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**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 others similarly situated,

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,

Corporate Defendants.

Case No. 5:14-cv-00750-EJD

**PLAINTIFFS' OPPOSITION TO CORPORATE DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**

**OTHER AUTHORITIES**

## I. INTRODUCTION

"Because elderly residents often both expend a significant portion of their savings in order to purchase care in a continuing care retirement community and expect to receive care at their continuing care retirement for the rest of their lives, tragic consequences can result if a continuing care provider becomes insolvent or unable to provide responsible care." Health & Safety Code Section 1770(b)[1] (Legislative Intent) (emphasis added). Plaintiffs and the Class have brought this litigation because they are victims of such "tragic consequences." Defendants' instant Motion to Dismiss is based on the false premise that Plaintiffs "rely on artful pleading" to overcome this Court's order on their prior motion to dismiss. Mot. at 1.[2]

To the contrary, Plaintiffs' Verified First Amended Complaint ("FAC") addresses the concerns raised by the Court when it gave Plaintiffs leave to amend – most notably the FAC specifically alleges the refundable nature of the Residency Contracts. As this Court stated, "In dispute is whether the Residency Contract is a 'refundable contract.' If it is, then Section 1792.6 would apply and the Vi would be required to keep a refund reserve." Docket No. 55 at 8. This Court previously found that Plaintiffs' original complaint did not adequately allege that the Residency Contracts were refundable. *Id*. at 9. Plaintiffs' FAC indisputably alleges that the Residency Contracts are "refundable contracts" under Section 1771(r)(2), and are therefore subject to the reserve requirements of Sections 1792.6 and 1793. FAC ¶¶ 2, 6, 18-19, 54, 57, 60, 63, 67, 70, 80-84, 111, 142, 200, 242, 244, 246, 254-256, and 258; *see also infra* at Section IV.B.2. Moreover, the FAC brings forth new evidence that Defendants represented in their marketing materials that Plaintiffs' Entrance Fees would remain at CC-PA and would be used for the operation of the Vi at Palo Alto. *See, e.g.,* FAC Ex. 26.[3]

Plaintiffs and the Class have standing because Defendants' upstreaming activities have caused actual impairment and injury to their statutorily created security interest in their Entrance

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[1] Unless otherwise noted, "Sections" refers to California's Health & Safety Code.

[2] This Opposition responds to the Motion to Dismiss filed by CC-PA, Inc. ("CC-PA"), Classic Residence Limited Partnership ("CRLP"), and CC-Development Group, Inc. ("CC-DG") (collectively, "Corporate Defendants"). Docket No. 68 ("Motion" or "Mot."). Plaintiffs are simultaneously filing an Opposition to Director Defendants' Motion to Dismiss (the "Pritzker Motion"). That Opposition is incorporated herein by reference.

[3] Unless otherwise noted, "Ex." refers to Exhibits to the FAC.

Fees. That security interest is created by Sections 1771(r)(2),1792.6 and 1793. Section 1792.6(a) states, "[a]ny provider offering a refundable contract, or other entity assuming responsibility for refundable contracts, shall maintain a refund reserve in trust for the residents." This statutorily created security interest is, by operation of law, incorporated into Plaintiffs' Residency Contracts. *See Infra*, §§ II; IV.B.2. Defendants admit that they have failed to maintain any reserves covering Plaintiffs' Entrance Fees. FAC ¶ 85.

The FAC also includes bolstered counts for injunctive relief (which requires only threatened injury) and a claim for declaratory relief. In addition to the direct (class) claims, the FAC also asserts derivative claims. The FAC cures the defects identified by the Court. Defendants' attempt to avoid responsibility for their conduct should be rejected. The senior citizens at Vi at Palo Alto have the right to have their claims decided on the merits.

## II. STATEMENT OF FACTS

The proposed Class consists of all individuals who have resided at the Vi at Palo Alto between January 1, 2005 and the present. *Id.*[4] Plaintiffs are senior citizens who reside at the Vi at Palo Alto, a high-end Continuing Care Retirement Community ("CCRC"). *See* FAC ¶ 1. Prior to entering the Vi at Palo Alto, Plaintiffs entered into Continuing Care Residency Contracts ("Residency Contracts"), and made over $460 million in loans to CC-PA (hundreds of thousands or millions of dollars per resident) in the form of refundable Entrance Fees. *Id.* ¶¶ 6, 15-23. The terms of these entrance fee loans are evidenced by CC-PA's "Entrance Fee Promissory Notes" (the "Promissory Notes"). *Id.* ¶ 77. In addition to Entrance Fees, Plaintiffs also pay large monthly fees to reside at the Vi at Palo Alto. *Id.* ¶¶ 24-30.

CC-PA breached the Residency Contracts and impaired Plaintiffs' security interest in their Entrance Fees by illegally upstreaming hundreds of millions of dollars to CC-PA's parent company, CC-DG. *Id.* ¶¶ 21-23. The upstreamed money constituted the reserve fund security for the Class' loans. CC-DG has disavowed any obligation to pay these debts. *Id.* ¶ 13. CC-PA

[4] Burton Richter, Linda Collins Cork, Georgia L. May, Thomas Merigan, Alfred Spivack, and Janice R. Anderson (collectively, "Plaintiffs") represent the putative class.

concealed these, and other important facts, from Plaintiffs. *Id*. ¶¶ 204, 246, and 258. CC-PA also made false assurances, including the following, regarding Plaintiffs' Entrance Fees:

> [Residents experience] a sense of security, knowing that 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.

*Id*. ¶ 90 and Ex. 18 (emphasis added).

Plaintiffs reasonably expected CC-PA would maintain sufficient cash reserves to pay back their Entrance Fees because California law requires it. *See* Sections 1771(r)(2), 1792.6 and 1793. While CC-PA's motion conspicuously avoids mentioning this issue, its promotional materials have acknowledged this reserve requirement since approximately 2005:

> **The California DSS [Department of Social Services] continues to regulate the community after the release of the funds and requires the community to maintain certain cash reserves in amounts sufficient to meet State requirements.**

FAC ¶ 20 and Ex. 26 (page 3) (emphasis added.)

Of the over $460 million in Entrance Fees loaned by the Class cince 2005, CC-PA upstreamed over $219 million to CC-DG through 2013, and incurred a deficit of over $310 million. FAC ¶¶ 15, 21-23. Defendants do not dispute that they have failed to maintain sufficient cash reserves to cover their Entrance Fee refund obligations; rather, they assert that their failure to do so is not actionable. *See* FAC ¶ 85 and Ex. 4 (page 1) ("there is no entrance fee repayment reserve").

The net effect of this upstreaming practice has been to substantially impair Plaintiffs' statutorily created security interest in their Entrance Fees. *Id*. ¶ 60. Defendants have not provided any information as to the existence of these upstreamed funds, where they are held, or whether they will be available to CC-PA when the loans come due. Defendants' only statement regarding the Entrance Fees came from CC-DG, disclaiming any legal obligation to repay residents. CC-PA's failure to maintain sufficient reserves is a direct violation of Sections 1771(r)(2), 1792.6 and 1793. FAC ¶ 51. This alone is sufficient grounds for Plaintiffs' claims under California Business

& Professions Code Section 17200 (California's Unfair Competition Law or "UCL"), which provides that violations of law provide a basis for private lawsuits. *See Infra*, § IV.I.

This violation is also a breach of the terms of the Residency Contracts and Promissory Notes, because all of the laws in effect, including Sections 1771(r)(2), 1792.6 and 1793, were incorporated into the Residency Contract by operation of law at the time it was executed. FAC ¶ 225; *see also Castillo v. Express Escrow Company*, 146 Cal. App. 4th 1301, 1308 (2007). This is further established by the fact that Section 1793.5 provides that "[a] violation under this section is an act of unfair competition as defined in Section 17200 of the Business and Professions Code." This conduct also provides grounds for Plaintiffs' claims for financial elder abuse and the direct claim for breach of fiduciary duty. The fact that Defendants' misled Plaintiffs about their security for these loans gives rise to Plaintiffs' claims for concealment and misrepresentation, violation of Section 1793(f), and independent causes of action under the UCL and California's Consumer Legal Remedies Act ("CLRA"). That this upstreaming occurred when CC-PA was financially insolvent gives rise to Plaintiffs' derivative claims for fraudulent transfer, unlawful dividends, waste, breach of covenant of good faith and fair dealing, and breach of fiduciary duty.

Plaintiffs are not alone in sounding the alarm – Defendants' upstreaming scheme caused the California Department of Social Services ("DSS") to state:

> [T]he issue is whether CC-PA's distributions of cash to its *non-provider* parent have weakened CC-PA's financial position so that it is (or the Department has have reason to believe that it is) "insolvent, is in imminent danger of becoming insolvent, is in a financially unsound or unsafe condition, or that its condition is such that it may otherwise be unable to fully perform its obligations pursuant to community care contracts" within the meaning of Health & Safety Code (H&SC) sections 1792(d)… 1793.13… and 1793.50(a). If the entrance fee from the resale of a Health Center resident's unit has already been collected and distributed to [CC-DG] when the Health Center resident's contract terminates, CC-PA's cash will not be sufficient to make the entrance fee repayment due.

