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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BURTON RICHTER, an individual; **LINDA COLLINS CORK**, an individual; **GEORGIA L. MAY**, an individual; **THOMAS MERIGAN**, an individual; **ALFRED SPIVACK**, an individual; and **JANICE R. ANDERSON**, an individual; on behalf of themselves and all other similarly situated

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

Defendants.

Case No.: C 14-00750 HRL

CLASS ACTION

DEFENDANT CC-PALO ALTO, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS CLASS ACTION COMPLAINT FOR: 1. CONCEALMENT; 2. NEGLIGENT MISREPRESENTATION; 3. BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE TRUST; 4. FINANCIAL ABUSE OF ELDERS (CALIFORNIA WELFARE AND INSTITUTIONS CODE §§ 15600, ET SEQ.); 5. VIOLATION OF CALIFORNIA CIVIL CODE §§ 1750, ET SEQ.; 6. VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS CODE §§ 17200, ET SEQ.; AND 7. BREACH OF CONTRACT

Date: June 3, 2014
Time: 10:00 a.m.
Dept.: 2, 5th Floor
Judge: The Hon. Howard R. Lloyd

Trial Date: Not set.

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 3, 2014 at 10:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 280 South First St., Courtroom 8, 4th Floor, San Jose, California, defendant, CC-Palo Alto, Inc., will move the Court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6).

This motion will be based on this Notice of Motion and Motion to Dismiss, the Memorandum of Points and Authorities, the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.

DATED: March 17, 2014

McMANIS FAULKNER

/s/ James McManis
JAMES McMANIS
SHARON KIRSCH
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

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INTRODUCTION

Defendant CC-Palo Alto, Inc. ("CC-PA" or "defendant") brings this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] This lawsuit arises out of plaintiffs' displeasure with the terms of the Residency Contracts, and is an attempt to change, rather than interpret, them. Plaintiffs' allegations utterly ignore applicable laws and the plain wording of the Residency Contracts. Despite their attempt to manufacture a dispute, plaintiffs' complaint falls hopelessly short of adequately pleading any acts on which a valid claim could rest. As a threshold matter, the complaint relies on mere speculation that there might be future damages, based on a number of unlikely and contingent events. Plaintiffs have not, and cannot, allege that they have suffered any damages as a result of defendant's alleged conduct. Moreover, all of the claims are grounded in fraud and they have failed to plead with the specificity required by Rule 9(b). Therefore, plaintiffs' entire complaint should be dismissed for failure to state a claim.

STATEMENT OF FACTS

Plaintiffs attempt to allege causes of action for concealment (first cause of action), negligent misrepresentation (second cause of action), breach of fiduciary duty and for imposition of a constructive trust (third cause of action), financial abuse of elders (fourth cause of action), violation of California's Consumers Legal Remedies Act (fifth cause of action), unfair competition (sixth cause of action), and breach of contract (seventh cause of action).

The complaint contains the following allegations: Defendant CC-PA owns and operates the Vi at Palo Alto, one of the most desirable retirement communities in the country. Complaint, ¶¶ 2-3. CC-Development Group, Inc. ("CC-DG") is the parent company of CC-PA. Complaint, ¶ 16. Classic Residence Management Limited Partnership ("CRMLP") is a subsidiary of CC-DG and provides the day-to-day management and operation at Vi at Palo Alto. Complaint, ¶ 17.

Vi at Palo Alto is a luxury continuing care retirement community ("CCRC"), which provides senior residents housing, meals, housekeeping, recreational and hospitality services,

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[1] All future references to a "Rule" hereinafter made are to the Federal Rules of Civil Procedure unless otherwise specified.

long-term care, and a long-term care financial benefits program for the rest of their lives, in return for payment of an entrance fee and a monthly fee. *See* Complaint, ¶ 6 and Exhs. 5, 7, 9, 11, 13, and 15 at sections 2.1 and 3. Vi at Palo Alto offers a continuum of care, consisting of three levels: a) independent living; b) assisted living, where residents can receive help with activities of daily living such as bathing, grooming, dressing, and medication management; and c) skilled nursing. *See* Complaint, Exhs. 5, 7, 9, 11, 13, and 15 at sections 1, 4, and 7. When residents require assisted living or nursing care they continue to pay essentially the same monthly fee that was paid in independent living, despite the higher actual cost of providing care. *See* Complaint, Exhs. 5, 7, 9, 11, 13, and 15 at section 4.1.

Prior to entry into the community, each resident must sign a Continuing Care Residency Contract ("Residency Contract") with CC-PA. *See* Complaint, ¶ 4. Plaintiffs allege that they each signed a Residency Contract with CC-PA and currently reside at the Vi at Palo Alto community. Complaint, ¶¶ 24-42. The Residency Contracts require payment of an entrance fee based on the type of apartment. Complaint, ¶ 50. Plaintiffs allege that entrance fees for 2014 range from $745,500 for a one bedroom apartment to $4,620,800 for a three bedroom apartment with den. Complaint, ¶ 50. Plaintiffs allege that the entrance fee is characterized as a "loan" to CC-PA, a portion of which is repaid to the resident or the resident's estate when the contract terminates. Complaint, ¶ 47-49. Residency Contracts terminate upon the resident's decision to leave the community or their death. Complaint, ¶ 49. Upon termination of the Residency Contract, the repayable portion of the entrance fee is due at the earlier of (a) fourteen days after resale of the resident's apartment, or (b) ten years after termination. Complaint, ¶ 49. The amount of entrance fee that is repaid is dependent on when the resident entered the community, as the repayable percentage has decreased over time. Complaint, ¶ 48. Plaintiffs allege that the repayable portion of their entrance fees range from 75% to 90%. Complaint, ¶ 47.

