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CC-Palo Alto, Inc. a Delaware corporation;
Classic Residence Management Limited Partnership,
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,

vs.

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.

vs.

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

Nominal Defendant.

Case No.: C 14-00750 EJD

DEFENDANTS CC-PALO ALTO, INC., CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP AND CC-DEVELOPMENT GROUP, INC.'S REPLY IN SUPPORT OF 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: None set.

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INTRODUCTION

Defendants CC-Palo Alto, Inc. ("CC-PA"), CC-Development Group, Inc. ("CC-DG"), and Classic Residence Management Limited Partnership ("CRMLP") (collectively, "defendants") submit this reply in support of their motion to dismiss plaintiffs' First Amended Complaint ("FAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs' opposition fails to demonstrate that the FAC pleads sufficient factual allegations to show standing or state viable claims. Plaintiffs' claims are premised entirely on bare assertions that they possess "security interests" in the entrance fees, and that this purported interest has been "impaired." However, neither the law nor the Residency Contracts that define the parties' legal rights and obligations, support their assertions, no matter how many times they repeat them.

Plaintiffs' failure to demonstrate an injury-in-fact, as required for constitutional standing, is fatal to their claims. Plaintiffs try to salvage their premature claims by asserting a theoretical risk of future injury: that CC-PA might not be able to make entrance fee repayments when they become due. Plaintiffs' FAC falls hopelessly short of pleading facts to support such an allegation. And even if plaintiffs were able to plead such facts, their alleged harm is not imminent. Plaintiffs cannot possibly be harmed until, at a minimum, ten (10) years from now.

By misleadingly quoting selective, out-of-context portions of the factual record, plaintiffs attempt to construct a façade of an adequately pled claim of insolvency of CC-PA. The façade, however, crumbles when the complete documents plaintiffs attach as exhibits to their FAC are examined. Plaintiffs' Exhibit 5, the DSS letter, specifically shows that contrary to plaintiffs' characterization the DSS has not made any determination regarding insolvency, and describes "CC-PA's success and business model [as] beyond question." Plaintiffs' Exhibit 4, the Milliman actuarial report, specifically shows that the expected cash available for CC-PA to repay entrance fees is many millions of dollars more than projected by Milliman to be needed.

Plaintiffs have suffered no injury—and have no prospect of one. No matter how characterized, plaintiffs' claims fail. Because plaintiffs have been given an opportunity to correct the complaint and have failed to cure critical flaws, the Court should dismiss the entire FAC without leave to amend.

ARGUMENT

A. PLAINTIFFS' ATTEMPTS TO CHARACTERIZE UNSUPPORTED LEGAL CONCLUSIONS AS FACTUAL ALLEGATIONS FAIL.

1. Plaintiffs Fail To Establish A "Security Interest" In The Entrance Fees.

Plaintiffs claim to have standing "because Defendants' upstreaming activities have caused actual impairment and injury to their statutorily created security interest in their Entrance Fees." Dkt. 74-1 at 1:28-2:1. Plaintiffs do not cite to any legal authority to support their claimed "security interest" in the unsecured repayable entrance fees loaned by plaintiffs to CC-PA. Instead, plaintiffs merely equate the statutory reserve requirements, if applicable to plaintiffs' Residency Contracts, to security interests. Merely saying it is so does not make it so.

The Court previously found that plaintiffs' security interest claims fail as a matter of law, finding no security interests were created under the California Commercial Code or relevant case law regarding secured loans. Dkt. 55 at 6:4-7:13. Plaintiffs impliedly concede these are not bases for their supposed security interests. *See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (failure to respond in opposition brief to an argument made in opening brief constitutes waiver).

Instead, plaintiffs now look to their Residency Contracts, which they allege provide for refundable entrance fees, to conclude that security interests in those entrance fees automatically followed. The Court previously found plaintiffs had not adequately pled that their Residency Contracts provided for refundable entrance fees. The Court therefore did not reach the issue of whether plaintiffs had a security interest in any such allegedly refundable entrance fees. Dkt. 55, at 7:14-9:5. If it had reached the issue, it would have found no security interests.

A security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation." Com. Code § 1-201(b)(35). A "security agreement" is defined as "an agreement that creates or provides for a security interest." Com. Code § 9102(a)(73). The allegations of the FAC and its attachments establish no such interest or agreement. The entrance fee paid by each plaintiff is a general unsecured loan. Thus, plaintiffs do not have a cognizable security interest in the money loaned.

Notwithstanding plaintiffs' unsupported legal allegations, CC-PA is not required to maintain entrance fee reserves because CC-PA's Residency Contract is not a refundable contract. The Residency Contract fits within the exception created by Health & Safety Code[1] section 1771(r)(2) because it includes a resale contingency.[2] The section does not require that, to be eligible for the exemption, entrance fee repayments must always, under every circumstance, be contingent. Where the non-contingent circumstances are remote, *e.g.* inability to resell the unit in ten years, the exemption applies; there is no demonstrable reason to conclude otherwise.

The DSS, the agency charged with enforcing the continuing care retirement community ("CCRC") statutes, did not until recently[3] consider fixed-time contingent on resale contracts to fit within the definition of a "refundable contract" under Section 1771(r)(2). *See* Smith Decl., Exh. A. An administrative agency's interpretation of the statute it administers is entitled to great deference by the reviewing court, even if it is not embodied in a formal rule. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("the rulings, interpretations and opinions" of an agency tasked with enforcing a statute, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); *Rea v. Blue Shield of Cal.*, 226 Cal. App. 4th 1209, 1237 (2014); *Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1006 (9th Cir. 2006). The DSS' interpretation of a "refundable contract" under

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[1] All future references to a "Section" are to the Health & Safety Code unless otherwise specified.

[2] Section 1771(r)(2) creates the following exception from the definition of a "refundable contract:"

> 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.' (emphasis added.)

[3] The DSS did not make its change in interpretation retroactive. *See* Declaration of Gary Smith in Support of Defendants' Motions to Dismiss FAC ("Smith Decl."), Exh. A. Moreover, the limited reserve now required by the DSS does not equal the full balance that a CCRC is obligated to repay. This rentrance fee reserve is based on a calculation that takes into consideration the resident's estimated life expectancy, a probability factor of a unit not reselling during the ten-year period beginning after the resident's estimated life expectancy end date, and a discount rate that takes into account the time value of money. *See* § 1792.6(c)(2)(A) (life expectancy tables). CC-PA has fully funded this 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.

Section 1771(r)(2), although informal, is entitled to deference because it is "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." *Skidmore*, 323 U.S. at 139.

CC-PA's Residency Contract is not transformed into a refundable contract because CC-PA does not refer to the conditional promise of repayment as a "refund." Extrinsic statements in newspaper articles or marketing brochures not specific to the Vi at Palo Alto community that use the word "refund" should not be relied upon when the contract unambiguously contains provisions making repayment contingent on reoccupancy, and when the contract consistently avoids using the word "refund" to describe such repayments.[4]

In their current opposition, plaintiffs point to section 11.7 of the Residency Contract, which generally provides that a resident's rights under the contract are senior to and have priority over the rights of any mortgage lender. Dkt. 74-1 at 15:7-16. Once again, plaintiffs erroneously assume this provision creates a security interest, without any citation to authority. Plaintiffs ignore the fact that when a security interest was intended to be granted by the Residency Contract, there is a specific grant of such right, identified as a "security interest."