Ex. 5 (page 2) (emphasis in original).

In addition to illegal upstreaming, Defendants have harmed Plaintiffs and the Class by charging them artificially inflated monthly fees. FAC ¶¶ 24-30. The monthly fees, which are intended solely to cover the costs of operating the Vi at Palo Alto, have been artificially inflated in multiple ways. First, CC-PA has stated it will pass on to the residents the increase in property

taxes incurred solely due to CC-PA's illegal upstreaming. *Id*. ¶¶ 27, 115-123. That pass on amounts to about $1.9 million annually CC-PA will charge the Class. *Id.* ¶ 117. Second, CC-PA improperly allocated charges for earthquake insurance premiums to Plaintiffs. These premiums pay, in part, for coverage of the buildings at the Vi at Palo Alto, but the Plaintiffs are only contractually responsible for capital items such as furniture and equipment. *Id*. ¶¶ 28, 124-127. Third, CC-PA overcharged Plaintiffs for so-called "marketing costs" that were allocated entirely to the current residents at the Vi at Palo Alto even though they were used to cover CC-PA's cost to generate Entrance Fees from future residents for the benefit of CC-DG. *Id*. ¶¶ 29, 128-129. That these fees were ultimately upstreamed to CC-DG renders CC-PA's lopsided cost allocation a violation of the Plaintiffs' reasonable expectations. The overcharges have been uniformly imposed on Plaintiffs and the Class.

Defendants' illegal upstreaming of Plaintiffs' Entrance Fees and its overcharges and unfair allocations associated with the monthly fees give rise to the fifteen causes of action alleged in the FAC, which are discussed in more detail below and in Plaintiffs' Opposition to the Pritzker Motion. Given facts alleged in the FAC, Defendants' motions should be denied.

## III. PROCEDURAL HISTORY

Plaintiffs' initial complaint was filed on February 19, 2014. It alleged seven causes of action. On March 18, 2014, Defendants filed their initial Motion to Dismiss. Docket Nos. 13, 20, and 21. On November 25, 2014, this Court granted the motion with leave to amend. Docket No. 55. On December 10, 2014, Plaintiffs filed the FAC, which included each of the original causes of action, additional allegations supporting those claims, added additional Defendants, and added the following causes of action: UCL – Injunctive Relief; Breach of Implied Covenant of Good Faith and Fair Dealing; Declaratory Relief; Creditor Claim for Breach of Fiduciary Duties Against the Director Defendants; Creditor Claim for Breach of Fiduciary Duties by the Corporate Defendants or in the Alternative Aiding and Abetting the Director Defendants' Breaches of Fiduciary Duties; Payment of Unlawful Dividends; Fraudulent Transfer of Assets; and, Corporate Waste. Docket No. 56.

## IV. ARGUMENT

### A. Legal Standards Governing Motions to Dismiss

#### 1. Rule 12

Courts deciding motions to dismiss under Fed. R. Civ. P. 12 must accept as true "all material allegations of the complaint" and "all reasonable inferences" drawn from those allegations. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Courts may only dismiss a case "where there is no cognizable legal theory or [there is] an absence of sufficient facts alleged to support a cognizable legal theory." *Id*. The central task for courts considering such motions is to assess whether the complaint "nudge[s] [Plaintiffs'] claims across the line from the conceivable to plausible." *Bell Atlantic et al. v. Twombly et al.*, 550 U.S. 544, 570 (2007). Plaintiffs' FAC states plausible claims.

#### 2. Rule 9(b)

The heighted pleading standards of Fed. R. Civ. P. 9(b) apply only to allegations of fraud or claims that "sound in fraud," such as intentional misrepresentation. *Primo v. Pac. Biosciences of Cal., Inc.*, 940 F. Supp. 2d 1105, 1113 (N.D. Cal. 2013). Claims that do not sound in fraud are not subject to these heightened standards. *Id*. The only claim to which this heightened standard could apply in this case is to Plaintiffs' second cause of action for concealment. However, in cases that involve "corporate fraud," Rule 9(b)'s particularity requirement is "relaxed" because "the facts supporting the fraud are exclusively within the defendants' possession." *Estate of John Migliaccio et al. v. Midland National Life Insurance Co.*, 436 F. Supp. 2d 1095, 1106 (C.D. Cal. 2006).

#### 3. Standing

To establish standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and *Twombly*, a plaintiff must demonstrate that it is plausible that (1) an injury in fact has occurred, (2) a causal connection between the alleged injury and defendants' conduct and omissions exists, and (3) that there is a likelihood that a favorable decision will provide redress for that injury. Defendants challenge only the injury in fact element. Defendants' argument fails because Plaintiffs' and the Class have a vested security interest in their Entrance Fees created by statute.

Plaintiffs have also suffered an injury in fact due to Defendants' imposition of inflated monthly fees. These injuries are discussed below.

**B. Plaintiffs Have Standing to Bring Their Claims**

**1. Plaintiffs' Residency Contracts are Refundable**

In ruling on Defendants' first motion to dismiss, this Court stated that "[i]n dispute is whether the Residency Contract is a 'refundable contract.' If it is, then section 1792.6 would apply and the Vi would be required to keep a refund reserve." Docket No. 55 at 8. The Court found that the original complaint did not allege that the Residency Contracts are "refundable" and was therefore lacking. Docket. No. 55 at 9. In the FAC, Plaintiffs have alleged their Residence Contracts are "refundable contracts" under Section 1771(r)(2). *See* FAC ¶¶ 2, 6, 18-19, 54, 57, 60, 63, 67, 70, 80-84, 111, 142, 200, 242, 244, 246, 254-256, and 258. Plaintiffs have also alleged Defendants' breached their obligations by failing to maintain a refund reserve, and that Plaintiffs have been injured as a result.

Section 1771(r)(2) is provided below in full (emphasis added):

> "Refundable contract" means 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."

Defendants initially argue that the Residency Contracts are not refundable on the basis that CC-PA's promise to pay the Entrance Fee refund is "primarily conditioned on resale of the unit," and is thus exempted from the reserve requirements under the "conditioned-upon-resale" language in section 1771(r)(2). Mot. at 8 (emphasis added). However, a plain reading of the Residency Contracts makes clear that Plaintiffs' Entrance Fee refunds are not conditioned (primarily or otherwise) upon resale of the unit. Defendants acknowledge that the refundable portion of Plaintiffs' Entrance Fees is due when "(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." *Id*. (emphasis added). The inclusion of CC-PA's unconditional ten-year refund obligation makes explicit that CC-PA's refund obligation is unconditional.

Because CC-PA's refund obligation exists regardless of whether the unit has been resold, repayment under the Residency Contract is not "conditional," and the "conditioned-on-resale" exclusion in Section 1771(r)(2) does not apply. In any event, "it is the general rule in contract interpretation that stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language." *Alpha Beta Food Markets v. Retail Clerks Union Local*, 45 Cal. 2d 764, 771 (1955). Importantly, there is no statutory support for Defendants' argument that a contract "primarily" conditioned on resale is non-refundable. The Residency Contracts are refundable contracts under Section 1771(r)(2) and are not conditioned on resale.

Defendants next pivot to the assertion that the Residency Contracts are "far more consistent with the concept" of "contingent on resale" contracts. Mot. at 8, citing Sections 1788.4(b) and (e). This argument fails for several reasons. First, it is at odds with the basic tenets of contract interpretation, which require contractual conditions to be explicitly stated. *Id*. Had CC-PA actually intended to make resale of the Plaintiffs' units a legal condition of the Entrance Fee refund, it would have included language in the Residency Contracts and Promissory Notes stating that residents are entitled to refunds only if and when their units are ultimately resold, and explicitly stated that there was no guarantee of repayment. The Residency Contracts and Promissory Notes do not do so. Moreover, neither section cited by Defendants uses the term "contingent on resale" and neither section states that a contract which promises to refund an entrance fee either after resale or a definite period of time is not "refundable." This Circuit has recognized that specifying a "mere lapse of time" before promised performance is insufficient to create a legal condition to that performance. *United States v. Schaeffer*, 319 F.2d 907, 911 (9th Cir. 1963).

Second, the cited sections actually support Plaintiffs. Section 1788.4(b) requires repayment in all events within 90 days of termination. This calls into question the effectiveness

of CC-PA's 10 year repayment requirements. Section 1788.4(e) also highlights that CC-PA is violating the statute if it takes the position that the contracts are conditioned on resale, and at the same time uses the term "refund" in communications with the public. Nothing in 1788.4 states that CC-PA may ignore the statutorily required refund reserve in Section 1792.6(a) or the disclosure requirement in Section 1793(f). Simply put, there is no statutory support for Defendants' characterization of its contracts as "primarily conditioned or resale" because they promise a refund either after resale or a definite period of time. To an ordinary resident entering the Vi at Palo Alto, CC-PA's promise of refund is both unequivocal and unconditional.