The complaint alleges that continuing care providers such as CC-PA are required to maintain a certain level of cash reserves for their repayment obligations or disclose their failure to do so. Complaint, ¶ 51. Plaintiffs allege that the marketing materials for Vi at Palo Alto did not include any such disclosure and the Residency Contracts "conceal the fact that there is no

cash reserve." Complaint, ¶ 54. Plaintiffs further allege that the "essence" of CC-PA's offering was that it would take care of the residents, "enhance the last chapter of their lives," and that "Vi at Palo Alto would be their home." Complaint, ¶ 57.

Plaintiffs' complaint alleges that CC-PA has transferred over $190 million dollars to its corporate parent, CC-DG, and is now "financially incapable of honoring its debts" when they become due. Complaint, ¶ 7. Plaintiffs allege that they were not informed that CC-PA intended to distribute excess cash to its parent company, and CC-DG's failure to assume responsibility for CC-PA's repayment obligation has "impaired the security interest underlying the loans made to CC-PA." Complaint, ¶ 8. Plaintiffs' complaint alleges that "the effect of these practices is to shift all financial risk of repayment to the resident, which substantially impairs the value of Plaintiffs' security interest." Complaint, ¶ 60.

The complaint alleges that in addition to one-time entrance fees, each resident of the Vi at Palo Alto is required to pay monthly fees. Complaint, ¶ 10. Plaintiffs claim that these monthly fees "have been artificially inflated" due to three improper charges levied by defendant: increased property taxes, earthquake insurance costs, and marketing costs. Complaint, ¶ 10.

Plaintiffs allege that on or about April 1, 2011, the Santa Clara County Tax Assessor gave CC-PA notice of its intent to seek an increase in the property tax assessment for the Vi at Palo Alto community. Complaint, ¶ 64. After hearing by the Assessment Appeals Board, the community's property taxes were increased as a result of CC-PA's distributions of excess cash to its parent company, CC-DG. Complaint, ¶ 63. The increased tax assessment will amount to an increase in back taxes in excess of $12 million and additional tax assessments of $1.9 million annually. Complaint, ¶ 65. On or about September 5, 2012, CC-PA filed an action challenging the increased tax assessment, which is still in a preliminary stage. Complaint, ¶ 65. Defendant has agreed to pay for the back taxes pending the appeal of the AAB decision, but has indicated that residents "will bear the ultimate responsibility for those taxes." Complaint, ¶ 65. Defendant has also indicated that residents will be charged for the increased taxes going forward. Complaint, ¶ 66. Plaintiffs further allege that defendant has suspended the crediting to residents of excess amounts in the cumulative operating surplus—which should be used to create an

operating reserve or remitted to the residents—to cover the increased cost of property tax. Complaint, ¶ 66.

Plaintiffs allege that defendant has also improperly allocated earthquake insurance coverage under the Residency Contract. Complaint, ¶¶ 72-73. In the event of an earthquake, CC-PA's insurance coverage would require a deductible of 5% of the replacement value of each "structure" at the time of loss, which plaintiffs claim would be passed on to residents in the amount of approximately $10 million dollars. Complaint, ¶¶ 69-70. Plaintiffs allege that "the Residency Contract provides that residents' monthly fees are 'intended to pay all costs of operating the community,' including 'the costs of insurance policies,'" but "the same provision limits these costs to 'maintenance, repairs, and replacement of capital items (including furnishings, fixtures and equipment).'" Complaint, ¶ 71. Plaintiffs state that "many" of the buildings are not included as capital items and thus residents should not be charged for the costs of insuring them. Complaint, ¶ 71. Thus, plaintiffs allege that defendant is responsible for the portion of insurance costs attributable to insuring the building, while the residents will pay to insure the community's furniture, fixtures and equipment. Complaint, ¶ 72.

Plaintiffs also allege that defendant has improperly allocated marketing costs under the Residency Contract. Complaint, ¶ 74. The Residency Contract states that residents' monthly fees are "intended to pay all costs of operating the community," including "marketing costs." Complaint, ¶ 74. Plaintiffs allege that they have paid more than $5.5 million in marketing costs from March 2006 through 2013. Complaint, ¶ 75. Plaintiffs allege that the Residency Contract does not define the term "marketing costs" and CC- PA has "unfairly expanded it to include the funding of [CC-DG's] national advertising program." Complaint, ¶ 74.

LEGAL ARGUMENT

I. LEGAL STANDARD FOR A MOTION TO DISMISS UNDER RULE 12(B).

Even though state law determines whether state law claims are viable in a diversity action, the manner in which such claims are stated is evaluated under the Federal Rules. *See, e.g., Taylor v. United States*, 821 F. 2d 1428, 1433 (9th Cir. 1987). A complaint may be

dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F. 3d 729, 732 (9th Cir. 2001). The Court must decide if the facts alleged, if true, would entitle the plaintiff to some form of legal remedy. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A complaint filed in federal court must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2). A complaint will satisfy this requirement if it gives the defendant notice of what the claim is and the basis for that claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs' complaint must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facts alleged must contain more than mere conclusions and must constitute more than mere speculation. *Twombly*, 550 U.S. 544 at 555, 570-572.

In addition to providing fair notice of the claim, the complaint must also show that the plaintiff is entitled to relief. Rule 8(a)(2). This showing is made by alleging sufficient facts to state a plausible claim for relief. *Twombly*, 550 U.S. 544 at 570.

II. DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS LACK STANDING.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Col. v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). Vital to the case-or-controversy requirement of Article III is the constraint that a plaintiff must have standing to invoke federal court jurisdiction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The party seeking to invoke federal court jurisdiction has the burden of establishing standing for each claim and for each form of relief sought. *See, e.g., Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734 (2008); *Friends of the Earth, Inc. v. Laidlaw Env'l Servs (TOC), Inc.,* 528 U.S. 167, 185 (2000). If a plaintiff fails to satisfy the prerequisites for Article III standing, the Court lacks jurisdiction and must dismiss the complaint. *See Valley Forge*, 454 U.S. at 475-76.