Section 8.4.1 of the Residency Contract provides:

> 8.4.1 Resident's Financial Difficulty. After Your initial occupancy of Your Home, the Provider will not terminate this Contract based on Your financial inability to pay Your Monthly Fee or other charges if the conditions set forth in this Section are satisfied. You may be allowed to remain at the Community, at the reasonable discretion of the Provider, with a portion of Your monthly Fee and other charges deferred, based on Your ability to pay, provided that: … You agree in writing that the amount of any Monthly Fees or other charges deferred under this Section ("Deferred Charges") shall be deemed a loan to You from the Provider with interest on the outstanding amount at a rate of prime plus one percent (1%) per annum or the maximum legal rate, whichever is less, compounded annually. Under

[4] CC-PA's Residency Contract scrupulously adheres to the CCRC law's distinction between non-contingent refunds and contingent repayments. The non-contingent refund language is used only where statutorily mandated: resident cancellations during the first 90 days of occupancy, termination by the provider for just cause, and refunds of unit upgrade charges. *See* § 1788.4; FAC, Exhs. 8, 10, 12, 14, 16, and 18 at sections 8.1, 8.4.2.a-g and j; Exhs. 8, 10, 12, and 18 at section 8.5.4; Exhs. 14 and 16 at section 9.3. The Residency Contract never refers to conditional repayments, such as those due upon death or the resident's voluntary contract termination, as "refunds." Because of these statutorily mandated "refunds", the Section 1771(r)(2) exception cannot be construed to require that every repayment under every circumstance be contingent to exempt the contract from the reserve requirements.

> these conditions, the Provider will pay the Deferred Charges on Your behalf as and when they become due. **The Provider will have a first security interest and lien against your estate and the portion of Your Entrance Fee** which is refundable or repayable hereunder, and the outstanding loan balance and interest shall be deducted when the Provider calculates Your refund or repayment under Section 8.5 (Amount and Timing of Refunds or Repayments) below. (emphasis added.)

The Residency Contract does not provide any such grant of a security interest to the resident in the entrance fee or any portion of it. If it were intended that residents be granted a security interest in the entrance fees, it would have been expressly provided in the Residency Contract. It was not. *See* FAC, Exhs. 8, 10, 12, and 18 at section 9.5; Exhs. 14 and 16 at section 11.6 (stating residents do not have any interest in any payments made under the Residency Contract). The Court cannot read into a contract anything by implication (except on the grounds of obvious necessity) and cannot rewrite a contract because a party feels that it was unwise or improvident. *Addiego v. Hill,* 238 Cal. App. 2d 842, 846 (1965); *see Am. Guar. & Liab. Ins. Co. v. Lexington Ins. Co.,* 517 Fed. Appx. 599, 600 (9th Cir. 2013) (concurring opinion of Judge Bea, in contract interpretation the principle of *expression unius* applies – the expression of one thing is the exclusion of another – such that when contracting parties express a specific term in one place but not another, there is no basis to extend the specific term to the other place) (unpublished Ninth Circuit opinion, copy attached hereto as Exhibit 1, Federal Rules of Appellate Procedure Rule 32.1).

Plaintiffs have failed to supply any authority in support of their argument that they have a "security interest" in the entrance fees.

2. <u>Plaintiffs' Opposition Fails To Establish Any Factual Basis For Insolvency</u>.

Plaintiffs' reliance on the DSS letter and the Milliman actuarial report is misplaced and misleading. Plaintiffs' selective quotation from the DSS letter (FAC, Exh. 5) ignores the fact that the DSS did not make any determination of insolvency of CC-PA. Dkt. 74-1 at 4:16-24. Plaintiffs' reliance on the Milliman report (FAC, Exh. 4) similarly ignores the fact that the report shows CC-PA has ample ability to make the entrance fee repayments as they come due.

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The full paragraph from the DSS letter, with the portions omitted by plaintiffs, reads:

> **The issue arising from CC-PA's financial reports is not whether CC-PA has been successful financially or whether Vi at Palo Alto's business model is sound. CC-PA's success and business model are beyond question. Rather**, the issue is whether CCPA's distributions of cash to its non-provider parent have weakened CC-PA's financial position so that it is (or the Department may 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 continuing care contracts" within the meaning of Health & Safety Code (H&SC) sections 1792(d) [stating the bases for increasing and/or escrowing a provider's liquid reserves], 1793.13(a) [stating the bases for requiring a financial plan to resolve a provider's unsound financial condition], and 1793,50(a) [stating the bases for seeking a judicially appointed administrator]. **Before it determines whether any of the preceding H&SC provisions apply, however, the Department is affording CC-PA 60 days to explain in writing why they do not. In short, CC-PA must establish that it is solvent, will remain solvent, is financially sound and safe, and is able to fully perform its continuing care contract obligations. To the extent that it is unable to show it meets each of these standards, CC-PA must submit a financial plan outlining how it intends to achieve and maintain those standards.**
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> (Portions omitted by plaintiffs in bold, underlining added.)

Thus, it is clear from the full quotation that the DSS had not found CC-PA to be financially unsound, insolvent, or unable to perform its obligations. Plaintiffs' silence in this regard speaks volumes—plaintiffs do not allege nor do they provide any evidence that the DSS ever made such a determination (because it did not). The DSS letter simply requests a response from CC-PA, which CC-PA provided. The DSS was satisfied with CC-PA's response. It did not take any further action or require CC-PA to submit a financial plan. Plaintiffs should not be permitted to rely on the letter, which asked for a response, nothing more, as evidence that CC-PA is insolvent.

Furthermore, the DSS letter does not support plaintiffs' claim that the distributions are "unlawful." The letter, which addresses the distributions from CC-PA to CC-DG, expressly states that "the statutes specifically contemplate such distributions." In fact, as plaintiffs note, all of the laws then in effect, including the statutes contemplating such distributions, were incorporated into the Residency Contract by operation of law. *Castillo v. Express Escrow Co.*, 146 Cal. App. 4th 1301, 1308 (2007).

Plaintiffs also ignore the express findings in the Milliman actuarial report, Exhibit 4 to the FAC, which are that CC-PA has and will continue to have net positive cash flow including

for repayment of entrance fees. As pointed out in defendants' motions to dismiss, the Milliman report states: "Cash balances are projected to remain positive over the ten year projection period." Dkt. 68 at 28:13-15. The report further shows that the net positive cash flow projected from entrance fees, less assumed 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, aggregating a total of over $195 million over that ten-year period. FAC, Exh. 4, p. 24-26.