Next, Defendants argue that if the Court finds Section 1771(r)(2) ambiguous, it should "defer to the interpretation" of the DSS. Mot. at 9.[5] This argument fails for several reasons. First, 1771(r)(2) is not ambiguous. Second, this Court has already denied Defendants' request for judicial notice of the same DSS letter Defendants rely on here. Docket 55 at 8; *compare* Mot at 9. The Court held that the letter "is material outside the pleadings and presents a fact in dispute." Docket No. 55 at 8. This has not changed. Third, while Defendants claim that "[u]ntil recently, the DSS interpreted the reserve requirement of Section 1792.6 to apply only to pure refundable contracts," they offer no actual authority for this assertion. Mot. at 9. The DSS letter Defendants cite on the same page does not use the term "pure refundable contracts," and does not define "fixed time contingent on resale contracts." *Id*. Moreover, the DSS letter is not an official position taken or regulation adopted after a notice and comment period. The DSS interpretation is therefore unavailing and outside the pleadings. However, even if the Court were to consider this letter, it would only create a disputed factual issue not appropriate for resolution on a motion to dismiss.

**a. Defendants' Documents Show the Residency Contracts are Refundable**

Even if Defendants' fanciful "primarily conditioned" argument were correct, the Residency Contracts would still be refundable because those contracts repeatedly refer to the

[5] Because Defendants cite no actual authority it is impossible to determine what Defendants rely on. However it should be noted that Defendants primary point of contact with DSS- Robert Thompson- is now gone from the agency.

promise of repayment as a "refund." *See, infra,* IV.B.2 and Appendix A (Contract Summary). While Defendants claim the Residency Contracts do not "refer to the repayment obligation as a refund" (Mot. at 9), they acknowledge the Residency Contracts do in fact use the term "refund," but assert that they intended that "the terms have different [technical] meanings and trigger different deadlines." *Id*. In essence, Defendants' argument is that they use the term "refund" only when they intend to apply it to residents who terminate their Residency Contracts during the cancellation period, or when CC-PA terminates them for "just cause"; and that they intended to use the term "repayment" when individuals die or leave Vi at Palo Alto after the cancellation period. *Id*. This is purely an ex-post explanation by Defendants in an attempt to avoid liability.

The reality is that the Residency Contracts repeatedly refer to CC-PA's repayment obligations as refunds. As Appendix A makes clear, the Residency Contracts use the terms "refund" and "repayment" interchangeably, and the term refund is used in several provisions relating to the Entrance Fees. Furthermore, the common dictionary definition of the word refund is "to give back, especially money, *return or repay . . . to make a repayment . . . a repayment of funds*." American Heritage Dictionary 5th Ed. 2011 (emphasis added). Again the provisions of the State's CCRC laws are to be liberally construed.

Simply stated, reasonable, prospective residents would not have appreciated Defendants' unstated intentions or after the fact linguistic gymnastics to deprive them of security for their loans to CC-PA. Consistent with the Legislature's evident purpose, as expressed in Section 1775(e), to protect "persons attempting to obtain or receiving continuing care," this Court should give "refund" in Section 1771(r)(2) the meaning that an ordinary, prospective resident would give it — i.e., to repay the entrance fee loans and to return the amount owed to the lending residents — and not a narrow, technical meaning that would deprive CCRC resident lenders of security for their loans, while allowing CCRC contract providers to avoid their statutory refund reserve obligations simply by using any synonym for "refund," but not "refund" itself. CC-PA's promise to repay the amount owed to Plaintiffs under the terms of their Promissory Notes constitutes a refund, and on that basis, CC-PA's Residency Contracts and Promissory Notes, together, are a "refundable" contract.

Regardless, in the final analysis of whether CC-PA's Residency Contracts' reference to the Entrance Fee payment obligation as a "refund" or a "repayment" causes them to be "refundable" contracts is a disputed factual issue not appropriate for resolution on a motion to dismiss.

Plaintiffs also cite to four documents showing that Defendants referred to the Entrance Fee payment obligations as refunds. FAC ¶¶ 20, 81-83. Two of these documents are promotional marketing materials produced by Defendants, and two are news articles. The fact that two of these documents are newspaper articles quoting Defendants, rather than documents created by Defendants, does not diminish their probative value as evidence that Defendants referred to these obligations as refunds. The documents state:

> **Do CCRCs refund the Entrance Fee?**
>
> Many but not all, CCRCs make the entrance fee partially refundable if the resident leaves the community after a specified period of time. Contact the community of your choice to find out more about the entrance fee programs offered.

Ex. 21 (excerpt from Vi CCRC "guidebook") at DEF00002351 (emphasis added).

> Barry Johnson [is a] senior sales director for Classic Residence by Hyatt in Palo Alto… Rates are structured so that residents pay an "entrance fee" ranging from $600,000 to $1.7 million, Johnson said. Ninety percent of the entrance fees will be refunded to residents when they leave the senior living center or will be refunded to their estates, he said.

Ex. 1 (Stanford Report) at DEF00002406 (emphasis added).

> When residents leave or die, Classic Residence refunds 90 percent of the entrance fee once it resells their apartment.

Ex. 22 (SF Gate) page one (emphasis added).

Defendants also published promotional materials stating that Plaintiffs' Entrance Fees would be held in escrow.

> *Who monitors or regulates CCRCs and the fees collected by the communities? What guarantee do I have that my reservation deposit and my entrance fee are secure?*
>
> The financial operation and solvency of CCRCs in California are closely monitored by the DSS. State law requires that reservation deposits be placed in an escrow account at the financial institution approved by the Department. The funds remain in the escrow account until the community proves that it has met stringent State requirements. The California DSS

> continues to regulate the community after the release of the funds and requires the community to maintain certain cash reserves in amounts sufficient to meet state requirements. The CCRC must also file annual reports with the State that demonstrate continuing strong financial management and financial solvency.

Ex. 26 (Classic Residence by Hyatt in Palo Alto promotional brochure) (emphasis added).

Defendants quibble about the significance of the articles, and argue that the guidebook they published and distributed to Plaintiffs is not specific to the Vi at Palo Alto. The extent, explicitness, and impact of those disclosures on the perceptions of the Plaintiffs are factual issues, which are not appropriate for a motion to dismiss. Regardless, Plaintiffs have sufficiently alleged that Defendants made public statements and published promotional materials referring to their Entrance Fee payment obligations as "refunds."

Defendants also rely on the argument that the Residency Contracts include a section entitled "Resident's Rights" which states that the Plaintiffs do not "have any interest in payments made under t[he] Contract." Mot. at 7. This section applies to "fees" – not to Plaintiffs' Entrance Fees, which are clearly designated as "loans" made pursuant to Promissory Notes. FAC ¶¶ 15, 77, 78, 81, 85, and 87. Regardless, this dispute cannot be resolved through a pleading challenge.

**b. The Cases Defendants Rely on are Unavailing**

Defendants' reliance on *Clapper et al. v. Amnesty Int'l U.S.A. et al.*, 133 S. Ct. 1138 (2013) is misplaced. *See* Mot. at 6 and 11. *Clapper* involved a challenge to the Foreign Intelligence Surveillance Act ("FISA") brought by individuals and government entities. 133 S. Ct. at 1140. Plaintiffs claimed that they were likely to be harmed because there was a risk that their "communications with foreign contacts will be intercepted." *Id*. at 1141. The Court held that this claimed harm was not "certainly impending" because plaintiffs had "no knowledge" of the Government's targeting practices, and relied on pure speculation regarding what form of surveillance the Government would choose to use and whether such surveillance would need authorization under FISA. *Id*. Here, in contrast, Plaintiffs specifically allege, based on CC-PA's own admissions and in testimony given by CC-DG's CFO at the hearing of the Assessment Appeals Board that their Entrance Fees have been upstreamed, and that CC-PA is not in a position to refund those fees to the Plaintiffs when they become due. *See* Assessment Appeals Board

Santa Clara County, Case No. 07-2906-07.2909, Findings and Conclusions, dated March 26, 2012, at pp. 6-7. Plaintiffs specifically allege they have been overcharged by inflated monthly fees due to improper cost allocations. These harms are not speculative.

The other cases Defendants cite in their standing argument are equally distinguishable. *See* Mot. at 6. First, *FW/PBS v. City of Dallas*, 493 U.S. 215, 231-233 (1990), involved a challenge to a city ordinance that prevented individuals who had been convicted of certain crimes from obtaining business licenses. The plaintiff in that case had been convicted of one of the enumerated offenses but her name was not listed on the application for any business license. *Id*. at 233-234. This is far different from the Plaintiffs in this case who have signed Residency Contracts and Promissory Notes that have been breached. Second, *Warth v. Seldin*, 422 U.S. 490, 518 (1990), involved claims brought by home builders challenging a building ordinance that affected Penfield, Pennsylvania. These plaintiffs lacked standing because they had no actual construction plans designed for Penfield. Again, this is different from the situation here, where Plaintiffs are currently living at the Vi at Palo Alto and have already been deprived of their security interest and been overcharged.

