, plaintiffs assert that "the full allocation of marketing fees to the residents [is] unconscionable." FAC, ¶ 128.

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LEGAL ARGUMENT

I. LEGAL STANDARD FOR A MOTION TO DISMISS.

A. Motion To Dismiss For Failure To State A Claim.

Even though state law determines whether state law claims are viable in a diversity action, the manner in which such claims are stated is evaluated under the Federal Rules. *See, e.g., Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir. 1987). Federal Rule of Civil Procedure 8(a)[1] requires each claim be pled with sufficient specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed pursuant to Rule 12(b)(6) if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The facts alleged must contain more than mere conclusions and "must be enough to raise a right to relief above the speculative level" such that the claim "is plausible on its face." *Twombly,* 550 U.S. at 555-57, 570-72.

When deciding a motion to dismiss, the court generally "may not consider any material beyond the pleadings." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, the court may consider material submitted as part of the complaint or relied upon in the complaint, and material subject to judicial notice. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The court must generally accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). But, "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

B. Motion To Dismiss For Lack Of Subject Matter Jurisdiction.

A party may file a motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction, adjudicating only cases which the Constitution and Congress authorize. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal jurisdiction is limited to "actual 'cases' and 'controversies.'" *Lujan v.*

[1] All future references to a "Rule" are to the Federal Rules of Civil Procedure unless otherwise specified.

Defenders of Wildlife, 504 U.S. 555, 560 (1992). In order to show a "case" or "controversy," a plaintiff must demonstrate both standing and ripeness. *Alaska Right to Life Political Action Comm. v. Feldman,* 504 F.3d 840, 848-49 (9th Cir. 2007).

The party seeking to invoke federal court jurisdiction has the burden of establishing standing for each claim and for each form of relief sought. *See, e.g., Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734 (2008); *Friends of the Earth, Inc. v. Laidlaw Env'l Servs (TOC), Inc.,* 528 U.S. 167, 185 (2000). If a plaintiff fails to satisfy the prerequisites for Article III standing, the court lacks jurisdiction and must dismiss the action. *See* Fed. R. Civ. P. 12(h)(3).

C. Rule 9(b) Pleading Requirements.

Claims sounding in fraud or mistake are subject to the heightened pleading requirements of Rule 9(b), which requires that a plaintiff "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor Co*., 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy this standard, allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege "an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam). Plaintiffs must not only identify the false statements, but must also state "what is false or misleading about a statement, and why it is false." *In re Glenfed, Inc. Sec. Litig*., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as stated in Ronconi v. Larkin*, 253 F.3d 423, 429 n.6 (9th Cir. 2001).

II. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS LACK STANDING.

To satisfy Article III standing requirements, a plaintiff must allege: (1) an injury in fact that is concrete and particularized, as well as actual and imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc.,* 528 U.S. at 180-81;

Lujan, supra, 504 U.S. at 561-62. Plaintiffs bear the burden to clearly allege facts demonstrating each of these three elements. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). The necessary facts "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the pleadings." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

The injury in fact prong requires a plaintiff to demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized … and (b) actual or imminent, not conjectural or hypothetical …." *Lujan,* 528 U.S. at 559-60 (internal quotation marks and citations omitted). Although in some instances an allegation of future injury may suffice, the Supreme Court recently reiterated that "threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1142-43 (2013) (internal quotations omitted) (emphasis in original). As the Court determined on defendants' motions to dismiss plaintiffs' original complaint, plaintiffs have not demonstrated injury in fact necessary to give plaintiffs standing to bring this action.

A. Plaintiffs Do Not Have Standing With Regard To The Entrance Fees.

Each plaintiff entered into a Residency Contract with CC-PA and paid an entrance fee, a portion of which is partially repayable. FAC, ¶¶ 75, 77. Each plaintiff is entitled to the repayable portion of the entrance fee upon (a) termination of their Residency Contract, and (b) fourteen days after resale of the apartment or ten years[2] from termination, whichever occurs first. *See* FAC, Exhs. 8, 10, 12, 14, 16, and 18 at sections 8.2 and 8.3 (termination); Exhs. 8, 10, 12, and 18 at section 8.5.2 (timing of repayment); Exhs. 14 and 16 at section 9.1.2 (timing of repayment). None of the plaintiffs have terminated their contract and are awaiting repayment.

Although CC-PA has **never** failed to make a repayment when due, plaintiffs' FAC alleges plaintiffs suffered harm with regard to the entrance fees in the form of "impairment of Plaintiffs' financial security." *See, e.g.,* FAC, ¶¶ 13, 21, 22, 87. However, plaintiffs do not have a concrete,

[2] Early Residency Contracts had an outside repayable date of 25 years after contract termination but were later amended to reduce the outside date to 10 years. *See, e.g.*, FAC, Exh. 8 at section 8.5.2 and Amendment to section 8.5.2.

legally protected interest in the entrance fees, nor have they shown an existing or imminent harm to any purported interest in the entrance fees.

1. Plaintiffs Do Not Have a Security Interest in the Entrance Fees.

Plaintiffs do not have a cognizable security interest in the repayable portion of the entrance fees. The Entrance Fee Promissory Notes, attached to the FAC as exhibits, reflect that the entrance fee is a general, unsecured obligation of CC-PA. Nowhere in the Residency Contract does it say that CC-PA agrees to hold residents' money in trust or for their account. Likewise, there is no escrow agreement. In fact, the Residency Contract section entitled "Resident's Rights," clearly states a resident's "rights under t[he] Contract are limited to those rights expressly granted in it and do not include … any interest in any payments made under t[he] Contract." *See* FAC, Exhs. 8, 10, 12, and 18 at section 9.5; Exhs. 14 and 16 at section 11.6. Nor can plaintiffs allege the reserve requirements applicable to "refundable contracts" under California Health and Safety Code section 1792.6 or 1793 (if still in effect)[3] grants them a security interest in the entrance fees.

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[3] Plaintiffs' reliance on Health and Safety Code Section 1793(f) is misplaced. Section 1793(f) states providers without a refund reserve must disclose such fact in all marketing materials and Residency Contracts. However, Section 1793 is obsolete. Section 1793 was superseded by Section 1792.6 in 2000 but was inadvertently left in the statutes when the comprehensive changes of 2000 were made. *See* Declaration of Hilary Weddell in Support of Defendants' Motion to Dismiss ("Weddell Decl."), Exhs. A and B (California Department of Social Services' publication of the continuing care contract statutes with a "banner" indicating that section 1793 has been superseded by Section 1792.6). The disclosure provision previously required by section 1793(f) was not included in the new Section 1792.6.

Section 1793 is obviously displaced as not only are its statutory cross-references incorrect after the 2000 amendments but all of its surviving provisions are included in Section 1792.6. Even the number of the Section is out of order. *See* Weddell Decl., Exh. C (Westlaw editorial note). Moreover, Section 1771(r), which defines "refund reserve" and "refundable contract" only refer to the refund reserve provided by Section 1792.6. There is no mention to any purported refund reserve required by Section 1793. Furthermore, Section 1793(f) is clearly no longer in force as DSS has approved every version of CC-PA's Residency Contract before its use and none of them contain a disclosure. *See* Health & Saf. Code § 1787(b) ("All continuing care contract forms, including all addenda, exhibits, and any other related documents, incorporated therein, as well as any modification to these items, shall be approved by the department prior to their use.")

> A "refundable contract" is:
>
> …a continuing care contract that includes a promise, expressed or implied, by the provider to pay an entrance fee refund or to repurchase the transferor's unit, membership, stock, or other interest in the continuing care retirement community when the promise to refund some or all of the initial entrance fee extends beyond the resident's sixth year of residency. Providers that enter into refundable contracts shall be subject to the refund reserve requirements of Section 1792.6. **A continuing care contract that includes a promise to repay all or a portion of an entrance fee that is conditioned upon reoccupancy or resale of the unit previously occupied by the resident shall not be considered a refundable contract for purposes of the refund reserve requirements of Section 1792.6, provided that this conditional promise of repayment is not referred to by the applicant or provider as a "refund."**

Health & Saf. Code § 1771(r)(2) (emphasis added). The definition explicitly exempts contracts that condition repayment on "reoccupancy or resale of the unit" from the reserve requirements of Section 1792.6. It does not require the contingency to be for any particular duration. **CC-PA's repayment obligations are primarily conditioned on resale of the unit**: the Residency Contracts signed by plaintiffs clearly state that plaintiffs are not entitled to the repayable portion of the entrance fee until (1) the contract is terminated, and (2) the earlier of fourteen days after resale of the apartment or ten years from the date of termination. *See* FAC, Exhs. 8, 10, 12, 14, 16, and 18 at sections 8.2 and 8.3 (termination); Exhs. 8, 10, 12, and 18 at section 8.5.2 (timing of repayment); Exhs. 14 and 16 at section 9.1.2 (timing of repayment). CC-PA's inclusion of the ten year outside repayment date does not change the conditional nature of the repayment obligation.