In addition, the Milliman report states:

> The following points should be noted considering this result [actuarial deficit]:
>
> ●…that entrance fee repayments are intended to be paid from proceeds received from future new entrants to the community.
>
> …
>
> ●The Residency Agreement provides for monthly fee increases of sufficient magnitude so as to cover all projected expenses of operating the community."

FAC, Exh. 4, p. 29. Plaintiffs do not address these findings. Instead, plaintiffs only cite the "actuarial deficit" finding, which as set forth in defendants' motions to dismiss (Dkt. 68 at 27:11-30:7), is not the same as the insolvency tests required under Delaware law.

For the reasons set forth above and in the Individual Director Defendants' reply brief which is incorporated herein by reference, plaintiffs insolvency allegations are not supported by the law and are contradicted by the allegations of the FAC.

B. EVEN ASSUMING PLAINTIFFS WERE ABLE TO SHOW A "SECURITY INTEREST" IN THE ENTRANCE FEES, THEY HAVE NOT SHOWN ACTUAL OR IMMINENT INJURY IN FACT.

Even if plaintiffs could demonstrate a cognizable "security" interest in the entrance fee loans, plaintiffs cannot articulate how they have suffered actual or imminent injury to that purported interest. It is undisputed CC-PA has never failed to make a repayment obligation.[5]

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[5] Waste cases, which plaintiffs point to as "instructive" (Dkt. 74-1 at p. 16, n. 7), are inapposite in that these cases deal with situations where there is physical damage to the real property securing a loan. *Bedrock Fin., Inc. v. United States*, 2013 WL 2244402, at *10 (E.D. Cal. May 21, 2013). Each of these cases deal with secured obligations where collateral was pledged as security for the repayment obligation. *See id.* at *8 (federal tax lien against the property); *Fait v. New Faze Develop., Inc.*, 207 Cal. App. 4th 284, 290 (2012) (secured by a deed of trust); *The Nippon Credit Bank v. 1333 N. Cal. Blvd.*, 86 Cal. App. 4th 486, 490 (2001) (secured by a deed

Plaintiffs fail to cite authority for their theory that they have suffered actual harm in the form of "impairment of security interest" in the entrance fees. It is not sufficient merely to allege actual harm in the form of feelings of uncertainty and uneasiness. Dkt. 74-1 at 18:4-6. These vague feelings are insufficient to confer standing for breach of a general unsecured loan agreement when CC-PA has always made repayments and there is no indication it will cease to do so.

Though plaintiffs proclaim their "harms are not speculative" (Dkt. 74-1 at 12:25-13:3), the FAC demonstrates otherwise. The cases cited by plaintiffs illustrate the difference between a situation in which a threat of future injury is real and immediate—and thus sufficient to demonstrate standing—and this case, where the "threat" of future injury is that one day, no sooner than ten years from now, CC-PA **may** not be able to make a repayment obligation.

Plaintiffs are correct that allegations of threatened injury can suffice for Article III standing; however, plaintiffs stretch this principle beyond its breaking point. Allegations of future injury can satisfy the "injury-in-fact" requirement of standing if it is "real and immediate" and not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983). Future injury "must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1142-43 (2013) (internal quotations omitted) (emphasis in original). The "certainly impending" requires a showing that the alleged future harm is more probable than reasonably likely. There must be a substantial risk of future harm based on concrete facts, and a showing that the defendant's actions caused the risk. *Id.* at 1150 n.5. The potential injury cannot be based on speculation about the unfettered choices made by independent actors or depend on a chain of possibilities. "[A]llegations of *possible* future injury are not sufficient." *Id.* at 1147 (emphasis in original).

The cases cited by plaintiffs further undermine their argument that simply alleging possible future injury is sufficient for Article III standing. In both *Estate of Migliaccio v. Midland National Life Insurance* and *Gladstone Realtors v. Village of Bellwood*, the courts

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of trust). The notion that the money loaned by plaintiffs to CC-PA would itself act as collateral for the repayable portion, without any otherwise expressed security, is tautologically illogical.

found evidence of actual harm. *See Migliaccio,* 436 F. Supp. 2d 1095 (2006) (finding plaintiffs suffered both actual and threatened economic damages); *Gladstone Relators,* 441 U.S. 91 (1979) (racial steering practices robbed the neighborhood of racial balance).

Plaintiffs' reliance on *Harris v. Board of Supervisors,* 366 F.3d 754, 761 (9th Cir. 2004), is misplaced. As this Court previously articulated in dismissing plaintiffs' original complaint:

> The imminent injury in Harris, however, is distinguishable from the instant matter. The plaintiffs in Harris were chronically ill individuals who faced the risk of losing medical services. Harris, 366 F.3d at 762. The Ninth Circuit found the plaintiffs to have "demonstrated that the County *already* [had] difficulty providing" access to care, and that "[g]iven the current crisis in the county health care system and existing shortages and delays, it [was] not speculative to anticipate that reducing the resources available [would] *further* impede the County's ability to deliver medical treatment." Harris, 366 F.3d at 762 (emphasis added). By contrast, here, Plaintiffs are not already going through the process of seeking refunds only to find that their repayment requests were denied. In fact, there is no indication that any Plaintiff has yet attempted to resell their apartment or is in such critical health that termination is imminent. Accordingly, there is no indication that Defendants will *further* deprive Plaintiffs of a repayment.

Dkt. 55 at pp. 9-10.

Likewise, the environmental cases cited by plaintiffs are distinguishable. Dkt. 74-1 at 16:16-17:15 (citing *Cent. Delta Water Agency v. USA,* 306 F.3d 938 (9th Cir. 2002); *Covington v. Jefferson Cnty.,* 358 F.3d 326 (9th Cir. 2004); *Friends of the Earth, Inc. v. Laidlaw Env'l Servs., Inc.,* 528 U.S. 167 (2000)). In *Central Delta Water Agency*, the Ninth Circuit explained that standing is unique in the environmental context because monetary compensation may not adequately return plaintiffs to their original position. *See Cent. Delta,* 306 F.3d at 950 ("The extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy [by monetary compensation].").

Plaintiffs cite *Clark K. v. Guinn* and *R.C. by Alabama Disabilities Advocacy Program v. Nachman ("Nachman")* for the proposition that where the acts causing injury are authorized or part of a policy, it becomes far more reasonable to assume those acts will occur. Both cases involved challenges to systematic deficiencies in the foster care system. *Clark K.*, 2007 WL 1435428 (N.D. Nev. May 14, 2007); *Nachman*, 969 F. Supp. 682 (M.D. Ala. 1997). In both cases, the court found that children in the foster care system, or children who would enter into the system within a short timeframe, had alleged an imminent threat of harm because there was no

doubt that the plaintiffs would suffer injury as a result of the defendants' unlawful policies. Thus, the courts found the plaintiffs had sufficiently alleged an injury-in-fact because they could not avoid exposure to the defendants' challenged conduct. *Clark K.*, 2007 WL 1435428 at *4; *Nachman*, 969 F. Supp. at 698-99. By contrast, here, CC-PA's alleged "policy" of transferring excess funds to CC-DG is not unlawful, nor is it an act which causes immediate injury to plaintiffs. Plaintiffs do not—and cannot—allege that CC-PA has an authorized policy of denying repayments. Because the alleged policy of transferring excess funds is not unlawful, and it is not certain that plaintiffs will suffer injury, the "threatened injury" is merely hypothetical.