**2. Plaintiffs Have a Statutorily Created Security Interest in Their Refundable Entrance Fees**

Plaintiffs and the Class have standing with respect to their Entrance Fees because Defendants' upstreaming activities have caused actual impairment and injury to Plaintiffs' statutorily created security interest in those fees. That security interest is the refund reserve required of refundable contracts by Sections 1771(r)(2), 1792.6 and 1793. Plaintiffs have alleged that their Entrance Fees are loans made pursuant to Promissory Notes. FAC ¶¶ 6-8, 15-16, 22, 52, and 77-79. Furthermore, the laws in existence at the time the Residency Contracts were executed, including California's Health & Safety Code, became part of the contracts by operation of law. *Castillo*, 146 Cal. App. 4th at 1308; *see also* FAC ¶¶ 77, 87.

In Defendants' first motion to dismiss, and again here, Defendants' argument that the Residency Contracts are not "refundable contract[s]" under section 1792.6(a) is partially based on a letter from DSS dated April 24, 2012. *See* Docket No. 55 at 8 and Mot. (Docket. No. 68) at 9.

In its prior Order, the Court declined to take judicial notice of this letter "because it is material outside the pleadings and presents a fact in dispute," holding that it "must evaluate the complaint and accept well-pleaded factual allegations as true." *Id*. The Court should do so again, for the same reason.

**3. Section 1793(f) is Still Good Law**

Defendants argue in a footnote that Section 1793(f) is no longer good law because it was "superseded" by Section 1792.6, but was "inadvertently left in the statutes." Mot. at n. 3.[6] Defendants do not cite any authority or legislative history for this "inadvertence" argument. Instead, they cite to a DSS publication of the CCRC statutes that still lists section 1793, but contains a "banner" stating that Section 1793 is "superseded" by Section 1792.6. *Id*. Notably, the text of this publication does not state that Section 1793 is no longer the law. Courts are "not bound by an administrative agency's position where, as here, it contradicts the language of the statute." *Rea v. Blue Shield of California*, 226 Cal. App. 4th 1209, 1237-38 (2014).

Section 1792.6's reserve requirements are in harmony with the disclosure requirements in Section 1793(f). Based on the Legislature's stated policy in Section 1770(c) to promote disclosure to prospective CCRC residents and the interpretive guidance in Section 1775(e) that the statute should be liberally construed to promote residents' rights, any conflict between Section 1796.2 and Section 1793(f) should be resolved in favor of disclosure to senior citizens. In any case, a DSS publication does not override or invalidate a statute, and Defendants fail to cite any legislative history indicating that Section 1792.6 was intended to replace the entirety of Section 1793.

Defendants also argue that Section 1793(f) is "clearly no longer in force" because DSS has approved prior versions of CC-PA's Residency Contracts and "none of them contain a disclosure." Mot. at n. 7. This assertion is immaterial. Initially, the "approval" at issue is unclear. The fact that the DSS may have generally approved a form contract does not immunize

[6] Section 1793(f) states: "All continuing care retirement communities offering refundable entrance fees that are not secured by cash reserves, except those facilities that were issued a certificate of authority prior to May 31, 1995, shall clearly disclose this fact in all marketing materials and continuing care contracts."

Defendants from claims that they violated the CCRC statutes; nor is CC-PA entitled to rely on an agency's failure to enforce compliance with the statute it administers. Defendants' argument is an admission that the Residency Contracts do not contain the disclosures required by Section 1793. Defendants have failed to show that these vague approvals "contradict" allegations in the FAC. Mot. at 11. Indeed they do not. Regardless, this again is material outside the pleadings and represents a fact in dispute. It is therefore not appropriate for a motion to dismiss.

**4. The Contract Confirms Plaintiffs' Superior Right to a Security Interest in the Proceeds of their Loans**

Section 11.7 of the Residency Contract states:

> In the event any mortgage loan encumbers the community, your rights under this contract are senior to and will have priority over the rights of the mortgage lender.

FAC, Ex. 16. Plaintiffs cannot have rights under their Residency Contracts that are superior to those of any future secured lender unless, in effect, Plaintiffs' rights are secured. *A fortiori*, Plaintiffs' rights in the proceeds of their loans, at least to the extent of the refund reserve required to be preserved from those proceeds by Sections 1771(r)(2), 1792.6 and 1793, should be held to be senior to, and to have priority over CC-PA's claim to them. Defendants' reliance on material outside the pleadings merely demonstrates there are factual disputes related to these issues which cannot be resolved on a motion to dismiss.

**5. Plaintiffs Have Suffered Actual and Imminent Injury Due to the Defendants' Impairment of Their Statutory Security Interest**

The injury in fact standing element is satisfied when a plaintiff alleges "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted). In this circuit, allegations of a "concrete risk of harm" or a "credible threat of harm" satisfy this inquiry. *Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 761 (9th Cir. 2004) (internal quotations and citations omitted). In its Order on Defendants' first motion to dismiss, this Court assumed the "Plaintiffs have a legally protected interest that is concrete and particularized" and stated, "[t]he inquiry is whether there is actual or imminent injury in fact." Docket No. 55 at 9. The FAC

alleges the injuries suffered by Plaintiffs resulting from CC-PA's upstreaming are both actual and imminent.

Plaintiffs have suffered and continue to suffer actual economic injury. The upstreaming has decimated CC-PA's finances, and CC-PA lacks the financial capability to cover the refundable Entrance Fees and must rely on voluntary cash transfers from CC-DG (which has disclaimed any obligation to make such transfers) to repay them when they come due. FAC ¶¶ 21-23, 80-89. These allegations support an actual injury to Plaintiffs' underlying security interest in those fees. *Id*. Defendants assert that CC-PA has never failed to meet a "repayment" obligation. Mot. at 6. However, Plaintiffs have already experienced actual injury because their security interest has been impaired, and assets inherent in that security interest has been diminished.[7] In all events, if creditors needed to await default to ask for security, security would be useless. Security interests of creditors, including those afforded to them by statute, are not based on prior default. They exist to protect against the possibility of a default occurring in the future.

**6. Plaintiffs Are Entitled to Injunctive Relief**

Plaintiffs are suffering under the threat of imminent injury and seek injunctive relief. The Ninth Circuit and its district courts have repeatedly held that "the possibility of future injury may be sufficient to confer standing on plaintiffs [because] threatened injury constitutes injury in fact" and "plaintiffs need not wait" for that injury to occur before bringing a claim to redress it. *Central Delta Water Agency et al. v. USA et al.*, 306 F. 3d 938, 947-50 (9th Cir. 2002) (internal

[7] Waste cases are instructive on this point. "California courts have not limited recovery under a theory of tortuous waste only to situations involving physical harm to real property." *Bedrock Fin., Inc. v. United States*, Case No. 1:10-cv-01055-MJS, 2013 U.S. Dist. LEXIS 71984 at *29 (E.D. Cal. May 21, 2013); *see also The Nippon Credit Bank, Ltd. v. 1333 North California Blvd. et al*, 86 Cal. App. 4th 486, 496 (2001). These cases hold that impairment of a noteholder's security interest constitutes an actual loss of value, or "milking" of, the underlying security interest. *Bedrock*, 2013 U.S. Dist. LEXIS 71984, *29; *Nippon*, 86 Cal. App. 4th at 497. Damages in such cases "are measured by the amount of injury to the security" and "the substantial harm which impairs the value of the property subject to the lien so as to render it an inadequate security for the mortgage debt." *Fait et al. v. New Faze Development*, 207 Cal. App. 4th 284, 295 (2012). While these cases "involved secured obligations where collateral was pledged as security," they equally apply here as Plaintiffs' FAC has clarified that the contracts are in fact "refundable" – the value of Plaintiffs' security interest is that the reserve requirements in Section 1792.6(a) acted as collateral on their refundable Entrance Fees.

quotes omitted); *see also Migliaccio*, 436 F. Supp. 2d at 1104 ("threatened rather than actual injury can satisfy Article III standing requirements"); and *Covington et al. v. Jefferson County et al.*, 358 F.3d 626, 639 (9th Cir. 2004) (the "relevant inquiry" is whether defendants' actions caused a "reasonable concern of injury" to the plaintiff).

This principle has been recognized by the Supreme Court on multiple occasions. *See Friends of the Earth, Inc. et al. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) (a "plaintiff who is injured or faces the threat of future injury due to illegal conduct" has standing); *Gladstone Realtors et al. v. Village of Bellwood et al.*, 441 U.S. 91, 99 (1979) ("the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"). Furthermore, other courts have held that in cases such as this one where "the acts which will cause injury are authorized or part of a policy, it becomes far more reasonable to assume those acts will occur," and that the elements of standing are satisfied. *See R.C. by Alabama Disabilities Advocacy Program v. Nachman*, 969 F. Supp. 682, 697 (M.D. Ala. 1997); *see also Clark K. v. Guinn*, 2:06-CV-1068-RCJ-RJJ, 2007 U.S. Dist. LEXIS 35232, *11 (D. Nev. May 9, 2007).