Moreover, the ten year outside repayment provision is incompatible with the concept of a "refundable contract" and is far more consistent with the concept of a "contingent-on-resale contract." This is supported by a reading of Health and Safety Code Section 1788.4, which sets forth the timing of refunds and repayments. Section 1788.4(b) states "any refunds due to a resident under a continuing care contract shall be paid within 14 calendar days after a resident makes possession of the living unit available to the provider or 90 calendar days after death or receipt of notice of termination, whichever is later." Section 1788.4(e), which sets forth the timing of repayment for contracts that are not purely refundable contracts, states "[a] lump-sum payment to a resident after termination of a continuing care contract that is conditioned upon resale of a unit shall not be considered to be a refund and may not be characterized or advertised as a refund. The

lump sum payment shall be paid to the resident within 14 calendar days after resale of the unit." CC-PA's Residency Contract conditions repayment on contract termination and resale of the unit, and payments are made 14 days **after resale of the unit,** pursuant to Section 1788.4(e).

If the court finds that the definition of "refundable contract" is ambiguous, it should defer to the interpretation of the California Department of Social Services ("DSS")—the agency charged with enforcing the continuing care contract statutes. *See Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ*., 464 F.3d 1003, 1006-07 (9th Cir. 2006). Until recently, the DSS interpreted the reserve requirements of Section 1792.6 to **apply only to pure refundable contracts** that were conditioned solely on contract termination. Fixed-time contingent on resale contracts, like the one offered by CC-PA that condition repayment on contract termination and resale of the unit, were not found to be within the definition of a "refundable contract" under Section 1771(r)(2), despite the fact that they may contain a ten year outside date for repayment.[4]

On April 24, 2012, DSS notified CCRC providers that the refund reserve requirement, starting May 1, 2012, now would apply to all fixed-time contingent on resale contracts. *See* Declaration of Gary Smith in Support of Defendants' Motion to Dismiss ("Smith Decl."), Exh. A. **CC-PA has fully funded this limited entrance fee reserve.** *See* FAC, Exh. 2, page 12 (line entitled "assets limited as to use—by state for entrance fee repayments"); *see also* FAC, page 23, fn. 3. However, DSS did not make the interpretation retroactive—fixed-time contingent on resale Residency Contracts entered into prior to this date are not considered refundable contracts subject to the reserve requirement.

CC-PA's Residency Contracts are not brought into the definition of refundable contract because CC-PA does not refer to the repayment obligation as a "refund." Although the Residency Contract uses both the term "refund" and "repayment," the terms have different meanings and trigger different payment deadlines. The term "refund" is used in the Residency Contract to refer to a payment made to a resident when: (1) the resident terminates the contract during the initial

[4] This determination rests, in part, on the fact that the likelihood of not reselling by the ten year outside date is extremely remote.

cancellation period; or (2) CC-PA terminates the resident's contract for just cause.[5] FAC, Exhs. 8, 10, 12, 14, 16, and 18 at sections 8.1, 8.4.2.a-g and j. In these two situations, the "refund" is not contingent on resale of the apartment but is generally due fourteen (14) days after the resident vacates his or her apartment. FAC, Exhs. 8, 10, 12, 14, 16 and 18 at sections 8.1, 8.4.5; Exhs. 14 and 16 at section 9.1.1. Conversely, the term "repayment" is used to refer to a payment made to a resident whose contract is terminated due to (1) the resident's death, or (2) the resident's decision to terminate the contract for any reason after the expiration of the cancellation period.[6] *See* FAC, Exhs. 8, 10, 12, 14, 16, and 18 at sections 8.2 and 8.3. When a contract terminates for one of these reasons, repayments are not due until the apartment is resold or after ten (10) years. FAC, Exhs. 8, 10, 12, and 18 at section 8.5.2; Exhs. 14 and 16 at section 9.1.2.

Similarly, the repayment obligation is not referred to as a "refund" in defendants' marketing materials. Plaintiffs refer to and attach three (3) documents which they contend show that CC-PA "regularly refers to the obligation as a 'refund' obligation." FAC, ¶ 81, Exhs. 1, 21, and 22. Two of these documents are newspaper articles, not documents created by defendants. Contrary to plaintiffs' suggestions, although the term "refund" is used by the authors of the articles, it is not contained in a quote made by the former Sales Director of Vi at Palo Alto. *See* FAC, Exhs. 1 and 22.[7] The third document, a "guidebook" attached as Exhibit 21 to the FAC, is not a marketing piece specific to the Vi at Palo Alto community. Rather it is a general overview of Vi's CCRCs across the nation, which are each subject to different laws.[8] The "guidebook" specifically states that "many, but not all, CCRCs make the entrance fee partially refundable" and advises prospective

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[5] For example, CC-PA may terminate a resident's contract when the resident fails to pay monthly fees, fails or refuses to comply with the community's rules, refuses to be transferred to a higher level of care, or breaches the contract. *See* FAC, Exhs. 8, 10, 12, 14, 16, and 18 at section 8.4.2.

[6] Payments made under Residency Contracts that are terminated due to damage, destruction, condemnation or appropriation of the community are also referred to as "repayments" and calculated in the same manner as contracts that are terminated due to death or a resident's decision to leave the community, but have different deadlines for repayment. *See* FAC, Exhs. 8, 10, 12, and 18 at 8.5.2; Exhs. 14 and 16 at 9.1.2.

[7] In fact the SF Gate article makes clear that the repayment obligation is not due until the unit is resold. There is no mention of the 25 year (at that time) outside repayable date. *See* FAC, Exh. 22.

[8] Plaintiffs attach only one page of the "guidebook," omitting the title page and end page which demonstrate that the document is not specific to the Vi at Palo Alto Community. A complete copy of the "Guidebook" is attached as Exhibit D to the Weddell Declaration.

residents to contact the specific communities for more information. FAC, Exh. 21. Accordingly, the allegations that defendants regularly referred to the obligation as a "refund" is contradicted by the exhibits to the FAC. *See Thompson v. Illinois Dept. of Prof. Reg.*, 300 F.3d 750, 754 (7th Cir. 2002) ("when a written instrument contradicts allegations in a complaint to which it is attached, the exhibit trumps the allegations").

2. Even if Plaintiffs Had a Security Interest in the Entrance Fees, They Have Suffered No Harm, Nor Is There a Risk Of Imminent Harm.

Even if plaintiffs somehow obtained legally protected interests in the entrance fees—and they did not—plaintiffs have failed to allege any cognizable injury that would confer standing. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan, supra,* 504 U.S. at 560. Plaintiffs have not alleged that any interest in these unsecured loans has been impaired as they have not—and cannot—allege that CC-PA has ever failed to pay any entrance fee obligation when it became due.[9]

Likewise, plaintiffs do not allege imminent harm with regard to the entrance fees as their allegations that CC-PA may one day fail to make a repayment rely on a series of highly unlikely, contingent, and hypothetical events. The Supreme Court recently reiterated that "the threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper, supra,* 133 S. Ct. at 1142-43 (internal quotations omitted) (emphasis in original). **There are no allegations that any plaintiffs have terminated their Residency Contract and are currently awaiting resale of their apartment.** Therefore, any "threat" that CC-PA may someday fail to resell a unit, and therefore be unable to make a repayment by the due date, is at the earliest, ten (10) years away. This is not a threat that is "certainly impending" to establish injury in fact for standing purposes.

[9] Plaintiffs do not allege that CC-PA has failed to meet a repayment obligation. In fact, they cannot allege such facts because CC-PA has **never** defaulted on an entrance fee repayment obligation. *See* FAC, Exh. 6 ("Neither the provider [CC-PA] nor any Vi affiliated entity has ever defaulted on an entrance fee repayment obligation."); *see also* Transcript of September 9, 2014 Hearing on Defendants' Motion to Dismiss, at 25:18-26:12.