To satisfy that burden, a party must demonstrate: (1) an injury in fact which is concrete and not conjectural; (2) a causal connection between the injury alleged and defendant's conduct or omissions; and (3) the likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The injury in fact prong requires a plaintiff to demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized… and (b) actual or imminent, not conjectural or hypothetical…" *Id.* at 559-60.

Plaintiffs have not suffered an injury in fact because there has not been a violation of a concrete, legally protected interest or any compensable injury. Plaintiffs do not allege that CC-PA has failed to meet a repayment obligation, and in fact cannot allege such facts because CC-PA has never defaulted on an entrance fee repayment obligation. *See* Complaint, Exh. 4 ("Neither the provider [CC-PA] nor any Vi affiliated entity has ever defaulted on an entrance fee repayment obligation."). Plaintiffs' complaint makes broad allegations of potential future harm in the form of "impairment of financial security" as a result of CC-PA's distributions of excess cash to its parent company, however, the Residency Contracts—attached to the complaint as exhibits—reflect that the entrance fee is a general, unsecured loan. In reality, plaintiffs have no cognizable security interest in the repayable portion of these entrance fee repayments as the Residency Contract explicitly states that plaintiffs are not entitled to the repayable portion of the entrance fee until the contract is terminated and the earlier of 14 days after resale of the apartment or 10 years[2] from the date of termination, whichever occurs first.. *See* Complaint, Exhs. 5, 7, 9, 11, 13, and 15 at sections 8.2 and 8.3 (termination); Exhs. 5, 7, 9, and 15 at section 8.5.2 (timing of repayment); Exhs. 11 and 13 at section 9.1.2 (timing of repayment). . In fact, plaintiffs acknowledge that the repayable portion of their loans are not yet due, but speculate that CC-PA may not be able to make a repayment at some point in the future. Allegations of "an injury at some indefinite future time" is not sufficient to show injury in fact. *Buttram v. Owens-*

[2] Early Residency Contracts had an outside repayable date of 25 years after contract termination but were later amended to reduce the outside date to 10 years. See, e.g., Complaint, Exhs. 5 and 7, section 8.5.2 and Amendment to Section 8.5.2.

Corning Fiberglas Corp., 16 Cal.4th 520, 531 n.4 (1997) (quoting *Budd v. Nixen*, 6 Cal.3d 195, 200 (1971)) (In order "to be actionable, harm must constitute something more than 'nominal damages, speculative harm, or the threat of future harm-not yet realized....'"). In these situations, "the injury [must] proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.*

Equally unpersuasive is plaintiffs' attempt to articulate a harm due to "inflated monthly fees." Plaintiffs rely on speculative future events and an erroneous reading of the Residency Contract to claim that the monthly fees have been inflated with regards to three items: 1) property taxes, 2) insurance, and 3) marketing fees. Plaintiffs' allegations are contrary to the terms of the Residency Contracts which clearly state that all costs of operating the community are intended to be covered by monthly fees. *See* Complaint, Exhs. 5, 7, 9, and 15 at recital E and sections 2.1.16, 3.3.2, and 3.3.3; Exhs. 11 and 13 at section 3.3.2. The unambiguous language of the Residency Contracts, which are exhibits to the complaint, trumps plaintiffs' allegations. *See Thompson v. Illinois Dept. of Prof. Reg.,* 300 F.3d 750, 754 (7th Cir. 2002) ("when a written instrument contradicts allegations in a complaint to which it is attached, the exhibit trumps the allegations").

First, plaintiffs allege that their monthly fees have been inflated because CC-PA has stated "that it will pass on" the cost of the increased taxes from the recent tax assessment in the event that CC-PA's appeal of the Assessment Appeals Board is unsuccessful. *See* Complaint, ¶ 11 and Exh. 21. Plaintiffs do not claim that they have been harmed by the increased taxes, as they admit that CC-PA has agreed to pay the amount assessed in back taxes (over $12 million) and will pay the additional taxes as a result of the increase (approximately $1.9 million per year) during the pendency of its appeal of the tax assessment. *See* Complaint, ¶¶ 65-66 and Exh. 21. Rather, plaintiffs speculate that they may be harmed in the future. *See* Complaint, ¶¶ 65-66 and Exh. 21. This allegation is not only speculative, but also clearly contradicts the unambiguous language in the Residency Contracts attached to the complaint. The Residency Contracts clearly state that real estate taxes are an operating expense of the Community to be paid from monthly

fees. *See* Complaint, Exhs. 5, 7, 9, 11, 13, and 15 at section 2.1.15; *see also* Complaint, Exhs. 11 and 13 at section 3.3.2.

Second, plaintiffs utilize a strained reading of the Residency Contracts to allege that defendant has improperly inflated monthly fees by misallocating insurance costs. *See* Complaint, ¶¶ 69-73. Plaintiffs allege that sections 3.3.2 and 3.3.3 of the Residency Contract support their claim that they are only responsible for insurance charges attributable to furniture, fixtures, and equipment. *See* Complaint, ¶¶ 71-72. Plaintiffs admit, however, that "residents' monthly fees are 'intended to pay all costs of operating the community,' including the "costs of insurance policies." *See* Complaint, ¶¶ 71-72. Nonetheless, plaintiffs allege that this is somehow limited by subsection (iv) which states residents are also responsible for "all costs of maintenance, repairs, and replacement of capital items, including furniture, fixtures, and equipment." *See* Complaint, ¶¶ 71-72. These subsections are illustrative of the operating costs included in plaintiffs' monthly fees. One subsection cannot be read to modify or restrict another. Such a reading clearly contradicts the language of the Residency Contract, which states multiple times that the residents' monthly fees are intended to pay for all operating costs of the community, and expressly includes the costs of insurance policies. *See* Complaint, Exhs. 5, 7, 9, and 15 at recital E and sections 2.1.16, 3.3.2, and 3.3.3; Exhs. 11 and 13 at section 3.3.2.