No matter how plaintiffs frame their arguments, they are unable to demonstrate a concrete risk of imminent harm. Plaintiffs have not shown imminent injury as they have not pled any facts to show that default is "certainly impending" as opposed to merely "possible." *See Clapper,* 133 S. Ct. at 1142-43. Even if there were a threat that CC-PA might fail to make a repayment, plaintiffs have not alleged they are currently awaiting repayment, and thus they could not suffer harm within the next ten years. This is not imminent harm.

To confer standing to a lender as to any purported controversy over the use of unsecured loans not yet due would not only eliminate the injury in fact requirement, but invite the Court to rewrite the terms of the loan agreement. Allowing a creditor to dictate what a debtor may do with loaned money, absent contractual language regulating such use, would be to rewrite the parties' contract. *See Hyundai Amer., Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217, 1219 (N.D. Cal. 1998) ("Courts interpret contracts as made by the parties and do not make new ones for them."); *see also Jones v. Re-Mine Oil Co.*, 47 Cal. App. 2d 832, 836-37 (1941) (a transaction cannot be condemned as "fraudulent" merely because one party later believes he made a bad deal). Clearly the law does not allow such an illogical result.

C. PLAINTIFFS' FINANCIAL ELDER ABUSE CAUSE OF ACTION FAILS BECAUSE PLAINTIFFS DO NOT ALLEGE DEFENDANTS HAVE DEPRIVED THEM OF ANY PROPERTY RIGHT.

Plaintiffs' financial elder abuse claim hinges on their mistaken belief that CC-PA is required to keep entrance fees in reserve, and that this reserve requirement grants plaintiffs an interest in the money they freely loaned to CC-PA before entering Vi at Palo Alto. Plaintiffs

claim the "Entrance Fees have been placed at risk, their security interest has been impaired, and they face increased tax assessment, which will lead to inflated monthly fees." FAC, ¶ 196, p. 48.

Plaintiffs have not alleged that they have been deprived of a property right. Situations in which courts have found financial elder abuse are vastly different than the circumstances here. For example, a court found a "skeletal claim" of financial elder abuse where developers effectuated a lot line adjustment and encumbered real property of elders without a valid power of attorney and without payment for any portion of the parcel. *See Bonfigli v. Strachan,* 192 Cal. App. 4th 1302, 1316 (2011). Another court found a colorable claim of financial elder abuse where the facts suggested that one defendant, "knowingly notarized fraudulent loan documents then attempted to cover that act by persuading Plaintiff to sign his journal or another acknowledgment," which resulted in the elder plaintiff losing equity in his home while the defendants retained the money obtained through the refinance. *Harrison v. Downey Savings & Loan Ass'n*, 2009 WL 2524526, at *6 (S.D. Cal. Aug. 14, 2009).

This is not a situation where an elder was unduly influenced to enter a contract wherein a property right was relinquished for nothing in return. Plaintiffs each freely entered into a contractual relationship with CC-PA, and pursuant to the terms of that agreement, paid an entrance fee. The Entrance Fee Promissory Note is an unsecured, general obligation of CC-PA. CC-PA has performed all of its obligations, and has made all repayments. *See* FAC, Exh. 4 ("Neither the provider [CC-PA] nor any Vi affiliated entity has ever defaulted on an entrance fee repayment obligation.").

Moreover, plaintiffs' contention that defendants have overcharged them for certain operating costs is contradicted by the express terms of the Residency Contract and was already dismissed by this Court. Dkt. 55 at 12; 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. Because plaintiffs have not been deprived of any right to which they are entitled, this cause of action should be dismissed.

D. PLAINTIFFS' CONCEALMENT CAUSE OF ACTION FAILS BECAUSE THE FAC DOES NOT ALLEGE ACTUAL RELIANCE OR DAMAGES.

In order to state a claim for concealment, plaintiffs must each plead with particularity "actual reliance" on the allegedly omitted facts. *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1093

(1993). In a concealment claim, actual reliance means "that, had the omitted information been disclosed, one would have been aware of it and behaved differently." *Id*.

Plaintiffs do not dispute they are required to allege actual reliance on concealed facts, but they argue that paragraph 205 of the FAC alleges plaintiffs "reasonably relied" on defendants' purported nondisclosures. This is not sufficient. Nowhere in the FAC do plaintiffs allege any facts regarding their purported reliance, what defendants should have disclosed to them, where such a disclosure should have occurred, that they would have seen such a disclosure, that the alleged nondisclosure changed their behavior, or that they would have acted differently if other disclosures were made. *See Snyder v. Ford Motor Co*., 2006 WL 2472187, at *3 (N.D. Cal. Aug. 24, 2006) (dismissing under Rule 9(b) for failure to describe the circumstances of purchase and what the defendant should have disclosed).

Plaintiffs' concealment cause of action should also be dismissed because plaintiffs fail to plead measurable damages caused by the fraud. It is not enough to simply claim plaintiffs were misled; they must allege the precise amount of damage resulting from the omission. *See Santoro v. Carbone,* 22 Cal. App. 3d 721, 728 (1972), disapproved on other grounds by *Tenzer v. Superscope, Inc*., 39 Cal.3d 18, 30 (1985). Plaintiffs' conclusory allegation that they were harmed by defendants' failure to disclose important facts is not sufficient. FAC, ¶ 205, p. 50.

E. PLAINTIFFS' NEGLIGENT MISREPRESENTATION CAUSE OF ACTION FAILS BECAUSE THE FAC DOES NOT IDENTIFY ANY ACTIONABLE MISSTATEMENT OR ALLEGE ACTUAL RELIANCE.

Plaintiffs' negligent misrepresentation claim is subject to the heightened standards of Rule 9(b), which requires plaintiffs to plead the time, place, and specific content of each alleged misrepresentation—along with facts demonstrating their personal reliance on those statements. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124–25 (9th Cir. 2009). Plaintiffs fail to meet these standards. None of plaintiffs' "examples" of misrepresentations were false, and plaintiffs do not claim to have relied upon any particular false or misleading statement.

Plaintiffs' argument that they have "alleged with particularity that defendants made multiple material misstatements" (Dkt. 74-1 at 25:19-21), is belied by the paragraphs plaintiffs

cite in support of this claim.[6] These paragraphs show plaintiffs only allege two purported misstatements, neither of which are affirmative, actionable misrepresentations. *See Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 841 n.2 (1992) (misrepresentations must be positive assertions, not implied statements). Both alleged misstatements identified in plaintiffs' FAC are generalized, vague, and unspecific, and are therefore not actionable as they constitute mere "puffery" upon which a reasonable consumer cannot rely. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990).