B. Plaintiffs Do Not Have Standing With Regard To The Monthly Fees.

Equally unavailing is plaintiffs' attempt to articulate a harm due to "inflated monthly fees." Plaintiffs rely on speculative future events and an erroneous reading of the Residency Contract to claim that the monthly fees have been inflated with regards to three items: (1) property taxes, (2) insurance, and (3) marketing costs. Plaintiffs' allegations are contrary to the terms of the Residency Contracts which clearly state monthly fees will be used to pay all costs of operating the community, including property taxes, insurance, and marketing costs. *See* FAC, Exhs. 8, 10, 12, and 18 at recital E and sections 2.1.16, 3.3.2, and 3.3.3; Exhs. 14 and 16 at section 3.3.2. The unambiguous language of the Residency Contracts, which are exhibits to the FAC, trumps plaintiffs' allegations.

1. Property Taxes.

Plaintiffs allege that their monthly fees have been inflated because defendants have "indicated" that plaintiffs will pay the cost of the increased real property taxes from the recent tax assessment if CC-PA's appeal to the Assessment Appeals Board is unsuccessful. *See* FAC, ¶ 119. Plaintiffs **do not claim that they have been harmed** by the increased property taxes. Rather, they admit that CC-PA has agreed to pay the amount assessed in back taxes (over $12 million) and will pay the additional taxes as a result of the increase (approximately $1.9 million per year) during the pendency of its appeal of the tax assessment. *See* FAC, ¶¶ 117-119 and Exh. 24. Plaintiffs speculate that they **may** be harmed at some point in the future in the event that the appeal is unsuccessful.[10] *See* FAC, ¶ 119. This allegation is not only uncertain, but also contradicts the unambiguous Residency Contracts, which state that real estate taxes are an operating expense of the Community to be paid from monthly fees. *See* FAC, Exhs. 8, 10, 12, 14, 16, and 18 at section 2.1.15 ("real estate taxes, special taxes or assessments, and any other taxes … will be included in the determination of Your Monthly Fee"); *see also* FAC, Exhs. 8, 10, 12, and 18 at section 3.3.3; Exhs. 14 and 16 at section 3.3.2.

[10] The appeal of the tax assessment is still in its early stages and plaintiffs' Residents Advisory Council believes that CC-PA's chance of success on the appeal of the tax assessment is high. *See* FAC, ¶ 118 and Exh. 33 (first paragraph).

Plaintiffs also fail to articulate injury with respect to their claim that they have been harmed by CC-PA's suspension of crediting funds from the Cumulative Operating Surplus (COS) reserve pending resolution of the tax assessment litigation. *See* FAC, ¶¶ 120-123. Under the express terms of the Residency Contracts, CC-PA **retained complete discretion** to retain operating surpluses as a reserve or to credit a portion of the surplus back to residents to lower future monthly fees. *See* FAC, Exhs. 8, 10, 12, and 18 at Appendix D; Exhs. 14 and 16 at Appendix C. Before the tax assessment, CC-PA, in the exercise of its discretion under the Residency Contract, credited excess amounts in the COS reserve back to the residents.[11] However, in August 2012, CC-PA notified the residents that it would suspend credits to residents, as provided for in the COS policy, pending resolution of the tax assessment appeal. *See* FAC, Exh. 24. On December 8, 2014, CC-PA decided to reinstitute the crediting of the previously-withheld amounts from the COS due to the slow progress of its tax appeal. *See* FAC, Exh. 31. CC-PA has fully credited the excess amounts in the COS reserve back to the residents, and has stated that it will continue to distribute any excess amounts in the future. *Id.*

2. Insurance Charges.

Plaintiffs utilize a strained reading of the Residency Contracts to allege that defendants have improperly inflated monthly fees by misallocating insurance costs. *See* FAC, ¶¶ 124-127. Plaintiffs allege that sections 3.3.2 and 3.3.3 of the Residency Contract support their claim that they are only responsible for insurance charges attributable to furniture, fixtures, and equipment. FAC, ¶ 125. Plaintiffs admit that residents' monthly fees are intended to pay all costs of operating the community, including the costs of insurance policies. *Id*. Nonetheless, plaintiffs allege that this is somehow limited by subsection (iv) which states residents are also responsible for "all costs of maintenance, repairs, and replacement of capital items, **including** furniture, fixtures, and

[11] Plaintiffs' allege the "Proposed Guidelines Regarding Cumulative Operating Surplus (COS) 3/12/09" modified the Policy on Surpluses and Deficits in the Residency Contracts and required CC-PA to return operating surpluses to residents over a formula amount reasonably necessary to provide for operating contingencies. FAC, ¶¶ 120-121. However, plaintiffs concede that even under this "proposed guideline"—which was not made part of the Residency Agreement—CC-PA still retained discretion to withhold credits to the residents if "then available information indicates that greater retention may be necessary because of significant unanticipated expenses or loss of revenue for the current year." FAC, ¶ 120, Exh. 7.

equipment." *Id*. (emphasis added). These subsections are illustrative of the operating costs included in plaintiffs' monthly fees. One subsection cannot be read to modify or restrict another. Such a reading clearly contradicts the language of the Residency Contract, which states multiple times that the residents' monthly fees are intended to pay for **all** operating costs of the community, and expressly includes "the costs of insurance policies (including property, casualty, and liability insurance policies)." *See* FAC, Exhs. 8, 10, 12, and 18 at recital E and sections 2.1.16, 3.3.2, and 3.3.3; Exhs. 14 and 16 at section 3.3.2.

3. Marketing Fees.

Finally, plaintiffs allege that they have been improperly charged for marketing costs. FAC, ¶¶ 128-129. Again, plaintiffs are attempting to change an explicit provision in their Residency Contracts, which states that marketing expenses are an operating cost of the community to be paid with monthly fees.[12] *See* FAC, Exhs. 8, 10, 12, and 18 at section 3.3.3; Exhs. 14 and 16 at section 3.3.2. Plaintiffs provide no basis for their allegations that marketing costs have been improperly allocated. Furthermore, all marketing costs relate to the operations of the community as the community cannot remain occupied without ongoing sales. In fact, a strong marketing program, which helps maintain a deep waiting list of prospective residents, is a substantial benefit, not a harm, to the residents as the repayable portion of the entrance fee is essentially contingent upon resale of the unit.

In sum, plaintiffs' FAC alleges neither a legally cognizable interest nor injury that could be redressed by this suit. Plaintiffs' lack of standing is dispositive and requires dismissal of the FAC in its entirety.

III. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION.

For similar reasons, plaintiffs' FAC should be dismissed as it is not yet ripe for adjudication. Like standing, ripeness is a threshold jurisdictional issue grounded in the courts'

[12] Early Residency Contracts provided that CC-PA pay the marketing costs until 90% of the independent living apartments were sold. *See, e.g.*, FAC, Exhs. 8, 10, 12, and 18 at section 3.3.3. Pursuant to this clause, the marketing costs associated with the first generation of sales were paid by CC-PA; however, the costs of ongoing marketing efforts are to be paid with monthly fees as an operating cost of the community.

limited Article III power to adjudicate actual cases and controversies. *Alaska Right to Life Political Action Comm., supra,* 504 F.3d at 848-49. The ripeness doctrine is designed to prevent courts from entangling themselves in abstract disagreements by premature adjudication. *See Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 807 (2003).

To determine whether the issues presented by a case are ripe for judicial review, a court must evaluate (1) the fitness of the issues for judicial decision, and (2) whether there is an imminent and significant hardship inherent in withholding court consideration. *Abbott Labs v. Gardner,* 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99, 105 (1977). The fitness for judicial resolution question depends on whether the case "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998). The hardship inquiry considers whether "withholding review of the issue would result in direct and immediate hardship and would entail more than possible financial loss." *Mun. of Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992).

Here, both considerations favor dismissal. The FAC alleges speculative harm based on a series of highly unlikely, contingent, and hypothetical events. Inviting review at this stage would only entangle the court in an abstract disagreement. There is also no imminent harm in withholding court consideration. Plaintiffs acknowledge that the repayable portion of their loans are not yet due, and that defendants have never failed to make a repayment. Instead, plaintiffs speculate that CC-PA **might** not be able to make a repayment **at some point in the future**. Plaintiffs have not identified any "direct and immediate hardship that would entail more than possible financial loss." *See id.*

IV. THE FIRST CAUSE OF ACTION FOR FINANCIAL ELDER ABUSE FAILS TO STATE A CLAIM.

Plaintiffs' claim of financial elder abuse is premised on their claims of misrepresentations and concealment and thus is subject to the heightened requirements of Rule 9(b). *See Edelman v. Bank of America Corp.,* 2009 WL 1285858, at *3 (C.D. Cal. Apr. 17, 2009). A cause of action for financial abuse of an "elder" requires proof of the following elements: (1) the defendant took, appropriated, or retained an individual's property; (2) the individual was 65 years of age or older, or a dependent adult, at the time of the defendant's conduct; (3) the defendant took or appropriated the property for a wrongful use with the intent to defraud or by undue influence; (4) the individual

was harmed; and (5) the defendant's conduct was a substantial factor in causing the individual's harm. *See*, *e.g.*, Cal. Welf. & Inst. Code §§ 15610.27, 15610.30; Cal. Judicial Council Civil Jury Instructions, No. 3100 Financial Abuse-Essential Factual Elements (2013 Ed.).