This case is similar to *Harris, Supra* at 16, in which the Ninth Circuit found that chronically ill patients had standing to challenge the planned closure of a county medical clinic based on the risk that they would lose necessary medical services. *Harris*, 366 F.3d at 762. Defendants claim that "none of the plaintiffs have terminated their contract and are awaiting repayment," but Plaintiffs have alleged that several residents of the Care Center have, in fact, terminated their contract (either by death or departure from the facility), and that CC-PA has been unable to pay its obligations on their Entrance Fees without financing from CC-DG. FAC ¶¶ 52, 74, 97, 102, 105, 116. DSS expressed this precise concern, noting that "CC-PA does not possess sufficient resources for current residents… to cover the actuarial present value of the expected costs of performing all the remaining obligations to such residents under their contracts." Ex. 5 at 1. Individuals who currently reside in the Care Center, like the rest of the Class, face the imminent risk that CC-DG, which disclaims any obligation to refund their fees, will not supply future cash infusions. *Id*. As the *Harris* court explained, requiring that injury occur before

permitting suit "would eliminate the claims of those most directly threatened but not yet damaged… Article III does not bar such concrete disputes from court." *Id*. The clear implication of Defendants' argument regarding standing is that these Care Center residents (more precisely, their estates) will have standing only after their death. Far from being able to live "free from worry" (as promised by CC-PA), they will die burdened with the fear that their estates and heirs may receive nothing. Plaintiffs have been injured because their security in their Entrance Fees has been destroyed and they have been overcharged.

**7. Plaintiffs Have Standing With Regard to the Monthly Fees**

The injuries suffered by Plaintiffs resulting from Defendants' overcharges are not hypothetical. Plaintiffs have alleged that they have paid, and continue to pay, artificially inflated monthly fees. FAC ¶¶ 115-129. CC-PA has unfairly allocated these costs to Plaintiffs and the Class in ways none of them could have reasonably envisioned at the time they entered their Residency Contracts. The overcharge stemming from these unfair, arbitrary, and undisclosed allocations represent past and ongoing injuries.

Defendants' argument that the contract trumps these claims rings hollow. Plaintiffs allege Defendants breached their fiduciary duties and the terms of the Residency Contract by charging inflated fees. These fees were inflated because they included charges for (a) marketing charges that did not solely benefit the current Residents of Vi at Palo Alto; (b) premiums for earthquake insurance coverage for CC-PA's buildings to protect Defendants' interest; and (c) property taxes levied against CC-PA due to its illegal, and undisclosed upstreaming. There is nothing in the Residency Contract permitting such overcharges or indicating that Defendants planned to engage in unfair cost allocations. The Residency Contracts and Promissory Notes are adhesion contracts offered to Plaintiffs on a "take it or leave it" basis. FAC ¶ 76. Courts interpret contracts of adhesion in a manner that protects the party with the weaker bargaining position in order to prevent oppression and overreaching. *See Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d. 807, 817 (1981); *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal. 4th 83, 113 (2000) (abrogated in part on other grounds by *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)); *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345, 357 (1976).

Defendants claim the Residency Contract's statement that "marketing expenses are an operating cost of the community to be paid by monthly fees" resolves any issue about whether they were fairly allocated to Plaintiffs. Mot. at 8. Defendants' position ignores the fact that the Residency Contract does not define the term "marketing costs." *See* FAC ¶ 128. Plaintiffs are entitled to a reasonable interpretation of "marketing costs" that does not permit Defendants to artificially classify any costs they wish to pass on to Plaintiffs as "marketing costs." Marketing costs that Defendants incur to generate Entrance fees for CC-DG from future residents, from which CC-PA and CC-DG solely benefit, do not benefit Plaintiffs. Plaintiffs are entitled to a refund of their Entrance Fees whether or not their apartments are ultimately re-sold. Defendants contention that the allocation of marketing fees is reasonable because it "is a substantial benefit" to Plaintiffs is rooted in their incorrect view that the refund of Entrance Fees are contingent on resale. Indeed, they are not.

The only economic benefit Plaintiffs realize from an apartment resale is a new resident who will share in their costs of operating the Community. Importantly, when a new resident joins the Vi at Palo Alto, CC-PA obtains a substantial Entrance Fee loan from that resident, along with that fractional portion of the Entrance Fee that is not refundable to the resident. CC-PA unilaterally determines the amount of the Entrance Fee that it requires of an entering resident, and does not share any portion of that fee with the current residents. Since Plaintiffs and CC-PA both benefit from the resale of an apartment, CC-PA has the obligation to equitably allocate marketing costs to Plaintiffs consistent with the benefit the Plaintiffs derive therefrom, and CC-PA's obligation of good faith and fair dealing. *See, e.g., Harris v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 61847, *27 (N.D. Cal. Apr. 30, 2013).

As the unilateral allocator, CC-PA should bear the burden of demonstrating the fairness of its allocations, regardless of the Residency Contract's terminology. Such a determination is beyond the scope of a Rule 12 motion. To date, Plaintiffs have paid 100% of CC-PA's marketing costs, amounting to over $5 million. While CC-PA has generated over $500 million in Entrance Fee loans from its marketing efforts, CC-PA has allocated no marketing cost to itself. FAC ¶¶

128-129.[8] This is an unfair allocation. No incoming resident would reasonably expect that all of CC-PA's marketing costs would be considered "costs of operating the Community" regardless of whether these costs actually benefit the community. In sum, Defendants wrongfully exercised their discretion in unreasonably allocating all of CC-PA's marketing costs to Plaintiffs, and their Residency Contract does not exculpate them from the consequences of abusing their discretion by allocating all costs to Plaintiffs.

As to the charges for earthquake insurance, Defendants' only argument is that one subsection of the contract cannot be read to modify another subsection. Mot. at 13-14. This misses the point. The correct rule of interpretation is that the contract "must be read as a whole and in light of the law relating to it when made." *Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1143 (9th Cir. 1988). The Residency Contract should be read as a complete document in favor of Plaintiffs because it is a contract of adhesion drafted solely by Defendants. When read together, its terms clearly state that the residents' monthly fees may pay for insurance, but the residents are only responsible for replacement of capital items, which do not include CC-PA's buildings. FAC ¶¶ 69-73. Plaintiffs have alleged a present and ongoing injury in the form of inflated monthly fees due to Defendants' improper allocation of insurance charges since the community's inception.

As to the issue of property taxes, Defendants do not deny Plaintiffs' allegation that, once CC-PA's suit against the Santa Clara County Assessor's Office and Assessment Appeals Board regarding the taxation of Defendants' entrepreneurial profits is concluded (including by settlement – a resolution over which the residents have no participation and no say), they will pass on to the residents the obligation to pay for increased property taxes going forward. *Id.* ¶ 8. The harm is concrete. Defendants claim this allegation is "ambiguous," but then confirm the premise by asserting that "real estate taxes are an operating expense of the community to be paid from monthly fees." Mot. at 12. They admit Plaintiffs will pay those additional taxes.

[8] Under the terms of CC-PA's Promissory Notes, a portion of these loans becomes non-refundable over a specified period up to 10 months from the issue date of the Notes. *See, e.g.,* Ex. 9, Section 4(b)(i). Through the end of 2013, as the result of its marketing efforts, CC-PA had received funds from its borrowing of Entrance Fees, aggregating in excess of $88 million dollars that it is not obligated to repay to the lending residents. *See* Exs. 2 and 23.

No reasonable reading of the Residency Contract suggests that the Residents will be responsible for taxes assessed as "entrepreneurial profit" created by Defendants' illegal upstreaming. Indeed, the actions of the County to which Defendants' make objection in their lawsuit includes the imposition of a tax on "entrepreneurial profits" attributable to the upstreaming of Entrance Fees. If Defendants did not anticipate the inclusion of entrepreneurial profits in the County's assessment of property taxes, it cannot now argue that Plaintiffs should have understood that risk when they signed their Residency Contracts. Defendants' deliberate misinterpretation of the contract is designed to charge Plaintiffs with these additional taxes. FAC ¶¶ 117, 122, and 163. This is an imminent hardship.

**C. Plaintiffs' Claims Are Ripe For Adjudication**

Plaintiffs' claims are ripe. Just like the standing doctrine, ripeness does not preclude claims simply because the alleged harm has not happened yet. Defendants argue that ripeness requires an evaluation of "(1) the fitness of the issues for judicial decision, and (2) whether there is an imminent and significant hardship in withholding court consideration." Mot. at 15, *citing Abbot Labs v. Gardner*, 387 U.S. 136, 149 (1967). In the Ninth Circuit, however, courts should invoke this doctrine only if "the systematic interest in postposing adjudication due to lack of fitness outweighs the hardship on the parties created by postponement." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992).

The "fitness for review" test applies to claims that challenge government regulations. *Id*. at 1320. The question in those cases is whether "the regulation at issue is a final agency action." *Id*. This prong of the *Abbott* test is inapplicable here. Rather, the applicable prong is "hardship," and the appropriate test is whether there is a "realistic danger of sustaining direct injury." *Babbit v. United Farm Workers National Union et al.*, 442 U.S. 289, 298 (1979). As the Supreme Court held in *Babbit*, "one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id*.; *see also, Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (U.S. 1923).