The first "example" provided by plaintiffs, a marketing brochure stating reservation deposits (deposits collected before the community's opening) will be held in an escrow account, is not a misstatement. Under Article 3 of the continuing care statutes, initial reservation deposits are placed in escrow until construction of the community is at least 50% complete and the community is able to demonstrate that it has met the other state financial requirements. *See* §§ 1780-1785. The references to "escrow" have nothing to do with entrance fees.

Likewise, the statement that the DSS "requires the community to maintain certain cash reserves in amounts sufficient to meet state requirements" refers to providers' obligations under Section 1792 to maintain minimum liquid reserves. *See* § 1792(a) (requiring an operating reserve and a debt service reserve). The statutes require CC-PA demonstrate its compliance with the minimum liquid reserve requirements each year and submit reports to the DSS with its annual audited financial statements, which CC-PA has done. *See* § 1792.5; FAC, Exh. 2, Form 5-5. The brochure gives no indication that CC-PA would maintain an entrance fee reserve.

The second "example" provided by plaintiffs is a 2008 marketing letter addressed to "friends" which states residents will experience a "sense of security" that they have "planned wisely to secure their future" because the entrance fee repayment will "not fluctuate with changes

[6] Plaintiffs claim paragraphs 204, 210, 211, 246, and 258 of their FAC identify the misrepresentations that form the basis of their negligent misrepresentation cause of action. However, only paragraphs 210 and 211 reference alleged misstatements, neither of which are actionable for the reasons stated in defendants' opening brief. (*See* Dkt. 68, at 17:17-18:6.) Paragraph 204 lists seven (7) "facts" defendants allegedly failed to disclose. Paragraphs 246 and 258 list seven (7) deceptive acts defendants purportedly engaged in.

in the market."[7] Dkt. 74-1 at 26:8-12; FAC, ¶ 90 and Exh. 25.[8] Plaintiffs' FAC does not articulate what was misrepresented in the letter, but their opposition appears to argue that the misstatement was that residents have "planned wisely." Dkt. 74-1 at 26:19-21. This sort of vague, subjective statement is not actionable. Moreover, the representation that entrance fee repayments are not subject to fluctuation only means that plaintiffs' repayment amounts are fixed and not dependent on the amount of the entrance fee paid by a new resident or changes in the market. These alleged misleading statements are not misrepresentations at all, but are truthful and accurate. There is no implication that CC-PA would keep entrance fee reserves.

Additionally, plaintiffs fail to plead actual reliance. In order to state a negligent misrepresentation claim, plaintiffs must allege and prove that they actually relied upon the misrepresentations, and that in the absence of fraud, would not have entered into the contract or other transaction. *Mega Life & Health Ins. Co. v. Super. Ct.*, 172 Cal. App. 4th 1522, 1530 (2009); *see also Schauer v. Mandarin Gems of Cal., Inc.,* 125 Cal. App. 4th 949, 960 (2005). Plaintiffs claim they met this standard and refer to paragraph 215 of their FAC (p. 52), which simply states plaintiffs "reasonably relied on Defendant's representations." This is not sufficient. Plaintiffs do not describe how they acted, or what plaintiffs did or did not do, as a result of their reliance. Instead, plaintiffs assert a sweeping allegation that every plaintiff relied on both statements—even those who entered the community before 2008. Plaintiffs' own allegations establish they cannot plead actual reliance because four of the six plaintiffs entered the community before the alleged misrepresentation. *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").

Because plaintiffs fail to identify any actionable misrepresentation and do not allege actual reliance, the negligent misrepresentation cause of action must be dismissed.

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[7] Plaintiffs' opposition argues that this 2008 letter might have been used as early as 2005 (Dkt. 74-1 at 26:14-15), but the FAC contains no such allegations.

[8] Paragraph 90 of the FAC, which quotes the 2008 marketing letter, mistakenly cites Exhibit 18. The letter is attached to the FAC as Exhibit 25.

F. PLAINTIFFS' BREACH OF FIDUCIARY DUTY CAUSE OF ACTION FAILS BECAUSE PLAINTIFFS DO NOT ALLEGE FACTS TO DEMONSTRATE THE EXISTENCE OF A FIDUCIARY RELATIONSHIP.

To state a claim for breach of fiduciary duty, plaintiffs must first establish the existence of a fiduciary relationship. Thus, plaintiffs must allege defendants either knowingly agreed to act on behalf and for the benefit of plaintiffs, or that they entered into a relationship with plaintiffs that imposed that undertaking as a matter of law. *City of Hope Nat'l Med. Ctr v. Genentech, Inc.,* 43 Cal.4th 375, 386 (2008). It is undisputed this is not an instance where a fiduciary duty is imposed by law. *Cf.* 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."). Thus, plaintiffs must allege defendants knowingly assumed duties beyond those of mere fairness and honesty and agreed to act on plaintiffs' behalf, giving priority to their best interests. *Comm. On Children's Television, Inc. v. Gen. Foods Corp*., 35 Cal.3d 197, 222 (1983).

Plaintiffs' allegations regarding the existence of a fiduciary relationship are based primarily on their Residency Contracts with CC-PA. Specifically, the FAC alleges CC-PA owes plaintiffs a fiduciary duty because it (1) "was entrusted with large sums of money that Plaintiffs set aside for their retirement[;]" (2) "asserts the unilateral right to determine the cost of residents' homes and their living environment[;]" (3) "denies the residents any right to participate in CC-PA's decisions" about their living environment; and (4) "assumed the role of caregiver and business partner." FAC, ¶ 130. These allegations are inadequate. Under California law, no fiduciary relationship arises in purely commercial situations. *McCann v. Lucky Money, Inc*., 129 Cal. App. 4th 1382, 1398 (2005); *Wolf v. Super. Ct.,* 107 Cal. App. 4th 25 (2003). This is because in a typical business contract or relationship, one party does not commit to act in the other party's best interest rather than in its own. *See, e.g., Scognamillo v. Credit Suisse First Boston LLC*, 2005 WL 2045807, at *4 (N.D. Cal. Aug. 25, 2005). Plaintiffs have not alleged facts that would demonstrate that CC-PA assumed duties beyond that in a typical business relationship, and agreed to give priority to plaintiffs' interests.

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Plaintiffs' allegations that defendants assumed the role of caregiver and business partner also clearly contradicts the parties' relationship as evidenced by the Residency Contracts. The Residency Contracts—which set forth the parties' relationship—specify that CC-PA does 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 their loved ones. *See* FAC, Exhs. 8, 10, 12, and 18 at section 4.4; Exhs. 14 and 16 at section 4.10.