Plaintiffs' claim for financial elder abuse fails as CC-PA has not taken, appropriated, or retained a property right belonging to plaintiffs. Plaintiffs allege that they have been deprived of a property right because the entrance fees "have been placed at risk, their security interest has been impaired" and plaintiffs face "inflated monthly fee charges." FAC, ¶ 196, p.48.[13] However, as discussed above in Section II, plaintiffs have not been deprived of any right to which they are entitled because they have no interest in the repayable portion of the entrance fees and the Residency Contracts state that property taxes, insurance, and marketing costs are to be paid from the monthly fees.

This is not a situation where an elder was unduly influenced to enter into a contract wherein a property right was relinquished for little or nothing in return. Plaintiffs, who are notably sophisticated, each freely entered into a contractual relationship with CC-PA. Pursuant to the terms of these contracts, they paid an entrance fee upon entering the community. *See* FAC, ¶¶ 15-17. CC-PA has performed all of its obligations under the contract, and has made all repayments as they become due. *See* FAC, Exh. 6 ("Neither the provider [CC-PA] nor any Vi affiliated entity has ever defaulted on an entrance fee repayment obligation."). The Residency Contract expressly states that monthly fees are intended to cover **all costs of operating the community**, and expressly includes real estate taxes, property insurance, and marketing costs. *See* FAC, Exhs. 8, 10, 12, and 18 at recital E and sections 2.1.16, 3.3.2, and 3.3.3; Exhs. 14 and 16 at section 3.3.2. Accordingly, the FAC fails to state a claim for financial elder abuse and the first cause of action should be dismissed.

V. THE SECOND CAUSE OF ACTION FOR CONCEALMENT FAILS TO STATE A CLAIM.

Plaintiffs fail to state a claim for concealment as the FAC lacks allegations of actual reliance and damages. *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 248 (2011). The FAC lacks any allegation that would show the "nondisclosure was an immediate cause of the

[13] The FAC uses paragraph numbers 191-247 twice. As such, this memorandum also specifies the page on which those paragraphs appear.

plaintiff's conduct which altered his or her legal relations, and … without such … nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1239 (1995). In other words, the FAC lacks facts that indicate that, had the omitted information been disclosed, plaintiffs would have behaved differently.

Plaintiffs also fail to describe how plaintiffs have been harmed by defendants' alleged failure to disclose facts. *See Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1818 (1996), quoting Civ. Code § 3333 ("In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the 'detriment proximately caused' by the defendant's tortious conduct."). The FAC does not include allegations as to the amount of damages plaintiffs suffered, nor is there anything to show that the damage is "because of" the concealment, as compared to some other extrinsic factor. Rather, plaintiffs make only a conclusory allegation that "Plaintiffs and the Class were harmed by Defendants' failure to disclose these important facts, and Defendants [sic] concealment was a substantial factor in the harm incurred by Plaintiffs and the Class." FAC, ¶ 205, p. 50. These factual deficiencies mandate dismissal of this cause of action.

VI. THE THIRD CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION FAILS TO STATE A CLAIM.

Although the cause of action for negligent misrepresentation states it is against "all defendants," plaintiffs only identify one misrepresentation[14] purportedly made by CC-PA. Plaintiffs allege only the following statement made in an October 9, 2008, marketing letter addressed to "friends":

> [Residents experience] a sense of security, knowing they have made a good choice. They know their entrance fee refund will not fluctuate with changes in the market…. Our residents enjoy a vibrant and enriching lifestyle with the knowledge that they have planned wisely to secure their future.

[14] Plaintiffs also allege that "CC-PA represented to Plaintiffs and the Class that their Entrance Fees would be used to provide services." FAC, ¶ 211, p. 51. There are no facts that support this allegation, and it contradicts the express terms of the Residency Contracts. *See* FAC, Exhs. 8, 10, 12, 14, 16 and 18 at section 3.3.2 (monthly fees, not entrance fees, are used to pay for all costs of operating the community); *see also* Exhs. 8, 10, 12, and 18 at Recital E ("The Provider intends that the daily operations for the Community will be budgeted such that Monthly Fees from all residents, along with other revenues, **excluding entrance fees** …. will be sufficient to pay all of the Community costs incurred in connection with the operations, maintenance, **and services** provided at the Community….) (emphasis added).

FAC, ¶ 210, p. 51. This statement is so generalized and vague, that it constitutes mere "puffery" upon which a reasonable consumer could not rely. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv*., 911 F.2d 242, 245 (9th Cir. 1990). The statement is also a prediction of future events, which is not actionable fraud. *Aguinaldo v. Ocwen Loan Serv., LLC*, 2012 WL 3835080, at *5 (N.D. Cal. Sept. 4, 2012) (citing *Tarmann v. State Farm Mut. Auto. Ins. Co*., 2 Cal. App. 4th 153, 158 (1991)).

Plaintiffs also fail to plead actual reliance. *See Cadlo v. Owens-Illinois, Inc.,* 125 Cal. App. 4th 513, 519 (2004). The FAC states that plaintiffs "reasonably relied" on CC-PA's representations, but lacks allegations as to how plaintiffs acted, or what plaintiffs did or did not do, as a result of their reliance. The FAC is devoid of any alleged facts to demonstrate (1) each plaintiff received the letter, (2) when he or she received it, (3) why the statement was untrue, (4) that they relied on the alleged misrepresentation contained therein, (5) why that reliance was reasonable, and (6) that each individual plaintiff would not have entered the community but for the alleged misrepresentation. *See Noll v. eBay, Inc*., 282 F.R.D. 462, 468 (N.D. Cal. 2012) ("A plaintiff must plead reliance on alleged misstatements with particularity…"). Plaintiffs cannot make such allegations because the four (4) plaintiffs that entered the community several years before the alleged misrepresentation was made could not have relied on it. *See Katz v. Feldman*, 23 Cal. App. 3d 500, 504 (1972) ("[A] party may not allege inconsistent facts in his pleading in the same case"). As such, plaintiffs' third cause of action should be dismissed.

VII. THE FOURTH CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY FAILS TO STATE A CLAIM.

To state a claim for breach of fiduciary duty a plaintiff must show the existence of a fiduciary relationship, its breach, and damage caused by the breach. *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1101 (1991). "The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another." *Vai v. Bank of America*, 56 Cal.2d 329, 338 (1961). "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which

imposes that undertaking as a matter of law." *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal.3d 197, 221 (1983), *superseded by statute on other grounds*.

Plaintiffs erroneously state that defendants owe plaintiffs a fiduciary duty due to their age and health, the nature of the contract, and because CC-PA "assumed the role of caregiver and business partner to Plaintiffs and the Class." FAC, ¶ 130. However, this allegation contradicts the parties' commercial relationship as evidenced by the Residency Contracts. The entrance fees are unsecured loans to CC-PA, and plaintiffs have no vested ownership interest in them. *See* FAC, Exhs. 8, 10, 12, and 18 at section 9.5; Exhs. 14 and 16 at section 11.6 (stating that residents do not have any interest in any payments made under the Residency Contract). The California Supreme Court has held that fiduciary duties are "inappropriate in a buyer-seller context" because the "various statutory and common law doctrines fashioned to protect the consumer from overreaching and deception are strong and flexible enough to accomplish that purpose[;] … it is unnecessary to call upon the law of fiduciary relationships to perform a function for which it was not designed and is largely unsuited." *Comm. on Children's Television, Inc.* 35 Cal.3d at 222.

The relationship between the parties is not at all comparable to that of a friend or personal caregiver who exercises undue influence over an elder for the purpose of taking financial advantage of them. Rather, plaintiffs are highly educated, independent, and successful individuals. *See* FAC, ¶¶ 54-72. Defendants do not exert control over the residents or their assets. Decisions regarding a resident's health status and other personal matters are left to the residents, their physicians, and loved ones. *See* FAC, Exhs. 8, 10, 12, and 18 at section 4.4; Exhs. 14 and 16 at section 4.10. Therefore, defendants in no way undertook a fiduciary duty.