Finally, plaintiffs allege that they have been improperly charged for marketing costs. *See* Complaint, ¶¶ 71-75. Again, plaintiffs are attempting to change an explicit provision in their Residency Contracts that states that marketing expenses are an operating cost of the Community to be paid with monthly fees.[3] *See* Complaint, Exhs. 5, 7, 9, and 15 at section 3.3.3; Exhs. 11 and 13 at section 3.3.2. Plaintiffs provide no basis for their allegations that marketing costs have been improperly allocated, or how CC-PA "used the term 'marketing costs' in a misleading

[3] Early Residency Contracts provided that CC-PA pay the marketing costs until 90% of the independent living apartments were sold. See, e.g., Complaint, Exhs. 5, 7, 9, and 15 at section 3.3.3. Pursuant to this clause, the marketing costs associated with the first generation of sales were paid by CC-PA; however, the costs of ongoing marketing efforts are to be paid with monthly fees as an operating cost of the community.

manner." *See* Complaint, ¶¶ 13, 74, 75. Furthermore, all marketing costs relate to the operations of the community as the community cannot remain occupied without ongoing sales. In fact, a strong marketing program, which helps maintain a deep waiting list of prospective residents, is a substantial benefit, not a harm, to the residents as the repayable portion of the entrance fee is contingent upon resale of the unit.

In sum, plaintiffs' complaint wholly fails to allege, much less establish, a legally cognizable injury traceable to CC-PA that could be redressed by this suit. Plaintiffs' lack of standing requires dismissal of the complaint in its entirety.

III. DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION.

For similar reasons, plaintiffs' complaint should be dismissed as it is not yet ripe for adjudication. A claim is "ripe" when facts giving rise to the case have matured into an existing substantial controversy warranting judicial intervention. *See Ventura County Humane Society v. Holloway*, 40 Cal. App. 3d 897, 907 (1974) ("It is black-letter law that damages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable."). The ripeness doctrine is concerned with when litigation is allowed to proceed, and is meant to prevent adjudication of premature claims like this. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013).

Courts use a two-part test to determine whether a controversy is ripe: (1) whether the dispute is sufficiently concrete, and (2) whether there is an imminent and significant hardship inherent in withholding court consideration. *See Pacific Legal Foundation v. California Coastal Comm.*, 33 Cal.3d 158, 171-73 (1982). Under this test plaintiffs' complaint is unripe because it alleges purely speculative harm based on a series of highly unlikely, contingent, and hypothetical events. Paragraph 130 of plaintiffs' complaint is illustrative of the speculative nature of plaintiffs' claimed injuries:

> By virtue of defendants' conduct, plaintiffs and the class were deprived of a property right, in so far as Plaintiffs' and the class' Entrance Fees have been placed at risk, their security interest has

> been impaired, and they may be subjected to increased tax assessments, which will lead to inflated monthly fees…."

See Complaint, ¶ 130 (emphasis added). Plaintiffs' entire complaint should be dismissed as unripe because it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (citation and internal quotation marks omitted).

IV. DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS FAIL TO PLEAD WITH THE SPECIFICITY REQUIRED BY RULE 9(B).

Rule 9(b) mandates that all allegations of fraud be pleaded with particularity. General pleading is insufficient. *Unimobil 84, Inc., v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986). "Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 109 (1976). To comport with Rule 9(b), the complaint must allege the who, what, when, where, and how of the alleged fraudulent conduct and set forth an explanation as to why the statement or omission complained of was false or misleading. *See Standfield v. Starkey*, 220 Cal. App. 3d 59, 73 (1990).

Rule 9(b)'s heightened pleading standard applies to all allegations of fraud, not just causes of action for fraud. "A plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of that claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading ... as a whole must satisfy the particularity requirement of Rule 9(b)." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009). All of plaintiffs' causes of action are grounded in fraud and thus must comply with the specificity requirements of Rule 9(b). *See id.* at 1125.

To comply with Rule 9(b), every element of the cause of action must be alleged in full, both factually and specifically; the policy of liberal construction of pleading will not be invoked to sustain a pleading defective in any material respect. *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324, 1332 (1986) (pleadings held insufficient where it was alleged that a lawyer knew the representations he was making were false and untrue but it was not

alleged how he knew this). Additionally, in fraud complaints against a corporation, a plaintiff must allege: the names of the persons who made the misrepresentations; their authority to speak for the corporation; to whom they spoke; what they said or wrote; and when it was said or written. *Lazar v. Sup. Ct (Rykoff-Sexton, Inc.)*, 12 Cal. 4th 631, 645 (1996); *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991). The court need not accept as true conclusory allegations or legal characterizations, nor need it accept unreasonable inferences or unwarranted deductions of fact. *Transphase Systems, Inc. v. Southern Calif. Edison Co.*, 839 F.Supp. 711, 718 (C.D. Cal. 1993).

Although the complaint spans over 30 pages, it fails to allege facts with the specificity required by Rule 9(b). For example, plaintiffs make multiple statements throughout the complaint that defendant made misrepresentations, yet fail to give any examples other than three sentences included in a marketing letter sent years after four of the six named representatives signed the Residency Contract. *See* Complaint, ¶¶ 56, 106. The mere allegation that false and fraudulent misrepresentations were made is conclusory and does not meet the required specificity of a fraud complaint because it cannot be determined what was said, by whom, or in what manner (orally or in writing). *See Tarmann,* 2 Cal. App. 4th at 157.

Plaintiffs also fail to specify the allegedly fraudulent acts of each defendant. Plaintiffs must differentiate their allegations so that each defendant knows what its alleged role was in the purported fraudulent scheme. *See Altman v. PNC Mortgage,* 850 F. Supp. 2d 1057, 1070 (E.D. Cal. 2012). "In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme. To state a claim of fraudulent conduct, which carries substantial reputational costs, plaintiffs must provide each and every defendant with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with." *Id.* (internal citations and quotation marks omitted). Plaintiffs' vague allegations that "defendants" committed acts are not sufficient to satisfy the requirements imposed by Rule 9(b).