Regardless, harm in this case has already occurred. The FAC alleges, for example, that Plaintiffs have a security interest in the Entrance Fee reserve CC-PA is required to keep, and that

this interest is impaired because CC-PA transferred the funds that should have been held in that reserve to CC-DG and now CC-PA lacks the financial ability to refund Plaintiffs' Entrance Fees. *See, supra,* §§ I., IV. B.2., IV. B.4., and IV. B.5. Plaintiffs also allege CC-DG affirmatively states it has no obligation to refund Plaintiffs. FAC ¶ 13. Finally, Plaintiffs allege that they have been overcharged through inflated monthly fees. *See, e.g.,* FAC ¶ ¶ 24-30, 115-123. 24-129. These are concrete injuries that are ripe for adjudication.

The cases cited by Defendants on the ripeness issue are unpersuasive. In *Abbott,* a group of drug manufacturers brought a claim for injunctive relieve against the Secretary for Health Education and Welfare alleging that its appointed Commissioner exceeded his authority in enacting a regulation requiring them "to print the established name of the drug prominently" on the label. *Abbott Labs.*, 387 U.S. at 137. The trial court granted the injunction and the Third Circuit reversed on jurisdictional and ripeness grounds. *Id*. at 139. The Supreme Court reversed the circuit court. *Id*. On the ripeness issue, the Court found that "the issues are appropriate for judicial resolution at this time," because the regulations were a "final agency action" which represented a "direct and immediate" impact to the plaintiffs. *Id*. at 149 and 152. The Court further explained that "[t]o require them to challenge these regulations only as a defense to an action brought by the government might harm them severely and unnecessarily." *Id*. at 153. In other words, the fact that the regulations had not yet been enforced was not an impediment to the Plaintiffs' standing to bring the action. *Id*.

*Texas v. United States et al.,* 523 U.S. 296 (1998), is also distinguishable. In that case the state challenged certain provisions of the Voting Rights Act that required "pre-clearance" prior to the adoption of state laws that affect voting. Texas was seeking pre-clearance to adopt a statutory scheme that included a number of penalties for poorly performing school districts. *Id*. at 298. Texas submitted this statutory scheme to the Attorney General, who determined that six of the eight sanctions did not affect voting, but that two of the sanctions "may result" in a violation of the act. *Id*. at 299. Texas then filed a complaint in federal court seeking a declaratory judgment that these two sanctions were not covered by the act. *Id*. The Supreme Court ruled that there was no case in controversy because the sanctions had not been ordered and the provisions had not

been interpreted by the Texas courts. Therefore, a determination of whether the sanctions required pre-clearance (*i.e.* whether they even effected voting) was not ripe. *Id*. at 301. This is far different from the case here, where Plaintiffs are challenging a course of conduct by a corporate defendant that has already taken place. CC-PA has already sent Plaintiffs' Entrance Fees to CC-DG and has already overcharged Plaintiffs inflated monthly fees.

The remaining cases cited in the ripeness section of Defendants' brief (Mot. at 14-15) also concern similarly distinguishable "preenforcement challenge[s]" to government regulations. *See Alaska Right to Life v. Feldman et al.*, 504 F. 3d 840, 843 and 849 (9th Cir. 2007) (challenge to Alaska Code of Judicial Conduct); *Municipality of Anchorage*, 980 F. 2d at 1322 (challenge to an EPA memorandum of understanding); *National Park Hospitality Association v. Department of the Interior*, 538 U.S. 803, 804 (2003) (challenging a National Park Service regulation).

**D. Plaintiffs Have Stated a Claim for Financial Elder Abuse**

Defendants rest their entire argument against this cause of action on the false statement that "Plaintiffs' elder abuse claim is premised on their claims of misrepresentation and concealment." Mot. at 5. Defendants have not read California's Elder Abuse Act. Plaintiffs can succeed on their elder abuse claim by showing that Defendants took Plaintiffs property for "a wrongful use or with an intent to defraud." California Welfare & Institutions Code § 15610.30(a)(1) and (2) (emphasis added). Plaintiffs have pled both. *See, e.g.,* FAC ¶ 194. Therefore, this claim survives as a whole even if the subsidiary fraud allegations fail.

Plaintiffs allege that CC-PA illegally took, appropriated, and retained their Entrance Fees by upstreaming them to CC-DG. See, supra, § II. This upstreaming impaired Plaintiffs' security interest in those fees. *Id*. California law requires Defendants to maintain financial reserves sufficient to repay the Entrance Fees. *Id*. These laws are incorporated into the Residency Contracts by operation of law and function as a security interest for those loans. *Id*. Defendants violated the California laws governing these reserve requirements, breached these terms of the Residency contract, and impaired Plaintiffs' security interest. California's Elder Abuse statute is remedial in nature and is designed to stop such conduct and "protect[] elder and dependent adults

who are residents of nursing homes and other health care facilities from reckless neglect and various forms of abuse." *Delaney v. Baker*, 20 Cal. 4th 23, 40 (1999).

Defendants' only challenge to these allegations is that "CC-PA has not taken, appropriated, or retained a property right belonging to plaintiffs." Mot. at 16. This assertion is the source of the factual dispute between the Parties, and is not a justification for dismissing Plaintiffs' claim. Plaintiffs have stated, with specificity, the factual basis for their claims that Defendants took their Entrance Fees for a wrongful use and with an intent to defraud. *See, supra,* § II. Moreover, at the motion to dismiss phase, Plaintiffs' allegations are to be taken as true as well as all reasonable inferences drawn from them." *Negrete v. Fidelity and Guarantee Life Insurance Company*, 444 F. Supp. 2d 998, 1001 (C.D. Cal. 2006).

Plaintiffs also allege Defendants took, appropriated and retained their property by charging them inflated amounts for monthly fees. *See, supra,* § II. Defendants' answer to this allegation is that "the monthly fees are intended to cover all costs of operating the community." Mot. at 16. This misses the point. Plaintiffs have alleged Defendants have artificially inflated their monthly fees by passing on property taxes attributable to their illegal upstreaming, improperly allocated marketing expenses, and earthquake insurance charges that cover CC-PA's buildings. *Id*. The portion of the fees Plaintiffs are challenging did not cover the costs of operating the community, and they were not contemplated by the Residency Contracts. *Id*. Plaintiffs also allege they did not freely enter into the Residency Contracts. Rather, they were offered on a "take it or leave it" basis, and Plaintiffs were pressured into signing them lest they lose the opportunity to live at the Vi at Palo Alto. FAC ¶ 76.

**E. Plaintiffs Have Stated a Claim for Concealment**

While fraud claims for intentional misrepresentation must generally meet the heightened pleading standards of Fed. R. Civ. P. 9(b), courts recognize that "a plaintiff in a fraudulent concealment suit will not be able to specify the time, place, and specific content of an omission as precisely as would a plaintiff in a false representation claim." *Baggett et al. v. Hewlett-Packard Company*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007) (internal quotations omitted). The reason for this is that "such a plaintiff is alleging a failure to act instead of an affirmative act, [and

therefore] cannot point out the specific moment when the defendant failed to act." *Id*. Given these circumstances, "a fraud by omission, or fraud by concealment claim, can succeed without the same level of specificity required by a normal fraud claim." *Id*. Moreover, in cases involving "corporate fraud," Rule 9(b)'s particularity requirement is "relaxed" because "the facts supporting the fraud are exclusively within the defendants' possession." *Migliacco*, 436 F. Supp. 2d at 1106. Plaintiffs allege that Defendants concealed at least eight important facts from them. FAC ¶ 204. Each of those concealed facts is listed separately. *Id*.

Defendants assert that Plaintiffs have not shown actual reliance or damages. Both arguments fail. First, Plaintiffs have alleged actual reliance. FAC ¶ 205. Second, the case Defendants cite states only that the plaintiff must prove the "detriment proximately caused" by Defendants' conduct. *See Service by Medallion, Inc. v. Clorox Co.,* 44 Cal. App. 4th 1807, 1818 (1996). This is no different than the injury in fact standard, which has already been discussed. *See, supra,* § IV.B. Plaintiffs have been damaged because their security interest has been impaired and they have been overcharged.

**F. Plaintiffs Have Stated a Claim for Negligent Misrepresentation**

Defendants' argument that Plaintiffs have not stated a claim for this cause of action is based on the mistaken conclusion that Plaintiffs only cited "one misrepresentation purportedly made by CC-PA." Mot. at 17. Defendants also incorrectly assert that because this document is from 2008, certain plaintiffs could not have relied on it. *Id*. To the contrary, Plaintiffs have alleged with particularity that Defendants made multiple material misstatements to the Plaintiffs. FAC ¶¶ 204, 210, 211, 246, and 258. Plaintiffs provided two examples of this conduct. Those examples constitute affirmative misstatements that go beyond what Defendants characterize as "implied misrepresentations" or "puffery." *See* Mot. at 13-14.