Likewise, the parties' relationship does not fall within one of the traditional fiduciary relationships that have been recognized by courts in the commercial context, for example, between a trustee and beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, or agent and principal. *See Wolf v. Superior Court,* 107 Cal. App. 4th 25, 30 (2003). Providing services to a consumer under a contract does not give rise to a fiduciary duty, even if one party is dependent on the other's performance. *Comm. on Children's Television, Inc.,* 35 Cal.3d at 222. In business relationships, the vulnerability of one party, unequal bargaining

power between the parties, or one party placing trust in another, do not warrant invocation of a fiduciary duty against the stronger party. *See City of Hope Nat'l Medical Center v. Genentech, Inc.*, 43 Cal.4th 375, 389 (2008). CC-PA is a seller of services and accommodations to consumers in a highly regulated business. Notably, the statutory scheme on which plaintiffs rely in their attempt to impose liability here does not impose a fiduciary relationship. *Compare* California Civil Code section 2923.1 which imposes a fiduciary relationship between mortgage brokers and borrowers ("A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary of the borrower."). Because the FAC does not establish and indeed contradicts the existence of a fiduciary relationship, the breach of fiduciary duty cause of action should be dismissed with prejudice.

VIII. THE FIFTH CAUSE OF ACTION FOR VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT FAILS TO STATE A CLAIM.

The California Consumers Legal Remedies Act ("CLRA") prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale ... of goods or services to any consumer." Cal. Civ. Code § 1770(a). Plaintiffs' CLRA claim should be dismissed because (1) plaintiffs failed to comply with the venue affidavit requirement; (2) plaintiffs failed to comply with the precomplaint notice requirements; (3) four of the plaintiffs are barred by the statute of limitations; and (4) plaintiffs have failed to state a claim.

A. Plaintiffs' CLRA Claim Must Be Dismissed For Failure To Comply With The Venue Affidavit Requirement Of Section 1780(d).

"In any action [under the CLRA], **concurrently with the filing of the complaint**, the plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county described in this section as a proper place for the trial of the action." Cal. Civ. Code § 1780(d) (emphasis added). If "a plaintiff fails to file the affidavit required by this section, the court **shall**, upon its own motion or upon motion of any party, dismiss the action without prejudice." *Id.* (emphasis added); *see also McVicar v. Goodman Global, Inc.*, 2014 WL 794585, at *9 (C.D. Cal. Feb. 25, 2014). Plaintiffs failed to file the required affidavit, and thus, their CLRA claim must be dismissed.

B. Plaintiffs' CLRA Claim Must Be Dismissed For Failure To Comply With The Precomplaint Notice And Demand Requirements Of Civil Code § 1782(a).

Plaintiffs also failed to comply with the CLRA's precomplaint notice and demand requirements. The CLRA requires that **at least 30 days prior to the commencement of an action for damages under the CLRA**, the consumer must notify the potential defendant of the claim and allow the potential defendant a chance to rectify. Cal. Civ. Code § 1782(a). The presuit notice must be in writing and sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, or to the potential defendant's principal place of business within California. *Id.,* § 1782(a)(2). Here, plaintiffs filed their original complaint on February 19, 2014 (Dkt. No. 1), but did not send their CLRA notice until March 27, 2014, with their opposition to defendants' motions to dismiss (Dkt. No. 29). Because plaintiffs did not send the presuit notice 30 days before filing the original complaint, the CLRA cause of action must be dismissed.

C. If Plaintiffs' Have Successfully Alleged A CLRA Claim, It Must Be Dismissed As To Plaintiffs Richter, Cork, May, And Anderson As They Are Barred By The Statute Of Limitations.

The statute of limitations for CLRA claims is three years and it begins to run on the date the improper consumer practice was committed. Cal. Civ. Code § 1783 (CLRA actions "shall be commenced not more than three years from the date of the commission of such method, act or practice" made unlawful by the act). Plaintiffs allege "Defendants' practices in connection with the marketing and sale of CCRC residential and financial management services related to Entrance Fees and allocated expenses violate the CLRA…." FAC, ¶ 234, p. 54. Thus, plaintiffs contend that defendants committed the improper consumer practice prior to and at the time they entered into their respective Residency Contracts. *See Plumlee v. Pfizer, Inc.*, 2014 WL 695024, at *7 (N.D. Cal. Feb. 21, 2014) (statute of limitations for CLRA claims "accrues when a defendant misrepresents or omits material information regarding a product or service and a consumer makes a purchase as a result of such deceptive practices"). The CLRA claims of plaintiffs Richter, Cork, May, and Anderson therefore are barred by the statute of limitations as they signed their residency contracts more than three years prior to filing their initial complaint. *See* FAC, Exh. 8 (Richter, 06/15/05), Exh. 10 (Cork, 07/29/05), Exh. 12 (May, 10/28/05), Exh. 18 (Anderson, 07/21/05).

D. Plaintiffs' CLRA Claim Should Be Dismissed For Failure To State A Claim.

In addition to the procedural defects noted above, plaintiffs' CLRA claim fails as a matter of law for three additional reasons: (1) plaintiffs fail to identify any actionable misrepresentations; (2) plaintiffs fail to plead actual reliance on the alleged misstatements; and (3) plaintiffs have not suffered any damage.

Plaintiffs' CLRA cause of action does not identify the purported misrepresentation made by defendants regarding the "security" of the repayable portion of the entrance fees (FAC, ¶ 235, p. 54), but it appears plaintiffs are relying on the same purported misrepresentation identified in their cause of action for negligent misrepresentation, which is not actionable. In addition, as discussed above in Section II.A., plaintiffs do not have a cognizable security interest in the entrance fees. Plaintiffs' conclusory allegations that misrepresentations were made with regard to the monthly fees are also unavailing because, as this court found in dismissing plaintiffs' initial complaint, plaintiffs' allegations that they have been overcharged for monthly fees are contrary to the express terms of the Residency Contracts. *See also* Section II.B., *supra.*

Moreover, where claims under the CLRA relate to an alleged misrepresentation, plaintiffs must also allege detrimental reliance, *i.e.*, that they would have made a different consumer decision but for the alleged misstatements at issue. *See, e.g., Faigman v. Cingular Wireless, LLC*, 2007 WL 708554, at *5 (N.D. Cal. Mar. 2, 2007) (explaining that "plaintiffs must allege that they would have acted differently—i.e., not purchased phones or services from Cingular, or opted for different Cingular products or services—had plaintiffs known" the undisclosed facts); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 947 (S.D. Cal. 2007) (dismissing CLRA claim where the plaintiff "[did] not allege that false statements or claims had anything to do with her decision to purchase" the products at issue). Plaintiffs have not alleged specific facts supporting their actual reliance on defendants' alleged misrepresentation.

Even if plaintiffs were able to allege facts sufficient to demonstrate reliance, plaintiffs have not suffered any damage as a result of the alleged misrepresentations. The California Supreme Court has found that the alleged unlawful practice must have "resulted in some kind of tangible increased cost or burden to the consumer." *Meyer v. Sprint Spectrum,* 45 Cal.4th 634, 641 (2009).

Plaintiffs have not been damaged as they lack a security interest in the entrance fees and the Residency Contract signed by each plaintiff provides that monthly fees will be used to pay for all costs of operating the community. *See* section II, *supra.* Accordingly, plaintiffs' cause of action for violation of the CLRA should be dismissed.

IX. THE SIXTH AND SEVENTH CAUSES OF ACTION FOR VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200 FAIL TO STATE A CLAIM.

California Business & Professions Code section 17200, also referred to as the "Unfair Competition Law" (or "UCL") prohibits any "unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. A plaintiff seeking to assert a UCL claim must meet the statute's requirements for standing, which are that he or she (1) has suffered an "injury in fact," and (2) "lost money or property." *Id.* at § 17204. Plaintiffs fail to meet either requirement.

Plaintiffs allege that defendants' business practices "impaired the value of [their] security interest and [they] have lost property as a result" but do not allege any facts to support this conclusory claim. FAC, ¶ 240, p. 55; ¶ 252, p. 58. As discussed above in Section II, plaintiffs have not—and cannot—articulate an injury in fact. With regard to the second requirement, plaintiffs cannot maintain they have lost any money or property as a result of defendants' conduct. Plaintiffs do not have a security interest in the repayable portion of the entrance fees and the Residency Contract expressly provides for all of the charges for which plaintiffs allege they have been overcharged. *See* Section II, *supra.* Because plaintiffs do not meet the statute's requirements for standing, their UCL claim must be dismissed.