The cases cited by plaintiffs involving the "targeting of senior citizens" are distinguishable as they each involve the sale of annuities where the defendant expressly held itself out as an objective expert acting in the elder's best interest. In those cases, defendants acted as objective financial advisors and estate planning specialists, controlled the elders' finances, and gave assurances they were looking out for plaintiffs' best interests. *See, e.g., Negrete v. Fidelity & Guaranty Life Ins. Co.,* 444 F. Supp. 2d 998, 1004 (2006) (financial advisors and estate planning specialists manipulation and control over senior citizens' finances and legal status gave rise to fiduciary duties); *Abbit v. ING U.S. Annuity & Life Ins. Co.,* 999 F. Supp. 2d 1189, 1199 (S.D. Cal. 2014) (insurance agents who acted as seniors' financial advisors and promised continued commitment gave rise to fiduciary duty); *In re Nat'l Western Life Ins.,* 467 F. Supp. 2d 1071, 1087 (2006) (insurance agents who held themselves out as objective financial planners acting in seniors' best interests gave rise to fiduciary duties); *Migliaccio,* 436 F. Supp. 2d at 1008 (fiduciary duty where sales agents lured seniors into their confidence and acted as financial advisors and estate planning specialists to ultimately sell them improper annuities).

By contrast, here, defendants did not exert control over plaintiffs' estates or finances. Defendants were not advising plaintiffs about investments, and were not managing their finances. By plaintiffs' own admission, the Residency Contracts were offered on a take it or leave it basis. FAC, ¶ 76. The entrance fees paid by plaintiffs were pre-set amounts based on the size of the independent living unit. The repayable percentage was set based on the date of entry into the community. The mere fact plaintiffs paid a sizable entrance fee upon entry does not give rise to fiduciary obligations. *See Das v. Bank of America, N.A.,* 186 Cal. App. 4th 727, 740 (2010) (finding no existence of fiduciary duty between bank and elderly and mentally incapacitated

account holder). The parties entered into an arm's length transaction where defendants provide services. It is inconceivable that every relationship "between contracting parties where the defendant targeted senior citizens" (Dkt. 74-1 at 15:1-3) is a fiduciary relationship.

No California court has found a fiduciary relationship based on residency in a continuing care retirement community. Furthermore, a comprehensive statutory scheme exists in California to regulate continuing care retirement communities. *See* Cal. Health & Safety Code, Div. 2, Chap. 10. A finding of a fiduciary duty here would disregard the statutory framework regulating the legal relationship created by the Residency Contract, and would drastically change the entire, heavily regulated, industry. Here, the parties' relationship is purely commercial. Plaintiffs' breach of fiduciary duty cause of action should be dismissed with prejudice.[9]

G. PLAINTIFFS' CLRA CAUSE OF ACTION FAILS BECAUSE PLAINTIFFS DID NOT COMPLY WITH THE ACT'S PROCEDURAL REQUIREMENTS AND FAIL TO STATE A CLAIM.

Plaintiffs' CLRA cause of action should be dismissed for failure to comply with the notice and venue affidavit requirements, because strict adherence to the statute's requirements is necessary to accomplish the Act's goals. *See Laster v. T–Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005) (dismissing CLRA claim with prejudice where pre-suit letter was sent after complaint was filed); *Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 38-41 (1975) (rejecting plaintiff's argument that substantial compliance is sufficient and finding strict adherence to CLRA's notice requirements is necessary); *Von Grabe v. Spring PCS,* 312 F. Supp. 2d 1285, 1303-04 (S.D. Cal. 2003) (dismissing CLRA claim with prejudice where plaintiff's pre-suit letter failed to comply with notice requirements and complaint did not contain allegations of compliance).

The CLRA requires, at least 30 days before the commencement of an action for damages under the CLRA, notification of the claim to allow the potential defendant a chance to rectify. Cal. Civ. Code § 1782(a). Here, plaintiffs filed their initial complaint on February 19, 2014,

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[9] Where, as here, the FAC does not allege facts suggesting that defendant undertook a special fiduciary duty, dismissal for failure to state a claim is appropriate. *Das*, 186 Cal. App. 4th at 741; *Committee on Children's Television,* 35 Cal.3d at 222.

which sought damages. Dkt. 1. Plaintiffs did not send their CLRA notice until March 27, 2014—more than a month later. Plaintiffs failed to comply with the CLRA's notice provisions, and therefore their CLRA claim should be dismissed. *In re Apple and AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1077 (N.D. Cal. 2011).

The CLRA also requires that "[i]n 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). Plaintiffs failed to file a venue affidavit "concurrently with the filing of the complaint," so their CLRA claim must fail.

In addition to these procedural defects, plaintiffs have also failed to state a valid claim for violation of the CLRA. Plaintiffs do not allege facts showing defendants' representations were false or misleading according to the reasonable consumer standard, which requires plaintiffs to show that members of the public are likely to be deceived. *Cullen v. Netflix, Inc*., 880 F. Supp. 2d 1017, 1025-26 (N.D. Cal. 2012); *see also* section E *supra*. The claim also fails because plaintiffs did not allege they each received and justifiably relied on the alleged misrepresentations. Furthermore, the allegations are insufficient to meet the particularized standing requirements of the CLRA which requires a showing that plaintiffs suffered economic injury as a result. Cal. Civ. Code § 1780(a); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350 (2010). Because of these deficiencies, plaintiffs' CLRA claim should be dismissed.

H. PLAINTIFFS' UCL CAUSE OF ACTION FAILS BECAUSE THEY HAVE NOT ALLEGED A LOSS OF MONEY OR PROPERTY AS A RESULT OF DEFENDANTS' CONDUCT.

Plaintiffs' UCL claims are subject to the heightened pleading requirements of Rule 9(b) because they are predicated on misrepresentations and omissions that are grounded in fraud. *See Tietsworth v. Sears, Roebuck & Co.,* 2009 WL 3320486, at *6 (N.D. Cal. Oct. 13, 2009). Because plaintiffs' UCL cause of action rests upon their other claims, which have not been adequately pled, they cannot serve as predicate offenses to support plaintiffs' UCL claim.

In support of their UCL claim, plaintiffs claim they have alleged a violation of section 1793.5, which is a *per se* act of unfair competition. The FAC states in conclusory terms that defendants violated Sections 1793.5 (d) and (f) (FAC, ¶¶ 242-244, pp. 55-56), but fail to allege facts that, if true, would constitute a violation of these sections. Contrary to plaintiffs' assertions, the FAC does not plead facts sufficient to show that CC-PA abandoned the community or its obligations under the Residency Contracts, which would amount to a violation under Section 1793.5(d). It is undisputed defendants still own and operate the community, and plaintiffs are living at the community and receiving benefits under their Residency Contracts.

Plaintiffs' allegations regarding an alleged violation of Section 1793.5(f), which prohibits "publication of any printed matter, oral representation, or advertising material" that does not comply with certain statutory requirements are premised on defendants' purported failure to comply with Section 1793(f). Section 1793(f), however, was superseded by Section 1792.6 and is therefore no longer good law. *See* Dkt. 68 at 7:23-28. Section 1792.6 does not contain the disclosure requirement of the former section 1793(f). Moreover, even if Section 1793(f) were still good law, it required disclosure of the absence of an entrance fee reserve **only** for those providers offering refundable contracts. As discussed above in section A, CC-PA's Residency Contract is not a refundable contract. The DSS repeatedly approved the forms of CC-PA's Residency Contracts, which did not include such a disclosure because one was not required.