First, Defendants used a marketing brochure which contains the following statements (provided in question and answer form) with regard to the Entrance Fees:

> **Who monitors or regulates CCRCs and the fees collected by these communities?**
>
> **What <u>guarantee</u> do I have that my reservation deposit and my entrance fee are secure?**

> The financial operation and solvency of CCRCs in California are closely monitored by the DSS. State law requires that reservation deposits be placed in an escrow account at a financial institution approved by the Department. **The funds remain in the escrow account until the community proves it has met stringent State requirements.** The California DSS continues to regulate the community after the release of the funds and requires the community to maintain certain cash reserves in amounts sufficient to meet State requirements. The CCRC must also file annual reports with the State that demonstrate continuing strong fiscal management and financial solvency.

FAC ¶¶ 91-92 Ex. 26 (emphasis added).

Second, Defendants sent a marketing letter containing the following statement:

> [Residents experience] a sense of security, knowing that 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.

FAC ¶ 90 and Ex. 18.

Defendants claim that because the letter was written in 2008, Plaintiffs who signed Residency Contracts prior to that date cannot have relied on it. Mot. at 14. However, the cited brochure above was used as early as 2005. None of the individual Plaintiffs began residing at the Vi at Palo Alto prior to 2005, and the Class consists of all individuals who have resided at the Vi at Palo Alto from 2005 to the present. Moreover, Defendants do not deny that the language in the 2008 letter was not used before 2008. Contrary to Defendants' assertions, these are not "prediction[s] of future events." Mot. at 18. These are statements of a present fact that Plaintiffs' Entrance Fees are held in reserve and that the residents at the Vi at Palo Alto have "planned wisely." They do not indicate a promise "to take or refrain from taking future action." *Aguinaldo v. Ocwen Loan Servicing, LLC*, Case No. 5:12-cv-01393-EJD, 2012 U.S. Dist. LEXIS 125400 (N.D. Cal. Sept. 4, 2012). Instead they indicate that Defendants will take present action to ensure that Plaintiffs' Entrance Fees are secure. Plaintiffs have alleged actual reliance on these statements. FAC ¶ 215.

**G. Plaintiffs Have Stated a Direct Claim for Breach of Fiduciary Duty**

In addition to stating a derivative creditor claim for breach of fiduciary duty against the Director Defendants, Plaintiffs have alleged a direct claim for breach of fiduciary duty based on

the caretaking relationship that CC-PA solicited and which has existed between Plaintiffs and CC-PA. The factual test for whether a fiduciary duty exists is whether "confidence is reposed by persons in the integrity of others, and [whether] the latter voluntarily accept or assume to accept the confidence." *Tri-Growth Centre City, Ltd. et al. v. Silldorf, Burdman, Duignan & Eisenberg et al.*, 216 Cal. App. 3d 1139, 1150 (1989). Once the relationship is formed, the fiduciary owes a duty of undivided loyalty. *See Pierce et al. v. Lyman*, 1 Cal. App. 4th 1093, 1102 (1991). Defendants' motion only challenges the existence of the alleged fiduciary relationship, not whether there has been a breach of the duties flowing from that relationship. Mot. at 18-20. This is not a sufficient basis for a motion to dismiss because "[w]hether a fiduciary relationship exists in any given situation is a question of fact." *Negrete*, 444 F. Supp. 2d at 1003.

A significant factor used to determine whether a fiduciary relationship exists is whether "one party [to the transaction] must rely on the good faith and integrity of the other." *Stevens v. Marco et al.*, 147 Cal. App. 2d 357, 372 (2nd Dist. 1956). Courts analyzing similar facts have found fiduciary relationships to exist between contracting parties where the defendant targeted senior citizens, which are a "protected class" in California. *See In re National Western Life Insurance Deferred Annuities Litigation*, 467 F. Supp. 2d 1071, 1087 (S.D. Cal. 2006); *Abbit et al. v. ING USA Annuity and Life Insurance Co.*, No. 13cv2310-GPC-WVG, 2014 U.S. Dist. LEXIS 24715 *23-24 (S.D. Cal. Feb. 25, 2014) (denying motion to dismiss where plaintiffs alleged that "Defendant targets senior citizens with products that falsely promise security," and that "Defendant drafted all contractual material . . . [took] advantage of [its] superior knowledge and bargaining power"); *Migliaccio*, 436 F. Supp. 2d at 1108 (denying motion to dismiss where plaintiffs alleged that defendants "trained their sales agents to lure senior citizens into their confidence by offering assistance with estate and financial planning, ultimately to sell them improper annuities"). A prerequisite for entry into the Vi at Palo Alto community is that prospective residents provide copies of their financial and medical records. This is ample demonstration that Plaintiffs reposed confidence in the integrity of the provider and that CC-PA voluntarily accepted and assumed that confidence.

The following passage from a similar case is especially instructive:

> Here, Plaintiff alleges Defendant targets senior citizens with products that falsely promise security. Plaintiff alleges Defendant promises investors continued commitment, thanking them for ongoing trust and confidence in Defendant as their "preferred financial services provider." Plaintiff further alleges Defendant drafted all contractual materials and structured pricing parameters, taking advantage of Defendant's superior knowledge and bargaining power.

*Abbit v. ING United States Annuity & Life Ins. Co.*, 999 F. Supp. 2d 1189, 1199 (S.D. Cal. 2014) (emphasis added) (internal citations omitted).

Such is the case here. Plaintiffs and the Class trusted in the good faith and integrity of CC-PA to keep the refundable portion of their Entrance Fees financially secure. *Supra* at 2-4. This trust was based on representations made by CC-PA, inducing Plaintiffs to spend the rest of their lives at the Vi at Palo Alto. *Id*. CC-PA assured Plaintiffs and the Class that their Entrance Fee refunds would "not fluctuate with changes in the market," thus promising continuing financial security. *Id*. CC-PA lured Plaintiffs, a protected class of senior citizens, into the Residency Contracts by promises of ongoing financial security – thus taking on fiduciary duties which they ultimately breached. *Id*. CC-PA exploited its superior knowledge, bargaining power, and Plaintiffs' vulnerable position. It has now transferred tens of millions of Plaintiffs' dollars to CC-DG, which disclaims any obligation to repay them. *Id*. Plaintiffs were never informed that CC-PA planned to upstream Plaintiffs' Entrance Fees to CC-DG, or that they would be charged inflated monthly fees. *Id*.

Furthermore, the fiduciary relationship alleged here is stronger than the circumstances in the above authorities, where primarily financial issues prevailed. Plaintiffs are senior citizens who have committed to live at the Vi at Palo Alto for rest of their lives. Plaintiffs reposed great trust in the good faith, fairness and integrity of CC-PA. Several allegations raise a reasonable inference that Plaintiffs reposed a great deal of trust in CC-PA and that the relationship was fiduciary in character: (1) Plaintiffs sought a secure community where they intend to spend the rest of their lives; (2) CC-PA assumed the role of care-giver and business partner; (3) Plaintiffs entrusted CC-PA with substantial amounts of money; (4) as they age, Plaintiffs become less and less physically, emotionally, and cognitively able to move out of the Vi at Palo Alto; (5) CC-PA

asserts the unilateral right to determine the cost of residents' homes and their living environment and denies the residents any right to participate in CC-PA's decisions about these essential matters. FAC ¶ 130. These circumstances give rise to a fiduciary duty to the residents on the part of Defendants. CC-PA owes Plaintiffs duties of reasonable care, candor, manifest fairness, and undivided loyalty. The FAC adequately alleges that CC-PA had a duty to look out for the best interests of Plaintiffs, including by maintaining the necessary reserves to refund their fees, and by fairly allocating to them its costs of operating the community, and that it failed to do so. *Id*. ¶¶ 131-135.

**H. Plaintiffs Have Stated a Claim for Violation of the CLRA**

Defendants state Plaintiffs' CLRA claims should be dismissed for four reasons: Plaintiffs' lack of compliance with the venue affidavit requirements; Plaintiffs' lack of compliance with the pre-complaint notice requirements; some Plaintiffs are barred by the statute of limitations; and that Plaintiffs failed to state a claim.

The first argument is easily dispensed with: Plaintiffs have filed an affidavit that meets the requirements of California Civil Code § 1780(d), which was signed on March 28, 2014. *See* Declaration of Demetrius Lambrinos ("Lambrinos Decl.") Ex. 1 (Affidavit of Burton Richter). The FAC was filed on December 1, 2014, over eight months later. In addition, at least one court has held that this requirement is a purely procedural rule that does not apply to complaints filed in Federal Court, and does "not have a significant impact on the outcome on the case." *See Evans v. Linden Research, Inc.*, 763 F. Supp. 2d 735, 738 n. 1 (E.D. Pa. 2011).

Defendants' second argument is a similar attempt to put form above substance, and fails for the same reasons. First, the CLRA pre-filing notice applies only to claims for damages. It does not apply to the claims for equitable relief or attorneys' fees. Civil Code § 1782(a). Second, Plaintiffs sent a postfiling demand letter to Defendants on March 27, 2014, per Civil Code 1782(d). *See* Lambrinos Decl. Ex. 2. *Laster v. TMobile United States, Inc.*, 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005) (Mot. at 18), explains that the reason for the pre-complaint notice rule is to facilitate "expeditious remediation before litigation." This goal has been achieved here because the Parties mediated this dispute without success prior to the filing of the complaint – no

further pre-complaint "notice" is needed. FAC ¶ 169. Defendants were on notice of Plaintiffs' claims before the complaint was filed, and did not take any remedial action. Indeed, they flatly and consistently refused to do so. Finally, Defendants cite no legal authority for their argument that the pre-complaint notice and demand must be filed before the "original" complaint. Mot. at 21. Indeed, that is directly contrary to the post-filing language in the statute. Civil Code § 1782(d).