X. THE EIGHTH CAUSE OF ACTION FOR BREACH OF CONTRACT FAILS TO STATE A CLAIM.

Here, just as in plaintiffs' original complaint, plaintiffs fail to state a claim for breach of contract. For breach of contract, a party must plead: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Reichert v. General Ins. Co.*, 68 Cal.2d 822, 830 (1968). Plaintiffs assert that CC-PA breached the contract by transferring excess cash to CC-DG and failing to maintain reserves. *See* FAC, ¶ 265, p. 60. Distributing excess cash to a parent company is a common business practice and is not

prohibited by law. *See, e.g., Tomaselli v. Transamerica Ins. Co.,* 25 Cal. App. 4th 1269, 1284 n.12 (1994) (recognizing that parent company's receipt of money from a subsidiary in the form of dividends and interest on loans and the reinvestment of some portion of those funds in the subsidiary "are precisely the kinds of transactions which would occur among entities which respect the corporate separateness among entities."); *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174 (Del. 1988); *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.,* 906 A.2d 168, 173 (Del. Ch. 2006). In fact—as conceded in an exhibit attached to the FAC—DSS, the department charged with enforcing the continuing care contract statutes, has stated that the statutes "specifically contemplate" that a provider will distribute excess cash to a parent company. FAC, Exh. 5, page 3 (first full paragraph).

Plaintiffs assert that CC-PA breached the Residency Contract by improperly allocating earthquake insurance charges and marketing costs. But, as discussed above in Section II, property insurance and marketing expenses are expressly included in the calculation of monthly fees. As the Court noted in dismissing plaintiffs' original complaint, "[t]he Residency Contract signed by each Plaintiff clearly provides that monthly fees will be used to pay for general operating costs, insurance costs, and marketing costs …. [N]othing has occurred to run afoul of the contract terms." Dkt. No. 55 at p. 12. "'[W]here it is clear from the unambiguous terms of the contract that the alleged conduct of the defendant does not constitute a breach of contract,' the complaint should be dismissed." *Guerard v. CNA Financial Corp*., 2009 WL 3152055, *8 (N.D. Cal. Sept. 22, 2009) (*quoting Arbor Acres Farm, Inc. v. GRE Ins. Group*, 2002 WL 777447, *5 (N.D. Cal. Jan. 16, 2001)).

As the FAC lacks any allegation that CC-PA has committed an essential element of the cause of action, *i.e.*, a breach, plaintiffs have failed to properly plead the cause of action. *Johnson v. Riverside Healthcare System, LP,* 534 F.3d 1116, 1122 (9th Cir. 2008) (plaintiff must at least "allege sufficient facts to state the elements of [his or her] claim"). Additionally, as discussed above in the standing section, plaintiffs have failed to allege that they have been harmed by any purported breach of the Residency Contract. *See Bramalea Cal., Inc. v. Reliable Interiors, Inc.*, 119 Cal. App. 4th 468 (2004) ("A breach of contract is not actionable without damage."). Because

plaintiffs' allegations contradict the express terms of the Residency Contracts, the eighth cause of action for breach of contract must be dismissed.

XI. THE NINTH CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING FAILS TO STATE A CLAIM.

"The implied covenant of good faith and fair dealing rests upon the existence of **some specific contractual obligation** .... [T]he implied covenant is limited to ensuring compliance with the express terms of the contract, **and cannot be extended to create obligations not contemplated in the contract**." *Racine & Laramie, Ltd. v. Cal. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026, 1031-32 (1992) (emphasis added). Therefore, courts have consistently held that to state a claim for breach of the implied covenant of good faith and fair dealing, plaintiff must cite a specific provision of the contract that was frustrated. *See, e.g., Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1156 (N.D. Cal. 2013); *Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d 1142, 1154 (E.D. Cal. 2010). The FAC includes a list of actions allegedly taken by CC-PA that supposedly interfered with plaintiffs' rights to receive benefits under the contract, but does not cite to any specific contractual provision that CC-PA's actions frustrated.

Furthermore, the covenant of good faith and fair dealing cannot contradict the express terms of a contract. *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 55 (2002). As determined by the court in dismissing plaintiffs' original complaint, plaintiffs' allegations that CC-PA improperly allocated insurance and marketing expenses contradict the express terms of the Residency Contract. *See also* Section II.B., *supra*. Plaintiffs cannot claim CC-PA breached the implied covenant of good faith and fair dealing regarding the monthly fees.

Because plaintiffs have failed to state a cause of action for breach of the implied covenant of good faith and fair dealing, the ninth cause of action should be dismissed.

XII. THE TENTH CAUSE OF ACTION FOR DECLARATORY RELIEF FAILS TO STATE A CLAIM.

In order to maintain a claim for declaratory relief, the party seeking such relief must demonstrate that there is an "actual controversy relating to the legal rights and duties of the respective parties[.]" Code Civ. Proc. § 1060. Declaratory relief is proper "only where there is a justiciable controversy, as distinguished from a difference or dispute of a hypothetical or abstract

character, from one that is academic or moot. A party seeking declaratory relief must plead facts rather than conclusions of law and must show a controversy of concrete actuality as opposed to one which is merely academic or hypothetical." *Auberry Union School Dist. v. Rafferty*, 226 Cal. App. 2d 599, 602-03 (1964) (citation omitted). Plaintiffs fail to demonstrate that there is a ripe controversy. *See* sections II and III, *supra.* Where, as here, the complaint shows that there is no actual controversy, it is proper to sustain a motion to dismiss for failure to state a cause of action. *See Auberry,* 226 Cal. App. 2d at 602.

Courts generally exercise their discretion to dismiss declaratory judgment claims that duplicate other substantive claims asserted in the same complaint. *See, e.g., Kinghorn v. Citibank, N.A.*, 1999 WL 30534, at *7 (N.D. Cal. Jan. 20, 1999) ("Where a party seeks declaratory relief and a substantially similar alternative remedy, the court may exercise its discretion to dismiss the declaratory judgment claim."); *Clark v. Caln Twp.*, 1991 WL 86911, at *6 (E.D. Pa. May 20, 1991) (dismissing declaratory judgment claim "because resolution of the other counts of the complaint will necessarily clarify the legal relations at issue in this case, [and thus] it does not appear that a declaratory judgment would serve any useful purpose."). Here, plaintiffs' declaratory relief claim does just that. Therefore, this cause of action should be dismissed as an unnecessary appendage to the FAC.

XIII. THE TWELFTH CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTIES, OR IN THE ALTERNATIVE AIDING AND ABETTING THE DIRECTOR DEFENDANTS' BREACHES OF FIDUCIARY DUTIES, FAILS TO STATE A CLAIM.

The FAC's twelfth cause of action purports to assert a derivative creditor claim against CC-DG, on behalf of CC-PA, on the theory that CC-DG breached duties of good faith, care, and loyalty allegedly owed to CC-PA and plaintiffs as CC-PA's creditors. FAC, ¶¶ 211-222, pp. 64-65. But, CC-DG does not owe a fiduciary duty to its wholly-owned subsidiary CC-PA. Under Delaware law,[15] unless the subsidiary has minority stockholders, "a parent corporation does not owe fiduciary

[15] Delaware law governs the twelfth cause of action because CC-PA is a Delaware corporation. In a diversity action, the district court applies the choice of law rules of the state in which the district court where the complaint was filed sits. *See Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 385, n.7 (5th Cir. 2009) (*citing Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). Under California's "internal affairs doctrine," codified in relevant part at Corporations Code section 2116, "the law of the place of incorporation governs the liability of directors to the

duties to its wholly-owned subsidiaries or their creditors." *Trenwick America Litigation Trust*, *supra,* 906 A.2d at 191-92 & n.66 (*citing Anadarko Petroleum Corp., supra,* 545 A.2d at 1174).

Although creditors of insolvent, wholly-owned subsidiaries have standing to bring derivative claims when the subsidiary is actually insolvent (*N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 102 (Del. 2007) ("*Gheewalla*")), *Gheewalla* did not hold that a cause of action lies against the parent corporation, as opposed to the individual directors. *See Gheewalla*, 930 A.2d 101-03; *see also ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 415-16 (Bankr. S.D. Tex. 2008) (holding that no new duty is created for the parent based on the subsidiary's insolvency). Presumably, this is why plaintiffs allege in the alternative that CC-DG is liable on an aiding and abetting theory. FAC, ¶¶ 212-222, p. 65.