Fairness requires that allegations of fraud be pleaded "with particularity" so the court can weed out nonmeritorious actions before a defendant is required to answer. *Small v. Fritz Cos.,*

Inc., 30 Cal. 4th 167, 183-84 (2003). Plaintiffs' vague and uncertain allegations fail to provide the requisite level of specificity to support claims grounded in fraud. Defendant will be deprived of a fair and robust defense, absent more concrete allegations setting forth examples of the alleged misrepresentations and why each statement was false or misleading, who made the misrepresentations, their authority to speak for defendant, to whom they spoke, what they said or wrote, and when it was said or written. Defendant's motion to dismiss may be granted on this ground alone.

V. DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS FAIL TO SET FORTH GROUNDS FOR THE COURT'S SUBJECT MATTER JURISDICTION.

Under Rule 8(a)(1), a complaint "must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support." Additionally, the Northern District Local Rules require that each complaint filed in the Northern District contain a separate paragraph entitled "Jurisdiction" that identifies the basis for federal jurisdiction and the facts supporting such jurisdiction. Civil L.R. 3-5(a). The jurisdictional allegations are essential to state a claim in federal court, without it a case may be dismissed for failure to comply with Rule 8(a)(1). *Stafford v. Mobil Oil Corp.,* 945 F.2d 803, 805 (5th Cir. 1991) ("Failure adequately to allege the basis for diversity jurisdiction mandates dismissal."); *Nat'l Right to Life Political Action Committee v. Connor, 323* F.3d 684, 689 (8th Cir. 2003) (lack of jurisdiction of federal court presumed unless it appears affirmatively from the record). The complaint should be dismissed for failure to comply with Rule 8(a)(1) and Civil L.R. 3-5(a) demonstrating the court's basis for jurisdiction.

VI. THE FIRST CAUSE OF ACTION FOR CONCEALMENT FAILS TO STATE A CLAIM.

To assert a cause of action for concealment a plaintiff must show that: (1) the defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose the fact to the plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or

suppression of the fact, the plaintiff sustained damage. *Boschma v. Home Loan Center, Inc.,* 198 Cal. App. 4th 230, 248 (2011).

Plaintiffs' complaint includes a litany of "facts" defendant allegedly concealed, but fails to demonstrate defendant was under a duty to disclose them. *See* Complaint, ¶ 100. Also vague are the allegations of intent to defraud and justifiable reliance. Plaintiffs simply assert that "Defendants intended to deceive Plaintiffs and the Class by concealing these facts" and "Plaintiffs and the Class reasonably relied on Defendants' actions." *See* Complaint, ¶ 101. Moreover, as discussed above in the sections on standing and ripeness, the complaint fails to describe how plaintiffs have been harmed by CC-PA's alleged failure to disclose facts. Rather, the complaint makes a conclusory allegation that "Plaintiffs and the Class were harmed by Defendants' failure to disclose these important facts, and Defendants [sic] concealment was a substantial factor in the harm incurred by Plaintiffs and the Class." *See* Complaint, ¶ 101.

VII. THE SECOND CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION FAILS TO STATE A CLAIM.

Under California law, the elements of a negligent misrepresentation claim are: (1) misrepresentation; (2) knowledge of the falsity, or scienter; (3) justifiable reliance; and (4) resulting damage. *Altman v. PNC Mortg.,* 850 F. Supp. 2d 1057, 1068-69 (E.D. Cal. 2012). The misrepresentation must be a positive assertion, not an implied statement. *See Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 841 n.2 (1992). Statements that are generalized, vague, or unspecific are not actionable as they constitute mere "puffery" upon which a reasonable consumer cannot rely. *See Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990).

In support of their claim for negligent misrepresentation, plaintiffs rely on one letter sent by CC-PA (formerly Classic Residence by Hyatt) dated October 9, 2008 which states:

> [Residents experience] a sense of security, knowing they have made a good choice. They know their entrance fee refund will not fluctuate with changes in the market…. Our residents enjoy a vibrant and enriching lifestyle with the knowledge that they have planned wisely to secure their future.

See Complaint, ¶¶ 56, 106. Plaintiffs allege that the "essence" of CC-PA's offering "has been that Vi will take care of residents" and "enhance the last chapter of their lives." *See* Complaint, ¶ 57. Additionally, plaintiffs state that the use of Penny Pritzker's name in connection with the community "strongly suggested it was a stable institution, and that Plaintiffs' Entrance Fees would be secure." *See* Complaint, ¶ 57.

Plaintiffs' conclusory statement that they relied on the above representation to their detriment is not sufficient to establish a claim for negligent misrepresentation. Plaintiffs have failed to offer any evidence that a misrepresentation was made.. Instead, plaintiffs rely on a vague statement in a marketing letter to claim that in "essence," defendant represented that it would "take care" of the residents. This is not a specific, positive assertion sufficient to state a claim of negligent misrepresentation. *See Evan F.,* 8 Cal. App. 4th at 840 n.2 ("The tort of negligent misrepresentation requires a 'positive assertion' and does not apply to implied misrepresentations."). Moreover, the Residency Contract specifically states that CC-PA is the only entity responsible for the repayment obligation and for providing services under the contract. *See* Complaint, Exhs. 5, 7, 9, 11, 13 and 15 at recital D ("The Provider [(CC-PA)] is solely responsible for providing services to You under this Contract.…Neither Stanford nor any entity related to either Provider or [CRMLP] is responsible for the performance of this Contract or payment of any obligation to You under this Contract or any other agreement related to it.").

Moreover, plaintiffs do not articulate how they were harmed by the alleged misrepresentation. If plaintiffs allege they were harmed by inducement to sign the Residency Contract, they have failed to make clear that they each received, read, and relied on the letter with the alleged misrepresentation before they signed the agreements. Plaintiffs cannot claim that they relied on an alleged misrepresentation in a 2008 letter when the letter is dated years after many of them signed the Residency Contract. In addition, plaintiffs fail to claim that their reliance on one sentence in a marketing letter was reasonable, especially considering the education and business sophistication of each of them. *See* Complaint, ¶¶ 24-42.

