JAMES McMANIS (40958)
WILLIAM FAULKNER (83385)
HILARY WEDDELL (293276)
McMANIS FAULKNER
a Professional Corporation
50 West San Fernando Street, 10th Floor
San Jose, California 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244
Email: hweddell@mcmanislaw.com

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

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 RESPONSE TO PLAINTIFFS' OPPOSITION TO JUDICIAL NOTICE AND OBJECTIONS TO EVIDENCE

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

Trial Date: None set.

Defendants, CC-Palo Alto, Inc. ("CC-PA"), Classic Residence Management Limited Partnership ("CRMLP"), and CC-Development Group, Inc. ("CC-DG") (collectively, "defendants"), hereby respond to the objections raised to their Request for Judicial Notice in Support of Defendants' Motion to Dismiss the First Amended Complaint ("FAC").

I. THE COURT IS NOT REQUIRED TO ASSUME THE TRUTH OF PLAINTIFFS' ALLEGATIONS WHERE THEY ARE CONTRADICTED BY JUDICIALLY NOTICEABLE FACTS.

Although the court generally assumes the facts alleged are true in ruling on a motion to dismiss, "courts do not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. Accordingly, conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." *The Comm. For Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency,* 365 F. Supp. 2d 1146, 1152 (D. Nev. 2005) (internal quotations and citations omitted). A court does not need to accept as true allegations of a complaint that are contradicted by material submitted as part of the complaint or documents incorporated by reference in the complaint. *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001). Likewise, the court need not accept as true allegations that contradict matters properly subject to judicial notice. *See Mullis v. U.S. Bankruptcy Court,* 828 F.2d 1385, 1388 (9th Cir. 1987); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). So, notwithstanding plaintiffs' allegations, the court can rely on judicial notice to dispose of meritless claims.

II. THE COURT MAY CONSIDER JUDICIALLY NOTIABLE FACTS.

Under Federal Rule of Evidence ("FRE"), Rule 201, a judicially noticeable fact is one that is not subject to reasonable dispute because it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *See* FRE Rule 201(b).

The Westlaw editorial note for California Health & Safety Code section 1793 is judicially noticeable because it is a document that is not subject to reasonable dispute and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The Westlaw editorial note is only proffered by defendants to illustrate that the

number of Health and Safety Code section 1793 is out of order. Judicial notice of the editorial note is proper here because the fact is not subject to reasonable dispute as it can be accurately verified by resort to the statute.

Defendants also request the Court take judicial notice of three documents published by the California Department of Social Services ("DSS")—the agency charged with enforcing the continuing care contract statutes. *See* Declaration of Gary Smith in Support of Defendants' Motions to Dismiss FAC ("Smith Decl."), Exh. A; Declaration of Hilary Weddell in Support of Defendants' Motions to Dismiss FAC ("Weddell Decl."), Exhs. A and B. In the Ninth Circuit, it is well-established that a court may take judicial notice of matters of public record or administrative materials. *United States v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008) ("Judicial notice is appropriate for records and "reports of administrative bodies.") (citing *Interstate Natural Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1954)); *Mack v. S. Bay Beer Distrib.,* 798 F.2d 1279 (9th Cir. 1986); *Minor v. FedEx Office & Print Servs.,* Inc., 2015 WL 225396, at *4 (N.D. Cal. Jan. 16, 2015). This is because a court "may presume that public records are authentic and trustworthy." *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999). The April 24, 2012 DSS memorandum (Smith Decl., Exh. A) and the DSS' publications of the Continuing Care Retirement Community statutes (Weddell Decl., Exhs. A and B) are records of an administrative body, and therefore judicial notice is appropriate.

III. THE COURT MAY CONSIDER DOCUMENTS RELIED ON BY PLAINTIFFS.

A court may also consider "material which is properly submitted as part of the complaint" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1989). "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Id.*

This rule has been extended to documents not attached to the FAC if the document is "central" to plaintiff's claim and no party challenges the document's authenticity. *See United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (extending the rule to documents not mentioned in complaint, where authenticity was not contested and the complaint necessarily relied on them), *superseded by statute on other grounds as recognized in Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (same as *Parrino*). Such consideration prevents "plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting reference to documents upon which their claims are based." *Parrino*, 146 F.3d at 706. The extension of this doctrine is particularly applicable in a case such as this where plaintiffs selectively attach 38 documents (or portions of documents) to their FAC in an attempt to construct allegations supporting their claims.

The Court can consider the documents attached to the Smith Declaration as Exhibits B-D pursuant to the incorporation by reference doctrine. **Plaintiffs have not objected to their authenticity** and the FAC necessarily relies on them.

The September 18, 2012 Milliman letter (Smith Decl., Exh. B) is written by the author of the Milliman actuarial study attached as Exhibit 4 to the FAC. The letter expressly clarifies the Milliman actuarial study on which plaintiffs rely for their insolvency allegations. *See, e.g.,* FAC, ¶ 21; Dkt. 74 at 12:5-13:8; Dkt. 74-1 at 4:16-24; 17:20-26; 32:7-26. The Milliman letter also directly addresses the August 2, 2012 letter from the DSS, attached as Exhibit 5 to the FAC, which plaintiffs rely on extensively for their allegations that there is a risk that CC-PA may someday fail to make a repayment. *See, e.g.,* FAC, ¶ 21; Dkt. 74 at 2:1-8; 11:19-12:4; Dkt. 74-1 at 3:15-20; 32:21-25. Plaintiffs **do not** challenge the document's authenticity and **do not** dispute that the letter is central to their claims. In fact, plaintiffs admit that the letter seeks to explain the Milliman actuarial study on which plaintiffs base their claims. Dkt. 74-3 at 5:20-22. Accordingly, because the omitted September 18, 2012 Milliman letter is central to plaintiffs' claims and its authenticity is not disputed, the Court can consider it under the incorporation by reference doctrine.

The Court can also consider Exhibits C and D to the Smith Declaration under the incorporation by reference doctrine because these documents are attachments to the Residency Contracts plaintiffs included as exhibits to their FAC. Copies of CC-PA's 2009-2010 and 2010-2011 audited financials should have been attached to plaintiffs' FAC as attachments to the Residency Contracts signed by plaintiffs, but they were omitted. Instead, plaintiffs included only the 2002-2003 audited financials that were attached to earlier Residency Contracts. *Compare* FAC, Exhs. 8, 10, 12, and 18 (Residency Contracts with 2002-2003 audited financials attached as Appendix J) *with* FAC, Exhs. 14 and 16 (Residency Contracts with Appendix J omitted). Plaintiffs cannot be permitted to attach incomplete copies of their Residency Contracts to the FAC to avoid placing facts before the Court that contradict their claims. Courts have expressly discouraged such deliberate omission of dispositive documents. *See Pension Ben. Corp. v. White Consol. Indust., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

IV. CONCLUSION.

The Court can and should take judicial notice of the documents that reveal the inadequacy of plaintiffs' FAC. These documents are records of the DSS—the agency charged with enforcing the continuing care statutes, or documents that are central to plaintiffs' claims. Plaintiffs do not dispute the authenticity of the documents but simply request the Court disregard any facts that contradict their unsubstantiated allegations. In extending the incorporation by reference doctrine, the Ninth Circuit expressly rejected attempts such as this. Plaintiffs cannot be allowed to selectively omit materials upon which their claims are based to survive a Rule 12(b)(6) motion.

DATED: April 20, 2015

McMANIS FAULKNER

/s/ James McManis
JAMES McMANIS
WILLIAM FAULKNER
HILARY WEDDELL

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