Moreover, plaintiffs' opposition fails to address the fact that plaintiffs cannot meet the UCL's heightened standing requirement which requires demonstration that plaintiffs have lost money or property as a result of defendants' conduct.[10] Plaintiffs' UCL claim thus fails.

I. PLAINTIFFS' BREACH OF CONTRACT CAUSE OF ACTION FAILS BECAUSE CC-PA IS NOT OBLIGATED TO MAINTAIN AN ENTRANCE FEE RESERVE AND PLAINTIFFS' MONTHLY FEES ARE NOT INFLATED.

Plaintiffs fail to state a claim for breach of contract because they have not identified any contractual provision that has been breached. Instead, they argue the contract has been breached by not maintaining reserves—which the Residency Contract does not require. As discussed

[10] Standing under the UCL is far narrower than traditional federal standing requirements. *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1348 n. 31 (2009).

above, plaintiffs have not established CC-PA is required to maintain an entrance fee reserve, and even if it were, plaintiffs have not shown how that reserve requirement grants a "security interest" in the reserve. *See* section A *supra*.

But even if plaintiffs were able to show that CC-PA is required to maintain an entrance fee reserve, there is no private right of action to bring a claim under Section 1792.6.[11] Because there is no private right of action under the statutory scheme, plaintiffs cannot rely on that scheme to bring a breach of contract cause of action. Simply calling the action one for breach of contract does not create a private right of action where the Legislature did not provide for one. "Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute. Such a private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature *intended* to create such a right to sue for damages." *Vikco Ins. Servs., Inc. v. Ohio Indem. Co.*, 70 Cal. App. 4th 55, 62 (1999) (emphasis in original). If the Legislature intended to provide a private right of action, the courts assume that it would have done so clearly and unmistakably. *Id.* at 62-63. Plaintiffs cannot claim as a breach of contract a violation of Section 1792.6 to circumvent the lack of a private right of action under statute.

With regard to monthly fees, this Court has already determined defendants have not breached the Residency Contracts by inflating or misallocating monthly fees:

> The 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. Plaintiffs have not alleged sufficient injury in fact to have standing for claims arising from their monthly fees because nothing has occurred to run afoul of the contract terms.

Dkt. 55 at p. 12. Plaintiffs' FAC does not allege any new facts regarding monthly fees.[12] Therefore, plaintiffs fail to state a cause of action for breach of contract.

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[11] The Legislature assigned enforcement of the CCRC statutes to the DSS. *See* § 1770(d). Multiple sections of the CCRC statute authorize the DSS, the Attorney General, and local district attorneys to bring enforcement actions. *See* §§ 1793.6, 1793.19, 1793.21, 1793.27, 1793.29, and 1793.31.

[12] In their FAC, like their original complaint, plaintiffs attempt to characterize CC-PA's suspension of crediting funds from the Cumulative Operating Surplus (COS) reserve as a breach of the Residency Contract. However, in dismissing plaintiffs' original complaint, this Court

J. PLAINTIFFS' BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING FAILS BECAUSE PLAINTIFFS CANNOT CITE A SPECIFIC PROVISION OF THE CONTRACT THAT WAS FRUSTRATED.

Plaintiffs' opposition fails to address, let alone distinguish, settled authority that requires a claim for breach of the implied covenant of good faith and fair dealing to cite a specific provision of the contract that was frustrated. *See* Dkt. 68 at 25:4-15. The FAC does not point to any specific contractual provision that was supposedly frustrated. This failure mandates dismissal of this cause of action.

K. PLAINTIFFS' DECLARATORY RELIEF CAUSE OF ACTION FAILS BECAUSE PLAINTIFFS DO NOT ALLEGE A CONCRETE CONTROVERSY.

The fact that plaintiffs seek declaratory relief does not relieve them of the requirement that they satisfy Article III standing requirements. Like their other claims, a claim for declaratory relief "is not sufficiently concrete and particularized to meet the case or controversy requirement of Article III if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Cramer v. John Alden Life Ins. Co.*, 763 F. Supp. 2d 1196, 1209 (D. Mont. 2011) (internal quotation marks omitted). Here, plaintiffs have not adequately alleged a concrete dispute that can be resolved by a declaratory action.

Plaintiffs' declaratory relief claim is also duplicative of other claims and therefore the Court should exercise its discretion to dismiss the claim as its resolution will serve no useful purpose. *See, e.g., Kinghorn v. Citibank, N.A.,* 1999 WL 30534, at *7 (N.D. Cal. Jan. 20, 1999).

L. PLAINTIFFS' TWELFTH CAUSE OF ACTION FAILS BECAUSE CC-DG DOES NOT OWE CC-PA OR PLAINTIFFS A FIDUCIARY DUTY, AND PLAINTIFFS FAIL TO ADEQUATELY ALLEGE CC-PA'S INSOLVENCY.

Under Delaware law, "a parent corporation does not owe fiduciary duties to its wholly owned subsidiaries or their creditors." *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 191-92 & n.66 (Del. Ch. 2006) ("*Trenwick*") (*citing Anadarko Petroleum Corp. v.*

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found that, under the express terms of the Residency Contract, it was in CC-PA's complete discretion to retain operating surpluses as a reserve. Regardless, as evidenced by the letter attached as Exhibit 31 to the FAC, CC-PA has reinstituted the crediting of COS reserves. CC-PA has fully credited the excess amounts in the COS to the residents, and has stated it will continue to do so in the future. FAC, Exh. 31.

Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988)). The court in *Trenwick* found that a fiduciary obligation to the subsidiary may arise if the subsidiary has minority stockholders. *Id.* at 192, n.66. Plaintiffs assert CC-DG, as a parent corporation, owes fiduciary duties to its subsidiary, CC-PA, because "there are parent-subsidiary dealings." Dkt. 74 at 21:17-21. In support, plaintiffs cite *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971), a derivative action brought by minority stockholders of a subsidiary against a parent company. *Sinclair Oil* fits into the exception to the general rule recognized by *Trenwick.* Here, CC-DG does not owe fiduciary duties to CC-PA because CC-PA does not have minority stockholders.

In the alternative, plaintiffs claim CC-DG is liable under an aiding and abetting theory. This also fails because, as discussed in plaintiffs' opening brief and above in section A, plaintiffs have not, and cannot, sufficiently alleged CC-PA's insolvency.[13] In order to state a plausible claim of insolvency, plaintiffs must show that CC-PA "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. Grp. v. NCT Grp., Inc.*, 863 A.2d 772, 782 (Del. Ch. 2004).