Plaintiffs' allegations are factually insufficient to support a claim of negligent misrepresentations and thus, plaintiffs' second cause of action should be dismissed.

VIII. THE THIRD CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY FAILS TO STATE A CLAIM.

To plead a cause of action for breach of fiduciary duty a plaintiff must show the existence of a fiduciary relationship, its breach, and damage caused by the breach. *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1101 (1991). "The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another." *Vai v. Bank of America*, 56 Cal.2d 329, 338 (1961). "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *Committee on Children's Television, Inc. v. General Foods Corp*., 35 Cal.3d 197, 221 (1983), superseded by statute on other grounds.

Plaintiffs erroneously state that defendant owes plaintiffs a fiduciary duty due to their age and health, the nature of the contract, and because CC-PA "assumed the role of caregiver and business partner to Plaintiffs and the Class." *See* Complaint, ¶ 76. However, the Residency Contract clearly describes the contractual relationship of the parties. Plaintiffs' entrance fees are unsecured loans to CC-PA, and plaintiffs have no vested ownership interested in them. *See* Complaint, Exhs. 5, 7, 9, and 15 at section 9.5; Exhs. 11 and 13 at section 11.6 (stating that residents do not have any interest in any payments made under the Residency Contract). The relationship between CC-PA and plaintiffs is not at all comparable to that of a friend or personal caregiver who exercises undue influence over an elder for the purpose of taking financial advantage of them. Plaintiffs fail to allege facts to the contrary. Rather, plaintiffs are highly educated, independent, and successful individuals. *See* Complaint, ¶¶ 24-42. 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 loved ones. *See* Complaint, Exhs. 5, 7, 9, and 15 at section 4.4; Exhs. 11 and 13 at section 4.10. Therefore, there is nothing to indicate that CC-PA knowingly undertook a fiduciary duty.

Furthermore, this is not an instance where the law imposes a fiduciary duty as a result of the relationship between the parties, such as a joint venture, partnership, or agency. Providing services to a consumer under a contract does not give rise to a fiduciary duty, even if one party is dependent on the other's performance. *Committee on Children's Television, Inc.*, 35 Cal.3d at

222. In business relationships, the vulnerability of one party, unequal bargaining power between the parties, or one party placing trust in another, do not warrant invocation of a fiduciary duty against the stronger party. *See City of Hope Nat'l Medical Center v. Genetech, Inc.,* 43 Cal.4th 375, 389 (2008). CC-PA is a seller of services and accommodations to consumers in a highly regulated business. Pursuant to California Health & Safety Code § 1787(b), the California Department of Social Services reviews and approves each contract. Nothing about CCRCs or the Residency Contract supports application of fiduciary principles and plaintiffs' third cause of action should be dismissed.

IX. THE FOURTH CAUSE OF ACTION FOR FINANCIAL ELDER ABUSE FAILS TO STATE A CLAIM.

Plaintiffs allege that CC-PA's distributions to CC-DG and the "inflation" of monthly fees constitutes Elder Financial Abuse. A cause of action for financial abuse of an "elder" under the Elder Abuse and Dependent Adult Civil Protection Act requires proof of the following elements: (1) the defendant took, appropriated, or retained an individual's property; (2) the individual was 65 years of age or older, or a dependent adult, at the time of the defendant's conduct; (3) the defendant took or appropriated the property for a wrongful use with the intent to defraud or by undue influence; (4) the individual was harmed; and (5) the defendant's conduct was a substantial factor in causing the individual's harm. *See*, e.g., Cal. Welf. & Inst. Code §§ 15610.27, 15610.30; *see also* Cal. Judicial Council Civil Jury Instructions, No. 3100 Financial Abuse-Essential Factual Elements (2013 Ed.).

Plaintiffs cannot state a claim for financial elder abuse as CC-PA has not taken, appropriated, or retained a property right belonging to plaintiffs. Plaintiffs allege that defendant "wrongfully deprived" them of their property because their purported "security interest" in the entrance fees paid to CC-PA has been impaired; they "may be subjected to increased tax assessments;" and defendant has made "improper allocations for earthquake insurance and marketing costs." *See* Complaint, ¶ 130. Plaintiffs do not dispute that they freely entered into a contractual relationship with CC-PA, and pursuant to the terms of that agreement, paid an entrance fee upon entering the Community. *See* Complaint, ¶ 4. The Residency Contracts—

attached to the complaint—specifically state that the "Entrance Fee is intended to be a loan to the Provider [CCPA], with a portion of that loan being repaid." *See* Complaint, Exhs. 5, 7, 9, and 15 at section 8.5; Exhs. 11 and 13 at section 9.1. This loan agreement is further set forth in the Entrance Fee Promissory Note that each resident signed. *See* Complaint, Exhs. 6, 8, 10, 12, 14 and 15. It cannot be disputed that the Entrance Fee Promissory Note is an unsecured, general obligation of CC-PA. Nowhere in the Residency Contract does it say that CC-PA agrees to hold residents' money in trust or for their account. Likewise, there is no escrow agreement. In fact, in the section of the Residency Contract entitled "Resident's Rights," it clearly states that a resident's "rights under t[he] Contract are limited to those rights expressly granted in it and do not include … any interest in any payments made under t[he] Contract." *See* Complaint, Exhs. 5, 7, 9, and 15 at section 9.5; Exhs. 11 and 13 at section 11.6 Plaintiffs allege reserves should be instituted because their "Entrance Fees have been placed at risk" and "their security interest has been impaired." *See* Complaint, ¶ 130. Plaintiffs have not been deprived of any right to which they are entitled because they have no vested interest in the repayable portion of the entrance fee and the Residency Contract states that monthly fees are intended to cover all costs of operating the community. Moreover, a bare assertion in the complaint that the defendant acted with intent to defraud is not sufficient. Accordingly, there is no colorable claim for financial elder abuse here and plaintiffs' fourth cause of action should be dismissed.

