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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

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

**RESPONSE TO PLAINTIFFS'
 OPPOSITION TO DEFENDANTS'
 REQUEST FOR JUDICIAL NOTICE
 AND OBJECTIONS TO EVIDENCE BY
 DEFENDANTS PENNY PRITZKER,
 NICHOLAS PRITZKER, JOHN
 POORMAN, GARY SMITH, STEPHANIE
 FIELDS AND BILL SCIORTINO**

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

Trial Date: None Set

INTRODUCTION

In deciding the motions to dismiss, this Court should have the opportunity to review documents that clarify and explain extrinsic materials relied upon by Plaintiffs. The Milliman Letter (Declaration of Diana DiGennaro In Support of Motion to Dismiss (“DiGennaro Decl.”) Ex. A, Att. B is just such a document. Without the Milliman Letter, the Milliman Report (FAC Ex. 4) is highly misleading and the conclusions Plaintiffs seek to draw from it would be highly prejudicial to the defendants. This is precisely the type of situation the incorporation by reference doctrine seeks to avoid. The same is true with respect to CC-PA’s October 3, 2012 letter (“CC-PA Response Letter”, DiGennaro Decl. Ex. A) in response to the CDSS’s August 2, 2012 letter (FAC Ex. 5). Plaintiffs would have this Court consider only one-half of a two-sided conversation, contravening Ninth Circuit precedent to the contrary. The Court should consider both the Milliman Letter and the CC-PA Response Letter in ruling on the Director Defendants’ Motion to Dismiss.¹

ARGUMENT

The Director Defendants seek to rely on only two extrinsic documents: the CC-PA Response Letter responding to the CDSS’s August 2, 2012 letter, which is attached to the FAC as Exhibit 5 and quoted at length in the Opposition; and the Milliman Letter, which CC-PA submitted to CDSS and which expressly clarifies the Milliman Report on which Plaintiffs base their insolvency allegations. Without these two documents, the story told by the FAC is incomplete and misleading. Plaintiffs do not dispute that the documents were produced to them in October 2014, and do not contest their authenticity. *See* Plaintiffs’ Opposition to Defendants’ Request for Judicial Notice and Objections to Evidence at 4-5.

When ruling on a motion to dismiss, the Court may consider material submitted as part of the complaint or relied upon in the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). If the documents are not physically attached to the complaint, they may be considered if the documents’ authenticity is not contested and the plaintiff’s complaint necessarily relies on them. *Id.* This includes companion documents that provide context. For example, in a defamation case,

¹ The Director Defendants did not request judicial notice of any documents.

1 the Ninth Circuit held that “[i]n evaluating the context in which the statement appeared, the Court
 2 must take into account ‘all parts of the communication that are ordinarily heard or read with it.’”
 3 *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (quoting Restatement (Second) of Torts §563
 4 cmt. d (1977)).

5 The *Knievel* court explained that the Ninth Circuit has extended the “incorporation by
 6 reference” doctrine “to situations in which the plaintiff’s claim depends on the contents of a
 7 document, the defendant attaches the document to its motion to dismiss, and the parties do not
 8 dispute the authenticity of the document, even though the plaintiff does not explicitly allege the
 9 contents of that document in the complaint.” *Id.* (citation omitted). *See also Parrino v. FHP, Inc.*,
 10 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds*, 443 F.3d 676 (9th Cir.
 11 2006) (holding that the district court properly considered documents attached to a motion to dismiss
 12 that described the terms of plaintiff’s group health insurance plan, where plaintiff alleged
 13 membership in the plan, his claims depended on the conditions described in the documents, and
 14 plaintiff never disputed their authenticity); *In re Silicon Graphics Inc. Sec. Litig.*, 970 F. Supp. 746,
 15 786 (N.D. Cal. 1997) (district court appropriately considered full text of defendant’s SEC filings
 16 over plaintiff’s objection where allegations in complaint based in part on review of defendant’s SEC
 17 filings). This rule prevents plaintiffs from surviving a Rule 12(b)(6) motion by deliberately
 18 omitting references to documents upon which their claims are based. *Parrino*, 146 F.3d at 706.
 19 “Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by
 20 failing to attach a dispositive document on which it relied.” *Pension Ben. Guar. Corp. v. White*
 21 *Consol. Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *aff’d*, 215 F.3d 407 (3d Cir. 2000).

22 The Court may and should consider the CC-PA Response Letter and the Milliman Letter
 23 because they provide context and clarify the documents on which Plaintiffs heavily rely. Plaintiffs
 24 base their entire insolvency argument on the Milliman Report and the August 2, 2012 CDSS letter,
 25 but omit CC-PA’s response to that letter and Milliman Letter’s clarification of its earlier report.
 26 The Ninth Circuit is clear that Plaintiffs cannot cherry pick when attaching material to their
 27 complaint, presenting only part of the story and omitting documents that provide context and
 28 clarification, albeit to Plaintiffs’ detriment. *See Parrino*, 146 F.3d at 706.

1 Plaintiffs argue, without citing any authority, that the incorporation by reference doctrine is
 2 “not appropriate here.” Plaintiffs’ Opp. to Defendants’ Request for Judicial Notice and Objection to
 3 Evidence at 5. According to Plaintiffs, the Milliman Letter “merely creates arguments and disputes
 4 about the factual interpretation of the actuarial analysis, which cannot be resolved on a motion to
 5 dismiss.” *Id.*

6 Plaintiffs’ argument fails for two reasons. *First*, whether or not the Milliman Letter creates
 7 a factual dispute is immaterial to the separate issue of whether the Court may and should consider it
 8 under the incorporation by reference doctrine. *Second*, the Milliman Letter does not create a fact
 9 dispute because it is authored by the *same* expert who authored the Milliman Report. There is no
 10 fact dispute when there is only one expert and that expert simply clarifies its conclusions. Despite
 11 having the benefit of that clarification, Plaintiffs nonetheless present the Milliman Report to the
 12 Court in exactly the manner the Milliman Letter instructs against. This is precisely the scenario the
 13 Ninth Circuit has sought to avoid by expanding the body of material that a court may consider in
 14 ruling on a motion to dismiss. *See Wietschner v. Monterey Pasta Company*, 294 F. Supp. 2d 1102,
 15 1110 (N.D. Cal. 2003) (“Where a plaintiff fails to attach to the complaint documents referred to in
 16 it, and upon which the complaint is premised, a defendant may attach to the motion to dismiss such
 17 documents in order to show that they do not support plaintiff’s claim”).

18 CONCLUSION

19 For the foregoing reasons, the Director Defendants respectfully request that the Court
 20 dismiss with prejudice all claims against them.

21
 22 Dated: April 20, 2015

ARNOLD & PORTER LLP

23
 24 By: /s/ Gilbert R. Serota

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