

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: hweddel@mcmmanislaw.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

Plaintiff,

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

Defendants.

Case No.: C 14-00750 EJD

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO STAY DISCOVERY,
OR ALTERNATIVELY, MOTION FOR
EXTENSION OF TIME TO RESPOND
TO WRITTEN DISCOVERY**

Dept.: Courtroom 4, 5th Floor
Judge: Hon. Edward J. Davila

Action Filed: February 19, 2014
Trial Date: None set.

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT Defendants CC-Palo Alto, Inc., CC-Development Group, Inc., and Classic Residence Management Limited Partnership (collectively “defendants”), move the Court pursuant to Federal Rule of Civil Procedure 26(c) for a Protective Order staying discovery, including responses to the discovery served by plaintiffs on September 16, 2014, until defendants file an answer to the complaint.

Alternatively, in the event the Court denies this motion to stay, defendants request an extension of time of sixty (60) days following the Court’s denial of this motion to stay to respond to plaintiffs’ first set of special interrogatories and rebquests for production.

This motion is based on this notice of motion, the accompanying memorandum of points and authorities and supporting declaration, all pleadings, exhibits, and papers on file in this action, and any other matters properly before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On February 19, 2014, plaintiffs filed a class action complaint alleging causes of action for concealment, negligent misrepresentation, breach of fiduciary duty and for imposition of a constructive trust, financial abuse of elders, violation of California's Consumers Legal Remedies Act, unfair competition, and breach of contract. (ECF No. 1.) Defendants filed motions to dismiss on March 17, 2014, attacking plaintiffs' complaint in its entirety. (ECF Nos. 13-21.) Specifically, defendants challenge whether plaintiffs have standing to sue because they have not, and cannot, allege they have suffered any damage as a result of defendants' alleged conduct.

The motions to dismiss should be granted without leave to amend as there is nothing that plaintiffs can do to correct the defects. A hearing on defendants' motions to dismiss was held on September 9, 2014, and the Court took the matter under submission.

The Court vacated the initial Case Management Conference in light of the pending motions, and did not issue a scheduling order. (ECF No. 47.) Plaintiffs have nonetheless propounded voluminous discovery on all defendants. (Declaration of Hilary Weddell in Support of Defendants' Motion to Stay Discovery ("Weddell Decl."), Exhs. A-F.) In total, plaintiffs propounded 11 interrogatories and 149 document requests. (*Id.*, ¶ 9.) Defendants' responses are due on October 21, 2014. (*Id.*, ¶ 10.)

On September 26, 2014, defendants' counsel contacted plaintiffs' counsel and requested that plaintiffs consent to stay discovery pending a ruling on defendants' motions to dismiss. (*Id.*, ¶ 11.) Plaintiffs' counsel refused to stay discovery. (*Id.*)

II. ARGUMENT

A. Discovery In This Case Should Be Stayed Pending A Ruling On Defendants' Motions to Dismiss.

Discovery in this action should be stayed until the Court has resolved defendants' motions to dismiss. This Court has broad discretion to manage the order of discovery and to enter protective orders to protect a party from undue burden or expense. Fed.R.Civ.P. 26(c). There is sound authority in the Ninth Circuit for staying discovery until the pleadings are

resolved. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729 (9th Cir. 1987). Moreover, the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), instructs against imposing the high costs of discovery on a defendant before the plaintiff has adequately pled a claim.

Further, Federal Rule of Civil Procedure 9(b), which applies to plaintiffs' claims, also militates against allowing discovery before plaintiff has stated a claim. Rule 9(b) is intended to "deter plaintiffs from the filing of complaints as a pretext for the discovery of unknown wrongs" and to "prohibit plaintiff[s] from unilaterally imposing upon the court, the parties, and society enormous social and economic costs absent some factual basis." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (citations and internal quotation marks omitted).

A court may stay discovery for "good cause." Fed. R. Civ. P. 26(c). Good cause exists when the "burden or expense of the proposed discovery outweighs its likely benefit taking into account the needs of the case . . . and the importance of the proposed discovery in resolving the issues." *Id.* at 26(b)(2)(C)(iii). Courts apply a two-prong test to determine whether there is "good cause" for the entry of a protective order staying discovery under Rule 26(c). *Hall v. Tilton*, 2010 WL 539679, at *2 (N.D. Cal. Feb. 9, 2010). "First, the pending motion must be potentially dispositive of the entire case, or at least dispositive on the issue at which discovery is directed." *Id.* Here, defendants have sought to dismiss the complaint in its entirety on multiple grounds as plaintiffs' claims fail to satisfy basic pleading standards and are legally flawed on numerous grounds. Defendants' motions to dismiss are potentially dispositive of the entire case. Plaintiffs have no standing, and no amendment to the complaint can confer standing on them.

"Second, the court must determine whether the pending dispositive motion can be decided absent discovery." *Id.* Here, it is obvious that no discovery is needed to determine whether the Complaint fails to state a claim because "[g]enerally, a court may not consider material beyond the complaint in ruling on a Fed. R. Civ. P. 12(b)(6) motion." *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007). It is equally clear that discovery would not aid plaintiffs in overcoming the defects in their complaint as plaintiffs lack standing to bring their claims. No amount of discovery will allow plaintiffs to assert a

1 cognizable harm as a result of defendants' conduct. Thus, the second prong is also satisfied
2 warranting entry of a stay of discovery in this case.