Contrary to the FAC's conclusory allegations, CC-PA is more than able to continue to pay its debts as they come due in the usual course of business. This is confirmed by the Milliman actuarial study which projects positive cash balances over the next ten years. *See* FAC, Exh. 4, pp. 24-26. Nowhere in the FAC do plaintiffs allege that any of the money owed to plaintiffs is currently due or that CC-PA has missed any payments. Plaintiffs' conclusory balance sheet insolvency allegations fail to account for the fact that the audited financials on which they rely do not reflect the market value of CC-PA's assets. Plaintiffs' balance sheet insolvency allegations are also based on the combined value of future contingent liabilities without any present value discount. Because plaintiffs have not sufficiently alleged, and are unable to allege, facts sufficient

[13] The Corporate Defendants join in and incorporate by reference the Individual Director Defendants' reply brief regarding the solvency of CC-PA.

to show the insolvency of CC-PA, based on a practical assessment of the actual value of its assets, this cause of action must be dismissed.

M. PLAINTIFFS HAVE NOT ADEQUATELY ALLEGED A CAUSE OF ACTION UNDER CUFTA OR DUFTA, THEREFORE THE FOURTEENTH CAUSE OF ACTION MUST BE DISMISSED.

Plaintiffs attempt to buttress their claim for violation of California's and Delaware's fraudulent transfer statutes by repeating inadequate allegations from the FAC. Although defendants specifically addressed each actual and constructive fraud theory under the statutes, plaintiffs do not respond directly to these arguments or clarify how their conclusory allegations were sufficient. *Compare* Dkt. 68 at 30:8-35:3; *with* Dkt. 74 at 23:10-24:5. Since plaintiffs failed to respond to defendants' arguments, and failed to explain how they could amend the FAC to state a claim under either the California Uniform Fraudulent Transfer Act (CUFTA) or the Delaware Uniform Fraudulent Transfer Act (DUFTA), the claim should be dismissed without leave to amend. *See Stichting Pensioenfonds ABP*, *supra,* 802 F. Supp. 2d at 1132.

1. <u>Plaintiffs Fail To Allege Actual Fraud</u>.

In their moving papers, the corporate defendants argued plaintiffs failed to allege plausibly the presence of statutorily recognized "badges of fraud" with enough specificity to satisfy Rule 9(b). *See In re Moriarty*, 2014 WL 6623005, *7-8 (Bankr. C.D. Cal. Nov. 20, 2014). Specifically, defendants noted CC-PA's alleged failure to retain possession of the funds was not an applicable factor, because the challenged transfer does not involve a change in title to real or personal property. *See* Dkt. 68 at 31:22-27. Plaintiffs did not respond to this argument, and thereby impliedly concede this factor does not apply. *See* Cal. Civ. Code § 3439.04(b)(2).

Defendants pointed out that CC-PA's alleged non-disclosure also was not a factor, because the Residency Contracts attached to the FAC showed the fact of the transfers was either disclosed in the contracts, or was available to the residents for inspection. *See* Dkt. 68 at 32:1-12; *see also* Cal. Civ. Code § 3439.04(b)(3). Plaintiffs did not respond to this argument other than to reiterate their conclusory non-disclosure allegation. This allegation is entitled to no weight in light of the countervailing facts appearing in the materials appended to the FAC. *See* FAC, Exhs. 8, 10, 12, and 18 at section 10.7; Exhs. 14 and 16 at section 12.8. Plaintiffs also reiterated their

conclusory allegation that the transfer drained CC-PA of substantially all its liquid assets (Cal. Civ. Code § 3439.04(b)(5)), but failed to counter defendants' showing that the Milliman report shows a positive cash flow projection for the next ten years, which contradicts this allegation. *See* FAC, Exh. 4, pp. 24-26.

Although plaintiffs argue in opposition that the transfer occurred shortly after substantial debts were incurred (Cal. Civ. Code § 3439.04(b)(10)), they fail to cite any provision of the FAC that clarifies when the allegedly unlawful transfers occurred. Neither the FAC nor plaintiffs' cursory statement in their opposition show how plaintiffs could amend to allege this factor with the specificity required by Rule 9(b). *See In re Moriarty*, 2014 WL 6623005, at *8.

Finally, plaintiffs reiterate their assertion that the transfer was to an insider (Cal. Civ. Code § 3439.04(b)(1)), but the significance of this assertion hinges on plaintiffs' allegations of insolvency, which are deficient. The same is true of plaintiffs' claim that CC-PA did not receive anything of value in exchange for the transfer (Cal. Civ. Code § 3439.04(b)(8)). As discussed above, plaintiffs have not adequately alleged insolvency under any test recognized in Delaware law, and certainly not with the degree of specificity necessary to satisfy Rule 9(b). As defendants pointed out in their motion, the FAC fails even to identify when the alleged insolvency occurred (Dkt. 68 at 34:21-35:3), because it has not, and plaintiffs' opposition brief did not clarify this point. Absent plausible allegations of insolvency, a transfer between a wholly-owned subsidiary and its parent for the benefit of the parent does not suggest fraud. *See Anadarko, supra,* 545 A.2d at 1174; *Trenwick, supra,* 906 A.2d at 173, 200-02.

2. Plaintiffs Fail To Allege Constructive Fraud.

Although plaintiffs cite to California Civil Code section 3439.05 in their opposition brief, they do not specifically argue that they could assert a constructive fraud claim under that section or any other provision of CUFTA or DUFTA. *See* Dkt. 74 at 23:10-24:5. Plaintiffs did not respond to any of the arguments regarding constructive fraud in defendants' moving papers. *Compare* Dkt. 68 at 33:9-35:3; *with* Dkt. 74 at 23:10-24:5. Therefore, plaintiffs impliedly concede they have not alleged, and cannot allege, a constructive fraud claim under CUFTA or DUFTA. *See Stichting Pensioenfonds ABP*, *supra,* 802 F. Supp. 2d at 1132.

N. THE COURT SHOULD TAKE JUDICIAL NOTICE OF DOCUMENTS INTEGRAL TO UNDERSTANDING PLAINTIFFS' ALLEGATIONS.

The implausible nature of plaintiffs' allegations is further demonstrated by the documents defendants proffer on this motion that are incorporated by reference or are otherwise integral to understanding plaintiffs' allegations. *See* Defendants' Response to Plaintiffs' Opposition to Judicial Notice and Objections to Evidence. Defendants do not ask the Court to make any specific findings of fact from the extrinsic documents offered. These documents are offered only to show that plaintiffs' allegations are implausible and insufficient to state the claims asserted.

The Court should not allow plaintiffs' cleverly drafted FAC to proceed where the requested documents both underlie and contradict assertions in the FAC. As shown by these documents, further pursuit of this matter would be futile and should not be permitted.

CONCLUSION

Plaintiffs fall short of adequately pleading any acts on which a valid claim could rest. Instead, they rely on fanciful arguments couched in legal conclusions. The Court does not have to accept their conclusory—and often contradictory—allegations.

Plaintiffs are simply displeased with the terms of the Residency Contracts they signed. Plaintiffs have not suffered a concrete harm and do not face the risk of imminent harm as a result of defendants' alleged conduct. Their inability to adequately allege injury is fatal to their claims. Because plaintiffs have already been granted an opportunity to correct the complaint and have failed to cure critical flaws, dismissal without leave to amend is proper.

DATED: April 20, 2015

McMANIS FAULKNER

/s/ James McManis
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