Even under an aiding and abetting theory, plaintiffs lack standing because the FAC does not contain enough non-conclusory allegations to support a plausible claim that CC-PA is actually insolvent under Delaware law. "To meet the burden of pleading insolvency, a plaintiff must plead facts showing that the debtor-corporation 'has either 1) a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the [face] thereof, or 2) an inability to meet maturing obligations as they fall due in the ordinary course of business.'" *In re Tropicana Entm't, LLC*, 520 B.R. 455, 472 (Bankr. D. Del. 2014) (*quoting Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 782 (Del. Ch. 2004)); *see also Gheewalla*, 930 A.2d at 98. Plaintiffs have not sufficiently alleged CC-PA's insolvency under either test. In fact, the FAC, its attachments, and materials required to be attached under the doctrine of completeness, support the opposite conclusion: CC-PA is not insolvent or in danger of becoming insolvent. Without a claim for breach of fiduciary duty against an individual director,[16] any claim against CC-DG on an aiding and abetting theory must also fail. *See In re Tropicana Entm't*, 520 B.R. at 472.

For all these reasons, plaintiffs lack standing to pursue derivative creditor claims, and the twelfth cause of action must be dismissed.

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corporation and its shareholders." *Charter Twp. of Clinton Police and Fire Ret. Sys. v. Martin*, 219 Cal. App. 4th 924, 934 (2013).

[16] Plaintiffs do not allege that any of the individual director defendants are directors of CC-DG.

A. Plaintiffs Have Not Adequately Alleged CC-PA's Inability To Meet Maturing Obligations As They Fall Due In The Ordinary Course Of Business (The "Cash Flow Test").

The cash flow test looks at the entity's ability to pay its debts as they come due in the usual course of business. *See In re Tropicana Entm't, LLC,* 520 B.R. at 471-72 ("[R]ecitation of the words 'insolvency' or 'financial collapse'—without more—is not enough to support a plausible claim of insolvency"). Here, the only allegations of cash flow insolvency are conclusory and belied by the materials appended to the FAC. *See* FAC, ¶ 8 ("As a result of this upstreaming, CC-PA has become insolvent and can pay its debts only by securing periodic, voluntary cash infusions from CC-DG"); ¶ 21; ¶ 105 (same); Exh. 4, pp. 24-26 (actuarial study projecting positive cash balances over the next ten years).

These allegations are inadequate to establish cash flow insolvency because they do not and cannot state that any of the money owed to plaintiffs is actually due. Plaintiffs also allege no examples of any missed payments. Contrary to the FAC's conclusory allegations, the Milliman actuarial study expressly states: "Cash balances are projected to remain positive over the ten year projection period." FAC, Exh. 4, p. 24. The Milliman actuarial study shows that the net positive cash flow from entrance fees, less entrance fee repayments and ground lease rent, will generate net positive cash flow of $14,368,000 to $26,749,000 annually from 2012 through 2021, a total of over $195 million over the that ten year period. FAC, Exh. 4, p. 25-26. Since plaintiffs have not raised this theory of insolvency above a speculative level, it cannot support a derivative claim.

B. Plaintiffs Have Not Adequately Alleged A Deficiency Of Assets Below Liabilities With No Reasonable Prospect That The Business Can Be Successfully Continued ("Balance Sheet Insolvency").

Balance sheet insolvency requires plaintiffs to show CC-PA has "'a deficiency of assets below liabilities **with no reasonable prospect that the business can be successfully continued in the face thereof**.'" *Production Resources Group*, 863 A.2d at 782 (*quoting Siple v. S&K Plumbing and Heating, Inc.*, 1982 WL 8789, at *2 (Del. Ch. Apr. 13, 1982) (emphasis added); *see also Gheewalla*, 930 A.2d at 98 & n.18. Plaintiffs have made no such showing, and the Milliman actuarial study attached as Exhibit 4 to the FAC contradicts any notion that the business cannot be successfully continued. FAC, Exh. 4, pp. 5, 24-26. Indeed, the Milliman report explains that

"[e]ntrance fee repayments are intended to be paid from entrance fee proceeds received from future new entrants at Palo Alto," causing the contingent repayment liability on the balance sheet to decline over time. FAC, Exh. 4, p. 5.

Moreover, plaintiffs omit additional analysis by Milliman that further explains CC-PA's financial status and the limitations of Milliman's actuarial analysis. In a letter dated September 18, 2012, Milliman wrote to the California Department of Social Services to clarify specifically: "The results of Milliman's December 31, 2011 actuarial study for Vi at Palo Alto **should not be interpreted to mean that the community is insolvent or in imminent danger of becoming insolvent.**"[17] Smith Decl., Exh. B, p. 1 (emphasis added). The letter further clarified: "Despite the deficit on the actuarial balance sheet, all the evidence reviewed for my report supports Vi at Palo Alto's ability to remain a going concern." *Id.* at p. 2. The omitted September 18, 2012 letter leaves no doubt that plaintiffs cannot show CC-PA has such a deficiency of assets that there is no reasonable prospect that its business can be continued.

Finally, the evidence attached by plaintiffs does not establish balance sheet insolvency because it does not show the market value of CC-PA's assets. The audited financial statements are based on Generally Accepted Accounting Principles (GAAP), which reflect the value of fixed assets at cost less accumulated depreciation, not market value. *See* FAC, Exh. 2 at p. 7 (audited financials prepared in conformity with GAAP) and p. 8 (property and equipment are stated at cost); Exh. 4 at p. 32 (under GAAP, values are recorded at cost less depreciation). The value of the Stanford ground lease is also not reflected as an asset on the balance sheet, though it has significant value. "In determining whether a debtor's liabilities exceed the assets, the court must evaluate the

[17] Milliman's September 18, 2012 response to the August 2, 2012 letter from DSS was produced to plaintiffs on or about October 20, 2014. Documents not attached to the complaint may be considered if the complaint refers to such documents, the document is "central" to plaintiff's claim, and no party challenges the document's authenticity. *See United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1988) (extending the rule to documents **not mentioned** in complaint, where authenticity was not contested and the complaint necessarily relied on them), *superseded by statute on other grounds as recognized in Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (same as *Parrino*). Here, the authenticity of the response is not reasonably subject to dispute, and the Milliman response is central to plaintiffs' creditor derivative claims, which depend on the ability to allege insolvency.

debtor's assets and liabilities based upon **a practical assessment of their actual value**—a 'fair valuation'—rather than in accordance with generally accepted accounting principles." *In re GSM Wireless, Inc.*, 2013 WL 4017123, *18 (Bankr. C.D. Cal. 2013) (*citing In re Bay Plastics, Inc.*, 187 B.R. 315, 330 (Bankr. C.D. Cal. 1995) (emphasis added)). Plaintiffs have not alleged facts sufficient to show the insolvency of CC-PA, based on a practical assessment of the actual value of its assets. They have not established CC-PA is insolvent under any applicable test. Therefore the twelfth cause of action cannot proceed on any theory and must be dismissed.

XIV. THE FOURTEENTH CAUSE OF ACTION FOR FRAUDULENT TRANSFER OF ASSETS FAILS TO STATE A CLAIM.

The fourteenth cause of action alleges that CC-PA's distributions of excess cash to CC-DG violated California Civil Code sections 3439.04 and 3439.05 (CUFTA), as well as Delaware Code, title 6, sections 1304(a)(1) and 1305(a) (DUFTA). Plaintiffs allege that CC-DG directed the transfer of entrance fees with actual intent to hinder, delay, or defraud them as creditors, because CC-PA (1) did not retain possession of the funds, (2) did not disclose the distributions to plaintiffs, (3) distributed the funds to an insider, and (4) drained itself of substantially all liquid assets. FAC, ¶ 236, p. 67. In addition, plaintiffs allege CC-DG is liable for constructive fraud under both CUFTA and DUFTA. None of these theories is based on factual allegations sufficient to raise this claim above the level of speculation.

A. Plaintiffs Fail To Plausibly Allege Actual Fraud.

Civil Code section 3439.04(a)(1) provides as follows:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, **whether the creditor's claim arose before or after the transfer was made or the obligation was incurred**, if the debtor made the transfer or incurred the obligation as follows:
>
> (1) With **actual intent to hinder, delay, or defraud any creditor** of the debtor.[18]

Civ. Code, § 3439.04(a)(1) (emphasis added).

[18] Delaware Code, tit. 6, section 1304(a)(1) is identical.

To determine whether the defendant has "actual intent to hinder, delay, or defraud," courts may consider whether one or more of 11 "badges of fraud" is present:

> (1) Whether the transfer or obligation was to an **insider**.
>
> (2) Whether the debtor **retained possession or control** of the property transferred after the transfer.
>
> (3) Whether the transfer or obligation was **disclosed or concealed**.
>
> (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (5) Whether the transfer was of **substantially all the debtor's assets**.
>
> (6) Whether the debtor absconded.
>
> (7) Whether the debtor removed or concealed assets.
>
> (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (9) Whether the debtor was **insolvent or became insolvent shortly after the transfer** was made or the obligation was incurred.
>
> (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Civ. Code, § 3439.04(b)(1)-(11) (emphasis added).[19] Here, the FAC does not contain non-conclusory allegations plausibly establishing fraudulent intent, as measured by these "badges of fraud." Plaintiffs' actual fraud theory also is not alleged specifically enough to satisfy Rule 9(b). *See In re Moriarty*, 2014 WL 6623005, *7-8 (Bankr. C.D. Cal. 2014) (slip copy).