Defendants' statute of limitations argument also fails. Defendants assert that the three year statute of limitations for CLRA claims started to run when the residents entered their respective Residency Contracts, and that four of the class representatives did so in 2005, which is more than three years prior to filing the initial complaint. *Id*. This argument flies in the face of Defendants' ripeness argument. Furthermore, this argument fails because, as Plaintiffs have alleged, Defendants deliberately concealed their business practices thus resulting in tolling of the statute. FAC ¶¶ 201-207; *see also NLRB v. Don Burgess Construction Corp.*, 596 F. 2d 378, 383 (9th Cir. 1979) ("fraudulent concealment tolls a statute of limitations").

In addition, "[i]n California, the discovery rule postpones accrual of a claim until the plaintiff discovers, or has reason to discover, the cause of action." *Plumlee v. Pfizer*, No. 13-cv-00414, 2014 U.S. Dist. LEXIS 23172 *26 (N.D. Cal. Feb. 21, 2014). Plaintiffs learned that Defendants did not have Entrance Fee reserves only after March 15, 2012, and the Complaint was filed on February 19, 2014. *See* FAC ¶ 85 and Ex. 6 (page 1). Therefore, the statute has yet to run. Furthermore, Plaintiffs and the Class have paid, and continue to pay, inflated monthly fees, and Defendants continue to upstream their Entrance Fees. The fact that this conduct is ongoing also tolls the statute of limitations. *See GSI Tech., Inc. v. Cypress Semiconductor Corp*., 2015 U.S. Dist. LEXIS 9378, *7-8 (N.D. Cal. Jan. 27, 2015) (under the continuing violation doctrine, "a new cause of action arises each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time") (internal quotes omitted). Disputes concerning the application of the continuing violation doctrine "present a question of fact that is ill-suited for resolution upon a motion to dismiss." *Stripling v. Regents of the Univ. of Cal.*, 2015 U.S. Dist. LEXIS 13432, *19 (N.D. Cal. Feb. 4, 2015).

Defendants' fourth argument fails because it hinges on the same flawed assumptions they have repeatedly made. First, Defendant asserts that the alleged misrepresentations have not been identified, and that Plaintiffs were not induced to alter their positions. Mot. at 22. This is clearly incorrect. Plaintiffs have alleged injury. They were lured into the Vi at Palo Alto by Defendants' assurances of financial security. *Supra* at 2-4. Second, Plaintiffs have alleged that the entrance fees are secured by California's reserve requirements, which are incorporated into the Residency Contract by operation of law. *Id.* at 5-6. Third, there is no hint or indication in any of the Residency Contracts or promotional materials indicating that the Entrance Fees are unsecured. *Id*. In fact, Defendants used marketing material stating there was a reserve fund for the Entrance Fees, and that they would be held in escrow. *Id.* at 13. Fourth, Defendants have again ignored Plaintiffs' allegations that Defendants have charged Plaintiffs and the Class inflated monthly fees.

**I. Plaintiffs Have Stated a Claim for Violation of the UCL**

Plaintiffs allege Defendants engaged in fraudulent, unfair, and/or unlawful business practices under California's UCL. FAC ¶¶ 238-249. Defendants argue Plaintiffs cannot state a claim under the UCL because they cannot articulate an injury in fact. Mot. at 23. This argument is no different than the standing argument addressed above. *See, supra*, § IV.B.

Defendants next claim that Plaintiffs have not alleged they lost money as a result of Defendants' conduct. Mot. at 23. This is also incorrect for the reasons stated above. *See, supra*, § IV.B. Section 1793.5 explicitly states that "[a] violation under this section is an act of unfair competition as defined in Section 17200 of the Business and Professions Code." Defendants concede that none of their contracts contain the required disclosure concerning their non-compliance with the Section 1793(f). *See* Mot. at n. 7. Plaintiffs plausibly state a claim.

**J. Plaintiffs Have Stated a Claim for Breach of Contract**

Defendants misstate Plaintiffs' position. Plaintiffs have a security interest in their Entrance Fees created by statute. That statutorily created interest (i.e. the reserve requirement) has been incorporated into their Residency Contracts by operation of law. Defendants' failure to maintain those reserves constitutes a breach of the Residency Contract.

Defendants argue that "[d]istributing excess cash to a corporate parent is a common business practice and not prohibited by law." Mot. at 23. That is a factual contention which is irrelevant to the motion to dismiss. Regardless, this allegedly common business practice does not allow a party to a contract which includes a reserve requirement to deplete those reserves by participating in such transfers. As Plaintiffs have explained, such practices are actionable to the extent they impair a creditor's security interest. *See, supra,* §§ IV.B. I-J, fn.7.

Defendants assert that a letter from the DSS supports their argument that California's statutes "'specifically contemplate' that a provider will distribute excess cash to a parent company." Mot. at 24. This is misleading at best. The full sentence of the letter states:

> Although the continuing care statutes do not preclude distributions of surplus cash to a providers principle (in fact the statute specifically contemplates such distributions), **the statutes do require that the provider entity remain financially sound after making those distributions**.

Ex. 5 (page 3) (emphasis added).

Just the opposite happened here, the CC-PA is in financial disarray. The DSS further noted its concern that "[i]f the entrance fee from the resale of a Health Center resident's unit has already been collected and distributed to [CC-DG] when the Health Center resident's contract terminate, [CC-PA's] cash will not be sufficient to make the entrance fee repayment due." *Id*. at page 2. The DSS was also concerned that, due to its cash transfers, CC-PA could be "insolvent, is in imminent danger of becoming insolvent, [or] is in a financially unsafe or unsound position" such that it may not be able to make its repayment obligations. *Id*. The DSS also cited to an actuarial study finding that CC-PA "does not possess sufficient resources for current residents (including the actuarial present value of periodic fees expected to be paid in the future by present residents) to cover the actuarial present value of the expected costs of performing all remaining obligations to such residents under their contracts." *Id*. at 1. In sum, this letter does not state that CC-PA's cash transfers are code compliant – in fact, the letters support Plaintiffs' claims.

Defendants have breached the provisions of the Residency Contracts regarding monthly fees. Plaintiffs' position is that the marketing costs at issue did not benefit the community, but

were instead used to generate additional Entrance Fees from incoming residents. *See, supra,* §§ II., IV. B.7. The provision relating to marketing fees has been breached. *See,* Ex. 8 at 3.3.3. Plaintiffs also allege that the earthquake insurance at issue covers CC-PA's buildings, which are not included as capital items under the contract. *See, supra,* §§ II., II.B.7. Defendants' arguments presuppose the outcome of fact issues which remain to be litigated and are irrelevant to this Court's assessment of the pleadings. The provision relating to insurance premiums has been breached. *See, e.g.,* Ex. 8 at 3.3.2.[9]

**K. Plaintiffs have stated a Claim for Declaratory Relief**

Defendants' arguments against Plaintiffs' claim for declaratory relief are simply a restatement of its standing and ripeness arguments, and fail for the same reasons. Plaintiffs are entitled to declaratory relief because their financial security has been impaired and they continue to be overcharged. Absent the declaratory relief they seek, Defendants will continue to interpret Sections 1771(r) and 1792.6 in a way that permits them to run CC-PA at a significant deficit and upstream Plaintiffs' Entrance Fees. Claims for declaratory relief are particularly appropriate when there is a dispute between parties regarding the interpretation of a contract, and parties' respective rights and obligations arising under that contract are at issue. *See, e.g., Clear Channel Outdoor, Inc. v. Bently Holdings Cal. LP*, No. C-11-2573 EMC, 2011 U.S. Dist. LEXIS 140764 at *17 (N.D. Cal. Dec. 7, 2011). Declaratory relief is necessary and non-duplicative here because even Defendants are found liable under the other causes of action and are ordered to pay damages, only an order of declaratory relief will prevent Defendants from relying on the same legal misinterpretations and therefore engaging in the same illegal conduct in the future.

**L. Plaintiffs' FAC Should Not be Dismissed With Prejudice**

Dismissal is not warranted in this case. However, to the extent this Court is inclined to grant Defendants' Motion, it should do so without prejudice and give Plaintiffs an opportunity to cure any deficiencies.

[9] Each of these breaches also serve as the basis for Plaintiffs' breach of contract claim and their claim for breach of the implied covenant of good faith and fair dealing. FAC ¶¶ 191-196. Contrary to Defendants' assertions, there is nothing in the Residency Contracts that "contradict" (Mot. at 25) the implied covenant alleged here.

## V. CONCLUSION

For the foregoing reasons, Defendants' Motion should be denied.

Dated: March 20, 2015

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