X. THE FIFTH CAUSE OF ACTION FOR VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT FAILS TO STATE A CLAIM.

The California Consumers Legal Remedies Act ("CLRA") prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale ... of goods or services to any consumer." Cal. Civ. Code § 1770(a). Plaintiffs CLRA claim must be dismissed because 1) plaintiffs failed to comply with the venue affidavit requirement; 2) plaintiffs failed to comply with the precomplaint notice requirements; 3) some of the plaintiffs are barred by the statute of limitations; and 4) plaintiffs have failed to state a claim.

A. Plaintiffs' CLRA Claim Must be Dismissed for Failure to Comply with the Venue Affidavit Requirement of Section 1780(d).

To bring an action under the CLRA, a plaintiff is required to file an affidavit "concurrently with the filing of the complaint" stating "facts showing that the action has been commenced in a county or judicial district described in this section as a proper place for the trial of the action." Cal. Civ. Code § 1780(d). A court must dismiss the claim if a plaintiff fails to file the required affidavit. *Id.; see also McVicar v. Goodman Global, Inc.*, No. SACV 13-1223, 2014 WL 794585, at *9 (C.D. Cal. Feb. 25, 2014). Plaintiffs failed to file the required affidavit with the complaint, and thus, their CLRA claim must be dismissed.

B. Plaintiffs' CLRA Claim Must be Dismissed for Failure to Comply with the Precomplaint Notice and Demand Requirements of Civil Code § 1782(a).

At least 30 days prior to the commencement of an action for damages under the CLRA, the consumer must notify the potential defendant of the claim and allow the potential defendant a chance to rectify. The presuit notice must be in writing and sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, or to the potential defendant's principal place of business within California. Cal. Civ. Code § 1782(a)(2). If a plaintiff files an action for damages without first sending the required notice, the claim should be dismissed. *Laster v. T–Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005) ("strict adherence to the statute's notice provision is required to accomplish the Act's goals of expeditious remediation before litigation.").

Here, plaintiffs have not complied with the precomplaint notice requirements. Plaintiffs' CLRA cause of action does not specify that it only seeks injunctive relief, which would relieve them of the precomplaint notice requirements. Cal. Civ. Code § 1782(d) ("An action for action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with [presuit notice requirements]"). Plaintiffs' CLRA cause of action incorporates by reference other allegations that relate to damages and refers to the prayer which includes a request for damages. Plaintiffs have failed to comply with the presuit notice and demand requirements and appear to be seeking damages, thus this cause of action must be dismissed.

C. Plaintiffs' CLRA Claim Must be Dismissed as to Plaintiffs Richter, Cork, May, and Anderson as They are Barred by the Statute of Limitations.

The statute of limitations for CLRA claims is three years and it begins to run on the date the improper consumer practice was committed. Cal. Civ. Code § 1783 (CLRA actions "shall be commenced not more than three years from the date of the commission of such method, act or practice" made unlawful by the act). Plaintiffs allege "defendants' practices in connection with the marketing and sale of CCRC residential and financial management services related to Entrance Fees and allocated expenses violate the CLRA…." *See* Complaint, ¶ 140. Thus, plaintiffs contend that defendant committed the improper consumer practice prior to and at the time they entered into their respective Residency Contracts. *See Plumlee v. Pfizer, Inc.* No. 13-CV-00414, 2014 WL 695024, at *7 (N.D. Cal. Feb. 21, 2014) (statute of limitations for CLRA claims "accrues when a defendant misrepresents or omits material information regarding a product or service and a consumer makes a purchase as a result of such deceptive practices"). Plaintiffs Richter, Cork, May, and Anderson are therefore barred by the statute of limitations as they signed their residency contracts more than three years prior to filing this complaint. *See* Complaint, Exh. 5 (Richter, 06/15/05), Exh. 7 (Cork, 07/29/05), Exh. 9 (May, 10/28/05), Exh. 15 (Anderson, 07/21/05).

D. Plaintiffs' CLRA Claim Should be Dismissed for Failure to State a Claim.

In addition to the procedural defects noted above and the failure to plead with the required specificity of Rule 9(b), plaintiffs' CLRA claim fails as a matter of law for three additional reasons: (1) plaintiffs fail to demonstrate that the alleged misrepresentations were material; (2) no reasonable consumer would have been misled by the alleged misrepresentations; and (3) plaintiffs have not suffered any damage.

Where claims under the CLRA relate to an alleged misrepresentation, the claimant must demonstrate the misrepresentation was "material" and that the alleged misrepresentations induced the claimant to alter his position to his detriment. *Mass. Mutual Life Ins. Co. v. Superior Court of San Diego*, 97 Cal. App. 4th 1282, 1294 (2002). Plaintiffs' allegations fail to establish either of these necessary elements.

Plaintiffs also fail to allege facts sufficient to demonstrate that a reasonable consumer would have been deceived. CLRA claims are governed by the "reasonable consumer" test, which focuses on whether "members of the public are likely to be deceived." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2009) (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). Plaintiffs make vague statements that "Defendants knowingly misrepresented the security of the refundable portion of Plaintiffs' Entrance Fees;" however, there is no security interest as the entrance fees are a general, unsecured loan of CC-PA. The Residency Contract expressly states that the entrance fee repayment is not due until the contract is terminated and either fourteen (14) days after resale of the unit, or ten (10) years, whichever occurs first. *See* Complaint, ¶ 49; Exhs. 5, 7, 9, and 15 at section 8.5.2; Exhs. 11 and 13 at section 9.1.2. A reasonable consumer would understand that conditioning repayment on resale of the unit means that the repayment obligation is satisfied using money received from the resale of the unit.