The first allegation that CC-PA did not retain possession of the funds does not support an inference of fraudulent intent. This factor is intended to apply in situations where the debtor transfers title to property to another, but still retains possession of the property, thereby suggesting the debtor intended to keep using the property while protecting it from creditors at the same time. *See* Legislative Committee Comments – Assembly to Stats.1986, c. 383, § 2, Comment (7)(b). Plaintiffs have misunderstood this factor, which is not applicable here.

[19] Delaware Code, tit. 6, section 1304(b) contains nearly identical language.

Plaintiffs also erroneously allege that CC-PA did not disclose the distributions of the funds to them. FAC, ¶ 236(b), p. 67. After the initial transfer in 2005, Appendix J to the Residency Contracts, an audited financial statement, disclosed the fact of the transfer. (*See* Smith Decl., Exhs. C and D.) The Residency Contracts also specifically stated:

> The Provider will make available to You for inspection at the Community, at all reasonable business hours and upon reasonable notice, its current audited financial statement for the Community. You have also received a copy of a disclosure statement containing general information about the Provider and the Community.

See, *e.g.*, FAC, Exh. 8, pp. 29-30. Here, however, the contracts attached as exhibits to the FAC only included Appendix J for the years 2002-2003; Appendix J appears to have been omitted from the contracts for all other years. *See* FAC, Exhs. 14 and 16 (Residency Contracts with Appendix J omitted).[20] Plaintiffs cannot plausibly allege this badge of fraud, because the fact of the transfers was either disclosed in their contracts, or was available to them for inspection.

Plaintiffs also erroneously allege that the distributions drained CC-PA of substantially all of its liquid assets. The Milliman Statement of Actuarial Opinion contradicts this allegation, because it shows a positive cash flow projection for the next ten years. FAC, Exh. 4, pp. 24-26. Therefore, plaintiffs' conclusory statement in the body of the FAC is insufficient to allege actual fraud.

Even if CC-DG qualifies as an "insider" under the Delaware definition (6 Del. C. § 1301(7), (9)), a transfer between a wholly-owned subsidiary and its parent cannot establish fraudulent intent by itself. Absent insolvency, "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Anadarko Petroleum Corp., supra,* 545 A.2d at 1174. Under Delaware law, a transfer from a solvent wholly-owned subsidiary to its parent is unremarkable and does not show fraud. *See Trenwick America Litigation Trust*, 906 A.2d at 173 ("Wholly-owned subsidiary corporations are expected to operate for the benefit of their parent corporations; that is why they are

[20] The Residency Contract signed by Thomas and Sue Merigan on May 14, 2012, indicates that copies of the December 31, 2010, and December 31, 2009, audited financial statements of CC-Palo Alto, Inc. are included as Appendix J. FAC, Exh.14. The Residency Contract signed by Alfred Spivack on July 5, 2012, indicates that copies of the December 31, 2011, and December 31, 2010, audited financial statements of CC-Palo Alto, Inc. are included as Appendix J. FAC, Exh.16. The Copies of these omitted audited financials are attached as Exhibits C and D to the Smith Declaration.

created."); *see also id.* at 200-02 ("Because the complaint fails to support an inference of insolvency, the Trenwick America directors were free to manage Trenwick America for the best interests of Trenwick, and to follow loyally the direction of Trenwick's board as to what Trenwick's best interests were."). As discussed above, plaintiffs have failed to allege facts showing that CC-PA is insolvent. To establish actual fraud, such allegations must be made with specificity under Rule 9(b). *See In re Moriarty*, 2014 WL 6623005, *7-8. Plaintiffs cannot meet this standard because CC-PA is solvent. Therefore, plaintiffs actual fraud theory fails to state a claim, and must be dismissed with prejudice.

B. Constructive Fraud.

CUFTA also contains various provisions addressing "constructive fraud":

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
>
> . . .
>
> (2) **Without receiving a reasonably equivalent value** in exchange for the transfer or obligation, **and** the debtor either:
>
> > (A) Was engaged or was about to engage in a business or a transaction for which the **remaining assets of the debtor were unreasonably small** in relation to the business or transaction.
> >
> > (B) **Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.**[21]

Civ. Code § 3439.04(a)(2). Another test for constructive fraud is set forth in section 3439.05:

> A transfer made or obligation incurred by a debtor is fraudulent as to a **creditor whose claim arose before the transfer** was made or the obligation was incurred if the debtor made the transfer or incurred the obligation **without receiving a reasonably equivalent value** in exchange for the transfer or obligation **and** the debtor was **insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.**

Civ. Code, § 3439.05 (emphasis added).[22]

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[21] Delaware Code, tit. 6, section 1304(a)(2) is identical.

[22] Delaware Code, tit. 6, section 1305(a) is identical. Section 1305 also contains subdivision (b), which reads as follows:

> (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent.

Under the "constructive fraud" test, a transfer is fraudulent if the debtor made the transfer (or incurred the obligation) **without receiving "reasonably equivalent value"** in exchange for the transfer or obligation and the debtor: (1) "Was engaged or about to engage in a business or transaction for which [his] **remaining assets . . . were unreasonably small** in relation to the business or transaction" (Civ. Code, § 3439.04(a)(2)(A) (emphasis added)); (2) "**[i]ntended** to incur or **believed or reasonably should have believed** that he or she would incur, **debts beyond his or her ability to pay as they came due**" (Civ. Code, § 3439.04(a)(2)(B) (emphasis added)); or (3) was **insolvent** at the time, or was **rendered insolvent** by the transfer or obligation (Civ. Code, § 3439.05) (emphasis added). Section 3439.05 further requires plaintiffs' claim to have arisen before the transfer took place.

Here, the positive ten-year cash flow predictions in Exhibit 4 to the FAC rebut plaintiffs' conclusory allegation that CC-PA's remaining assets were unreasonably small. *Compare* FAC, ¶ 238, p. 67 *with* FAC, Exh. 4, pp. 24-26. Likewise, as discussed above, Exhibit 4 contradicts the conclusory allegations that CC-DG reasonably believed or should have believed CC-PA would incur debts beyond its ability to pay as they came due. *See* FAC, ¶ 8 ("As a result of this upstreaming, CC-PA has become insolvent and can pay its debts only by securing periodic, voluntary cash infusions from CC-DG"); ¶ 21; ¶ 105 (same); ¶ 239 p. 67; *see id.* at Exh. 4, pp. 24-26 (actuarial study projecting positive cash balances over the next ten years). Plaintiffs' conclusory allegations do not meet the *Twombly*/*Iqbal* standard and do not state a claim under CUFTA or DUFTA.

Finally, although the FAC alleges in a conclusory fashion that CC-PA either was insolvent when the distributions were made, or that the distributions caused CC-PA to become insolvent, the FAC does not allege when the distributions occurred. Both California Civil Code section 3439.05 and Delaware Code, title 6, section 1305(a) require a showing of insolvency **at the time of the transfer or because of it**. Plaintiffs' allegations of insolvency are not tied to any particular transfer, do not identify when any of the transfers occurred, and do not identify the time as of

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Delaware Code, tit. 6, section 1305(b) (emphasis added). Plaintiffs did not allege defendants' conduct violated section 1305(b).

which CC-PA supposedly was insolvent. For these reasons, plaintiffs have not adequately alleged constructive fraud under any theory, and the fourteenth cause of action must be dismissed in its entirety.

XV. PLAINTIFFS' FAC SHOULD BE DISMISSED WITH PREJUDICE

This Court should dismiss the entire FAC without leave to amend. Plaintiffs have already been granted an opportunity to correct the complaint and have failed to cure critical flaws. *See Fid. Fin. Corp. v. Fed. Home Loan Bank*, 792 F.2d 1432, 1438 (9th Cir. 1986) ("The district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend his complaint."). It is clear plaintiffs cannot allege facts sufficient to confer standing. Because the complaint cannot be saved by amendment, and amendment would be solely an exercise in futility, dismissal without leave to amend is proper. *See Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160-61 (9th Cir. 1989).

CONCLUSION

For the foregoing reasons, defendants respectfully submit that this motion to dismiss the FAC should be granted in its entirety.

DATED: February 20, 2015

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