3 The circumstances justifying a stay here are particularly compelling. Absent a stay,
4 defendants would be required to expend significant time and resources to respond to plaintiffs'
5 extensive and premature discovery. As an initial matter, plaintiffs' requests seek emails dating
6 back more than ten (10) years which would necessitate the restoration and examination of
7 backup tapes, at considerable expense. (Weddell Decl., Exh. D, RFP Nos. 7, 52.) Moreover,
8 many of plaintiffs' requests for production of documents are overbroad and seek documents
9 unrelated to the current action, and therefore are unduly burdensome. For example, plaintiffs ask
10 for "all promotional, advertising and marketing materials, in every type of medium and every
11 type of format, that have been provided to prospective residents for all the subsidiaries of [CC-
12 Development Group] (including CC-PA) from the inception of the advertising and marketing
13 efforts." (*Id.*, Exh. D, RFP No. 5.) CC-Development Group, Inc. currently has ten (10)
14 continuing care retirement community (CCRC) subsidiaries in eight (8) states. Until recently,
15 CC-Development Group, Inc. also had a number of other senior rental subsidiaries, which were
16 not based on the CCRC model. Requesting all marketing materials for every subsidiary of CC-
17 Development Group is entirely overbroad and could not reasonably lead to the discovery of
18 admissible evidence. In fact, because the pleadings are still unsettled and the scope of plaintiffs'
19 claims is unresolved, there is no meaningful way to determine whether any of the proposed
20 discovery by plaintiffs meets the relevance standard or not.

21 To reply to plaintiffs' requests for production, defendants would have to engage in a
22 costly and time-consuming search for responsive documents from multiple locations in different
23 states, convert the information into a readable and reviewable format, pay a vendor to host the
24 documents, review the data for privileged or confidential information, redact, and produce
25 documents. To do so at such an early stage would impose an undue burden on defendants. If the
26 Court grants defendants' motions to dismiss, these efforts will have been unnecessary.
27 Defendants should be permitted to challenge the legal sufficiency of a claim before they are
28 subjected to costly and time-consuming discovery.

By contrast, plaintiffs can claim no prejudice that would result from the requested discovery stay. There is nothing urgent or otherwise time-sensitive in plaintiffs' discovery requests. There has been no scheduling order entered to date and no discovery cutoff has been set in this action. In fact, the initial Case Management Conference was vacated due to the unsettled pleadings. (ECF No. 47.) If the case does proceed past the pleading stage, plaintiffs will have ample time to conduct discovery. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007) (staying discovery where there was "no urgent need for immediate discovery . . . [and Court had] time enough to critique the complaint and to then consider the best course for discovery"). Granting this motion to stay will not unduly delay the case or prejudice plaintiffs.

A stay of discovery would also serve the interests of efficiency and judicial economy. In particular, because the motions to dismiss are potentially dispositive, defendants would avoid the need to gather documents and respond to discovery on claims that do not proceed past the pleadings stage. The Court would also avoid the need to adjudicate any discovery issues that arise from such claims. Specifically, before any document production, a stipulated protective order with an attorneys' eyes only provision will need to be entered by the Court, given the sensitive and confidential nature of the documents and information, including the medical and financial information of putative class members. To date, the parties have been unable to agree on an acceptable form.

In short, to require defendants to respond to discovery at this time would be disruptive and burdensome in light of the arguments asserted in defendants' motions to dismiss. Thus, granting a stay would minimize that burden and would significantly and positively promote the overall efficiency of the case.

B. Alternatively, Defendants Request an Extension of Time to Respond to Plaintiffs' Written Discovery.

Plaintiffs' first set of Special Interrogatories and Request for Production of Documents (collectively "written discovery") were mailed to counsel for defendants on September 16, 2014, and received on September 22, 2014. (Weddell Decl., ¶¶ 2-8, Exhs. A-F (Proofs of Service).)

Defendants' responses are due by October 21, 2014. (*Id.*, ¶ 10.) Defendants proposed a stipulated stay of discovery pending the determination of their motions to dismiss but the parties were unable to come to any agreement. Accordingly, defendants have filed the instant motion to stay.

Although defendants have been working on responses to the written discovery, due to the wide-ranging nature of the requests, additional time is necessary to complete the responses and to locate and process responsive documents. Accordingly, in the event the Court denies defendants' motion to stay, defendants respectfully request an extension of time of sixty (60) days following the Court's ruling within which to respond to the written discovery. On September 26, 2014, defendants' counsel contacted plaintiffs' counsel and asked plaintiffs to consent to an extension of time to respond to its discovery requests. Plaintiffs' counsel declined.

III. CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court issue a Protective Order staying discovery until defendants' file an answer to the complaint. Alternatively, in the event the Court denies the motion to stay, defendants request an extension of time of sixty (60) days following the Court's denial of the motion to stay to respond to plaintiffs' first set of special interrogatories and requests for production.

DATED: September 29, 2014

McMANIS FAULKNER

/s/ Hilary Weddell

JAMES McMANIS
WILLIAM FAULKNER
HILARY WEDDELL

Attorneys for Defendants
CC-Palo Alto, Inc. a Delaware corporation;
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CC-Development Group, Inc., a Delaware
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