Moreover, even if plaintiffs were able to allege facts sufficient to demonstrate the alleged misrepresentations were material and a reasonable consumer would have been deceived, plaintiffs have not suffered any damage. The California Supreme Court has found that the alleged unlawful practice must have "resulted in some kind of tangible increased cost or burden to the consumer." *Meyer v. Sprint Spectrum,* 45 Cal. 4th 634, 641 (2009). As noted above in the sections on standing and ripeness, plaintiffs fail to allege, let alone with the requisite specificity under Rule 9(b), how defendant's alleged actions have caused them harm. Accordingly, plaintiffs' fifth cause of action should be dismissed.

XI. THE SIXTH CAUSE OF ACTION FOR VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200 FAILS TO STATE A CLAIM.

California's Unfair Competition Law, pursuant to Business and Professions Code section 17200, et seq. ("Section 17200" or "UCL"), prohibits five different types of wrongful conduct, only three of which are at issue here: (1) unlawful; (2) unfair; or (3) fraudulent business practices. The unlawful prong of the UCL "borrows violations of other laws and treats them as unlawful practices," which the UCL then "makes independently actionable." *Cel–Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999) (internal

quotation marks and citations omitted). A business practice violates the unfair prong of the UCL if it is contrary to "established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006). A "fraudulent business practice" does not involve the common law tort of fraud, but, rather, is a practice where "members of the public are likely to be deceived." *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 618 (1996) (internal quotations omitted).

Plaintiffs' UCL cause of action rests upon their claims of concealment, negligent misrepresentation, breach of fiduciary duty, financial elder abuse, and violation of the Consumers Legal Remedies Act. These claims, however, cannot serve as predicate offenses to support plaintiffs' UCL claim because, as discussed above, they have not been adequately pled. Plaintiffs also allege defendant's failure to disclose certain "important facts" constitutes a "deceptive act;" however, plaintiffs fail to allege facts to support that defendant had a duty to disclose these facts. *See* Complaint, ¶ 150. "Although a UCL claim need not plead the elements of common law fraudulent deception, it must allege the existence of a duty to disclose. 'Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.'" *Newsom v. Countrywide Home Loans, Inc.*, 714 F. Supp. 2d 1000, 1012 (N.D. Cal. 2010) (quoting *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557 (2007)) (internal citation omitted).

Moreover, UCL claims require that a plaintiff have "suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. As discussed in *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305 (2009), the language of Proposition 64 "presumably intended to incorporate into Business and Professions Code section 17204 the definition of "injury in fact" as required for standing to bring actions in federal courts under Article III of the United States Constitution." *Id*. at 1346. For a plaintiff to have standing to prosecute a UCL cause of action, therefore, he or she "must have personally suffered an invasion or injury to a legally protected interest." *Troyk*, 171 Cal. App. 4th at 1346. As discussed above, plaintiffs fail to allege they have suffered an injury in fact.

Finally, only two remedies are expressly available under Section 17200—injunctive relief and restitution. Bus. & Prof. Code § 17203. An award of damages is not permitted. *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1266 (1992). Plaintiffs' complaint seeks an award of restitution, however, a plaintiff must have an ownership right in the property sought in order to get restitution. *Korea Supply Co. v. Lockheed Martin Corp*. 29 Cal.4th 1134, 1149 (2003) ("The remedy sought by plaintiff in this case is not restitutionary because plaintiff does not have an ownership interest in the money it seeks to recover from defendants."). Plaintiffs do not have an ownership interest in the entrance fees as the repayable portion is not yet due. *See* Complaint, Exhs. 5, 7, 9, and 15 at section 9.5; Exhs. 11 and 13 at section 11.6 (stating that residents do not have an interest in any payments made under the Residency Contract). Accordingly, plaintiffs cannot state a claim under California's unfair competition law and their sixth cause of action should be dismissed.

XII. THE SEVENTH CAUSE OF ACTION FOR BREACH OF CONTRACT FAILS TO STATE A CLAIM.

For breach of contract, a party must plead: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Reichert v. General Ins. Co.*, 68 Cal.2d 822, 830 (1968). Plaintiffs assert that CC-PA breached the contract by transferring excess cash to CC-DG and failing to maintain reserves. *See* Complaint, ¶¶158-159. Distributing excess cash to a parent company is a common business practice and is not prohibited by law. *See, e.g., Tomaselli v. Transamerica Ins. Co.,* 25 Cal. App. 4th 1269, 1284 n.12 (1994) (recognizing that parent company's receipt of money from a subsidiary in the form of dividends and interest on loans and the reinvestment of some portion of those funds in the subsidiary "are precisely the kinds of transactions which would occur among entities which respect the corporate separateness among entities."). In fact—as conceded in an exhibit attached to the complaint—the Department of Social Services, the department charged with enforcing the continuing care contract statutes, has stated that the statutes "specifically contemplate" that a provider will distribute excess cash to a parent company. *See* Complaint, Exh. 3, page 3 (first full paragraph).

Plaintiffs also assert that CC-PA breached the Residency Contract by improperly allocating monthly fees. However, as discussed above in the section on standing, the costs of real estate insurance, real estate taxes, and marketing expenses are expressly included in the calculation of monthly fees. The monthly fees are intended to cover all costs of operating the community. *See* Complaint, Exhs. 5, 7, 9, and 15 at recital E and sections 2.1.16, 3.3.2, and 3.3.3; Exhs. 11 and 13 at section 3.3.2.

As the complaint lacks any allegation that CC-PA has committed an essential element of the cause of action, i.e., a breach, plaintiffs have failed to properly plead the cause of action for breach of contract against defendant CC-PA. *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) ("plaintiff must at least "allege sufficient facts to state the elements of [his or her] claim"). Moreover, as discussed above in the standing and ripeness discussion, plaintiffs have failed to articulate a concrete harm. Thus, plaintiffs' seventh cause of action for breach of contract must be dismissed.

CONCLUSION

For the foregoing reasons, Defendant CC-Palo Alto, Inc. respectfully submits that its motion to dismiss the Complaint should be granted in its entirety for failure to state a claim under Rule 12(b)(6).

DATED: March 17, 2013

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